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# Environmental Law & Regional Australia

Dear Readers,

Planning for the 21st NELA Conference is well under way. The Victorian Division is hosting the Conference to be held from 31 October to 1 November 2002. The theme of this year s Conference centres on empowering the regional community and will involve discussions on ways in which the community can become involved in environmental decision making.

Topics to be covered include:

- Intensive animal husbandry; (a real issue in semi-rural communities)
- Land clearing;
- Wind generated power;
- Catchment management; and
- Compensation to land holders for the cost of environmental improvements

The last dot point mentioned has been touched upon in previous editions of NELR. Refer to Volume 2, 2001 at page 40 for Marc Allas article on the Federal Inquiry into Public Good Compensation and also see No.4 of 2001 and No.1 of 2002 for commentary on compensation for the placement of regional reservations over land under the *West Australian Metropolitan Region Town Planning Act 1959*.

It is interesting to note that in submissions to the Commonwealth Government s discussion paper on the World Summit on Sustainable Development, (to be held August - September 2002) the major issues identified as future challenges for Australia included a number of the themes of the Conference. That is sustainable energy production, integrated water management and land degradation.

Please contact the NELA Secretariat for details of registration and costs. The conference will be held in Lorne, a popular seaside town in regional Victoria.

Rachel Baird
National Editor

# NELR Editors

## *NATIONAL EDITOR*: Rachel Baird

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Rachel Baird has been a member of NELA since 1996 (in Qld, the ACT and now Victoria!) and has been involved with the Victorian State Executive since late 1999. She became the National Editor in late 2000.

She holds degrees in Arts and Law from Queensland University and a Masters of Law (Environment) from QUT. She has an interest in the law of the sea, in particular the prevention of marine pollution and natural resource management.

Rachel has worked in both government and private practice. In her past life she was a military legal officer and has worked at some stage in nearly every state and territory in Australia.

Rachel is currently lecturing in environmental law at the University of Melbourne and conducting research on the management of Australia s remote fisheries.

## *NEW SOUTH WALES EDITOR*: Dr Nicholas Brunton

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Nicholas Brunton has a been a member of NELA and state editor since 1992.

He has degrees in Law and Geography from Macquarie University and received a PhD from the University of Sydney in 1998. His thesis examined the law and policy relating to coastal water pollution in Australia.

Nicholas currently practices in the areas of planning, environment, valuation, property and commercial law. He is also kept busy providing guest lectures at both Sydney and Macquarie Universities.

## *QUEENSLAND EDITOR*: Leanne Bowie

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Leanne Bowie has been the Queensland editor for four years.

Leanne holds degrees in Arts and Law (Honours) from the University of Queensland. She has specialised in environmental and planning law, working for both the private sector (heavy industrial, mining and general commercial) and state and local government.

She is also a member of the Queensland Law Society s planning and environment committee and the Queensland Mining Council s environment committee.

## *VICTORIAN EDITOR*: Jennie Slatter

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Jennie Slatter has recently become the Victorian state editor. Jennie holds a Bachelor of Applied Science degree in Environmental Assessment and Management from the University of Newscastle and is currently undertaking a Masters in Environmental Law at the University of Sydney (part-time).

Jennie worked in private environmental consulting for seven years period to joining EPA Victoria in 2001. She also worked for two years in the environmental department at an open-cut coal mine in the Hunter Valley.

Jennie is a member of the Victorian Planning and Environmental Law Association (VPELA).

## *SOUTH AUSTRALIAN EDITOR*: Tiana Nairn

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Tiana Nairn has been involved with NELA since 1996 and is the Secretary of the South Australian Division. She is currently a Senior Policy Officer in the Environment Legislation Branch of the Department for Environment and Heritage. Tiana has worked previously as an Associate with Jamie Botten & Associates, a specialist environment and planing firm in Adelaide, and as a Senior Environmental Officer at the South Australian Department for Transport, Urban Planning and the Arts.

Tiana holds degrees in Law (Hons) and Science (Jurisprudence) from the University of Adelaide. Her honours thesis examined how ecologically sustainable development is being promoted within South Australia s planning and development control system.

## *TASMANIAN EDITOR*: Frances Scherrer

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Frances Scherrer has recently become the Tasmanian state editor. Frances holds degrees in Law and Science (Chemistry) from the University of Tasmania, and a Master of Environmental Laws from the University of Sydney.

Frances has worked in private practice in the areas of environment, planning and local government law. She has lectured in environmental law at the University of Western Sydney and undertaken lobbying work in Canberra for the Australian Conservation Foundation on trade and environment issues. Frances is currently undertaking research into trade and environment issues and participates in the public law teaching program at the University of Tasmania.

## *WESTERN AUSTRALIAN EDITOR*: Aidan Kelly

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Aidan Kelly has been a member of NELA since 1994 and he has recently become the West Australian state editor. Aidan holds degrees in Science and Law, both from Murdoch University.

He has worked for both government and private practice. Previous experience includes employment as an environmental assessment and policy officer for the Northern Territory Government (Department of Planning and Environment) and a senior policy officer with the West Australian Government (Department of Resources Development) in the area of environmental policy and legislation. He currently practices in the area of resources and environmental law with Freehill s Property and Environment section in Perth.

## *NATIONAL, COMMONWEALTH & ACT EDITOR*: John Ashe

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John Ashe has been involved with NELA since 1993 and is currently the Treasurer of the ACT Division. John holds degrees in Economics and Business Administration and a Master of Environmental Law from the Australian National University.

He worked previously as an Assistant Secretary in the Environmental Assessment Branch of Environment Australia. He has been involved in environmental impact assessment and policy and legislative reviews.

# written contributions and letters to the Editor

Written contributions to the *National Environmental Law Review*, by way of case note, book review or article are welcomed by the editorial board.

Please send contributions to you state editor in the first instance. They will review contributions and forward them to the national editor. State editorial contact details are on the preceding pages.

We hope that the NELA website will be up and running later this year. Detailed information on the form and content of the submissions will then be available online. In the interim please refer to the Australian Guide to Legal Citation (Melbourne University Law Review Association Inc 1998) as an illustrative style guide. As a general guide, articles should be between 3,000-5,000 words. Articles are expected to conform to standard conventions of legal writing.

Please note that due to changes in the NELR design and production process, footnotes are required to be presented as endnotes. This will assist layout of the Review and minimise the margin of error when articles are imported into the design software.

Acceptance of written work in the NELR does not in any way indicate an adoption by NELA of the opinions expressed by authors. Authors remain responsible for their opinions, and any defamatory or litigious material and the Editor accepts no responsibility for such material.

Letters to the Editor are also welcomed. Please forward these to:

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# recent developments

*INTERNATIONAL* Current editor: Rachel Baird

### *CITES Listing For Patagonian Toothfish*

The Commonwealth Government announced on 5 June 2002, World Environment Day, that it will nominate both the Patagonian and Antarctic Toothfish for listing under Schedule II of the Convention on International Trade in Endangered Species (CITES).

If Australia is successful when the 159 Convention Parties meet in Santiago, Chile later this year, the illegal fishing industry will find it very difficult to land catches and ship them to markets. Under Schedule II, which applies to all species not necessarily threatened with extinction, but in danger of becoming extinct if trade is not subject to strict regulation, each catch of toothfish will require an individual certificate from the State in which the catch is landed, *before* the fish can be unloaded.

This would significantly bolster the efforts to stem illegal fishing via the Catch Documentation Scheme which exists under CCAMLR but applies only to the 24 member nations. Under the CDS, CCAMLR members can require vessels provide a Certificate identifying the vessel and location of the catch. The advantage of a CITES listing is that 159 nations would be able to impose strict requirements on the landing of catches of toothfish. This means the illegal fishers cannot simply move to another port as they have done so under CCAMLR management.

Announcing the nomination, the Minister for Environment and Heritage, Dr David Kemp, was careful to note that the move "should not be seen as a rejection of the efforts of CCAMLR in favour of an alignment with CITES."

### *Japan and the European Union ratify Kyoto Protocol*

Also saving its big announcement for World Environment Day, Japan formally ratified the Kyoto Protocol at the UN Headquarters in New York on 5 June 2002. The Japanese move followed the announcement by the European Union in late May that it would ratify the Protocol. These two latest ratifications bring the number of committed countries to 73. Under Article 25, 55 ratifications are required, representing 55% of the industrialised world s greenhouse gas emissions.

The United States remains committed to its own greenhouse gas management program, despite a US Environmental Protection Agency report to the UN that found greenhouse gas emissions in the US would rise by about 43% between 2000 and 2020. The US currently accounts for 36% of the combined global emissions.

Australia seems likewise committed to follow the US lead in this issue. It is expected that Russia could ratify the Protocol later this year, bringing the percentage of global emissions committed to the reduction program close to the magic 55%.

The US may be left out in the cold on this one and so by its own inaction, Australia.

### *World Summit on Sustainable Development Aug-Sept 2002*

The fourth and final preparatory meeting, Prepcon 4 met from 24 May- 7 June to finalise the Chairman s Negotiating Text for the Summit.

Over 60 nations have submitted National Assessment Reports detailing progress in implementing sustainable development since the 1992 Rio Earth Summit. Australia has submitted a 60 page Report covering issues such as sustainable decision making by authorities and government, accounting at both private sector and government levels and major environmental issues including salinity, water and land management.The Australian Report is available at www.johannesburgsummit.org/html/prep_process/national_reports/australia_natl_assess0105

### *Australia's Ramsar Wetlands Report**

Environment Australia has released its report on Australia s compliance with the Ramsar Convention for the Eighth Conference of the Contracting Parties to the Convention. The report concludes that, although advances have been made in wetland management and conservation, Australia faces ongoing challenges and there are areas where improvements can be made.

The report is available via the Environment Australia web site at www.ea.gov.au.

### *Australia and UNESCO Sign MOU to Protect World Heritage**

The Minister for the Environment and Heritage, Dr David Kemp, and the Director-General of UNESCO, Mr Koïchiro Matsuura, have signed a Memorandum of understanding (MOU) on World Heritage issues in the Asia˘Pacific region. The MOU seeks to promote World Heritage sites in the region and encourage the highest standards of World Heritage management

Dr Kemp said that the MOU will help Australia and UNESCO work together in partnership with regional nations in promoting the World Heritage Convention and managing natural and cultural values in this heritage-rich part of our planet.

** Contributed by John Ashe, Commonwealth and ACT editor.*

### *Inaugural Meeting of the Environment Protection and Heritage Council*

The inaugural meeting of the Environment Protection and Heritage Council (EPHC) took place in Hobart on 2 May 2002, chaired by the Federal Minister for Environment and Heritage, Dr David Kemp. The EPHC agreed to a wide range of initiatives responding to priorities identified in the State of the Environment report released in March 2002. Initiatives agreed at the meeting include:

- *World Heritage*: ways to progress proposals for World Heritage listing of the Coolola Sands extension to the Fraser Island World Heritage Area and the listing of Tasmania s convict sites;
- *National Heritage Policy*: development of an integrated national heritage policy covering natural, indigenous and historic heritage, with a particular focus on the heritage tourism industry,
- *Heritage Places*: establishment of a task force to develop more effective incentives for the conservation of heritage places by government, industry and the community;
- *Participation by Aboriginal and Torres Strait Islander* Peoples: development of an action plan to find new ways to build partnerships with Indigenous communities;
- *Air Quality*: joint Commonwealth, State and Territory funding of a $200, 000 study of the link between air quality and human health;
- *Waste Management*: endorsement of an industry strategy to reduce the level of electronic waste going to landfill;
- *Chemicals*: development of a national approach to ecologically sustainable chemical management and regulation, in consultation with the Primary Industries and Health Ministers Councils;
- *Working with Business*: a meeting of Ministers with Australian business leaders at a Sustainability Summit, after the 2002 World Summit on Sustainable Development in Johannesburg in August˘September, to seek ways of improving the environmental performance of business; and
- *Finance Sector*: a forum to be held to explore ways the finance sector can encourage improved environmental performance by business.

The new Council, comprising ministers with environmental protection and heritage responsibilities, encompasses matters previously dealt with by the National Environment Protection Council, environment protection matters from the Australia and New Zealand Environment and Conservation Council and the Heritage Ministers Meeting. The Council of Australian Governments (COAG) agreed to formation of the EPHC at its meeting on 8 June 2001, as part of a restructuring of ministerial councils.

### *Second Meeting of the Natural Resource Management Ministerial Council*

The Natural Resource Management Ministerial Council held its second meeting, in Hobart, on 2 May 2002, and dealt with a range of natural resource management issues. The Council comprises Federal, State and Territory Ministers with responsibility for the environment, water, natural resources and primary industries.

The Council:

- reviewed progress in implementing the National Action Plan for Salinity and Water Quality (NAP) and supported commitment by COAG to accelerate implementation of the NAP, including by signing of the Intergovernmental Agreement by all parties; concluding the remaining bilateral agreements by the end of June 2002; and making substantial progress on regional plans in all jurisdictions by the end of 2002;
- agreed to initial funding for the Market Based Instruments program under the NAP;
- agreed to develop as a matter of urgency a national communications strategy for the NAP, to be developed by the Commonwealth for agreement by Council;
- endorsed a strategic framework for the delivery of the Natural Heritage Trust (NHT) which incorporates agreed funding principles;
- agreed on a number of national frameworks to govern the delivery of natural resource programs, including accreditation criteria for natural resource management plans, to form the basis for NAP and NHT regional investments;
- endorsed the National Natural Resource Management Monitoring and Evaluation Framework, established to assess the progress of the NAP and the NHT Extension;
- agreed that the Commonwealth, with the States and the Northern Territory, will explore a new approach to coastal management issues that could benefit from national cooperation;
- confirmed its workplan for the immediate future, and identified key issues as the national Environmental Management Systems framework; a high level review of the current water reforms, including an assessment of progress to date; developing a national approach to genetic and biochemical resources; identifying priorities to be addressed to improve Australia s national fisheries resource management arrangements; and reviewing the development and implementation of the National Representative System of Marine Protected Areas;
- agreed to implement the Natural Resource Management Action Plan for Advancing Indigenous Reconciliation;
- agreed to establish an annual working community advisory forum, based on NAP on NHT regions and including community partners and experts in natural resource management;
- welcomed an arrangement for expert scientific and technical advice through the preparation of an annual report prepared by CSIRO and the Bureau of Meteorology;
- considered a report on water reform from its Standing Committee s Chief Executive Officers Group on Water (CEOGW) and requested CEOGW to bring to the next Council meeting key options for progressing issues arising from the report prepared by jurisdictions for COAG on water property rights regimes; and
- endorsed a voluntary code of practice for firewood merchants.

## *Gene Technology Update*

*(See also National Environmental Law Review No 3/2001)*

### *Ministerial Council*

The Gene Technology Ministerial Council held its inaugural meeting on 24 May 2002. The Council oversees the national regulatory framework for gene technology in Australia a national cooperative scheme involving the Commonwealth and all States and Territories. It comprises Ministers from a range of Commonwealth, State and Territory portfolios, including health, agriculture and the environment.

The Council agreed to a process for the development of policy principles that may be issued by the Council to establish parameters for the national regulatory system and to govern the work of the Gene Technology Regulator.

Under the *Gene Technology Act 2000*, the Ministerial Council has the power to issue a policy principle which would recognise areas designated under State or Territory law for the purpose of preserving the identity of genetically-modified (GM) or non-GM crops for market purposes. The Gene Technology Regulator must then recognise such areas when issuing licences for dealings with GM organisms. The Council agreed to start work on the development of a policy principle to provide constitutional certainty for GM/GM-free designated areas declared under State or Territory legislation.

Ministers also agreed to the Operating Procedures that will govern the work of the Gene Technology Standing Committee. This committee comprises officials from all jurisdictions and provides support to the Ministerial Council.

### *Declaration that State Laws are Corresponding State Law*

On 16 May 2002 the Hon Trish Worth MP, the Parliamentary Secretary to the Federal Minister for Health and Ageing, declared the following State laws to be corresponding State law to the *Gene Technology Act 2000* (Cth) and the *Gene Technology Regulations 2001* (Cth):

- *Gene Technology Act 2001* (Vic)
- *Gene Technology Regulations* (Vic)
- *Gene Technology Act 2001* (SA)
- *Gene Technology Regulations* (SA)

These declarations facilitate the operation of the national scheme by, among other things, enabling the Gene Technology Regulator to exercise powers under Victorian and South Australian legislation.

### *Appointments to Gene Technology Committees*

On 22 May 2002 Minister Worth announced appointments to the chairs of three committees established under the *Gene Technology Act 1999* (Cth) which provide advice at the request of the Gene Technology Regulator or the Ministerial Council.

The former Governor-General, Sir Ninian Stephen, is the chair of the Community Consultative Committee. This committee provides advice on matters of general concern to the community in relation to genetically-modified organisms (GMOs).

Professor Donald Chalmers, Professor of Law at the University of Tasmania, is the chair of the Gene Technology Ethics Committee. This committee provides advice on ethical issues relating to gene technology and any codes of practice or policy principles developed by the Regulator or the Ministerial Council.

Professor Stephen Powles, Director of the WA Herbicide Resistance Initiative attached to the Faculty of Agriculture at the University of Western Australia, .is the chair of the Gene Technology Technical Advisory Committee. This committee provides scientific and technical advice (including on individual applications), and replaces the forme Genetic Manipulation Advisory Committee.

### *Release of Air Toxics Discussion Paper*

At its 20th meeting in June 2001 the National Environment Protection Council (NEPC) resolved to develop a national environment protection measure (NEPM) for Ambient Air Toxics. It is expected that a draft NEPM will be developed by April 2003.

The NEPC is seeking input from interested parties on the appropriate approach to reducing the exposure of the Australian population to air toxics, and has released a discussion paper for public comment. The paper is available at www.nepc.gov.au.

Air toxics include the following general categories of compounds: volatile and semi-volatile compounds, polycyclic aromatic hydrocarbons, heavy metals and aldehydes. There is growing international recognition of
the potential health risks associated with exposure to air toxics and the need for action to minimise these risks.

### *Mining and Sustainability Report Released*

The Australian mining industry has released its report, *Facing the Future: The Report of the Mining, Minerals and Sustainable Development Australia Project*. The report discusses key issues related to the Australian mining industry and sustainable development.

The report is the result of more than fifteen months research and consultation coordinated by the Australian Minerals and Energy Foundation (AMEEF). It will contribute to the Global Mining Initiative and the mining sector s input to the World Summit on Sustainable Development to be held in Johannesburg in August˘September 2002.

The report is available via the AMEEF web site at www.ameef.com.au.

### *Review of River Management Legislation*

A report commissioned by the National Rivers Consortium of Land and Water Australia has put forward a model legislative framework, which identifies key components applicable to water resource legislation. The report is based on a study of water resources law in four States South Australia, Tasmania, Victoria and Western Australia.

The report is available at www.users.bigpond.com/jon.nevill/index.html.

### *Australians Less Concerned about the Environment*

The reported level of concern about the environment by Australian households has dropped to its lowest level since recording by the Australian Bureau of Statistics (ABS) started. The ABS publication, *Environmental Issues: People s Views and Practices* (Cat. No 4602.0) reports that 62 per cent of Australian households reported being concerned about the environment in 2001 compared with 75 per cent in 1992. The report also records people s responses in relation to membership of environmental organisations, donation of time and money to environmental protection, and water conservation practices.

### *Murray Darling Basin Policy Discussion Paper*

The Murray˘Darling Basin Commission (MDBC) has released for public comment a policy discussion paper *How to Encourage Sustainable Land Use in the Dryland Regions of the Murray-Darling Basin.* The paper, prepared as part of the Landmark Project, contains suggestions about ways to make land use and management more sustainable.

The paper and further information about the Landmark Project are available via the MBDBC web site at www.landmark.mdbc.gov.au.

### *Using Management Accounting to Improve Environmental Performance and Profitability*

The Institute of Chartered Accountants is undertaking a research project to help Australian businesses to use management accounting techniques to improve both their environmental performance and profitability. This will seek to address such questions as what is a benefit and what is a cost when a company improves its environmental performance, and how can this be reflected in business accounts.

The project will include five case studies in the following organisations:

- AMP
- Telstra
- The Michel Group
- Methodist Ladies College, Perth
- Cormack Manufacturing

The project is being funded jointly by the Commonwealth and Victorian Governments. It is one of a number of initiatives that the two governments have introduced to encourage the finance sector to contribute to sustainable development.

### *State of the Environment 2001*

The Minister for the Environment and Heritage, Dr David Kemp, tabled in March 2002 *Australia s State of the Environment 2001* (SOE 2001) The report is the second independent national report on Australia s environment and heritage. An expert committee chaired by Professor Bruce Thom prepared the report

The report draws on seven detailed theme reports Atmosphere, Human Settlements, Biodiversity, Land, Natural and Cultural Heritage, Inland Water, and Coasts and Oceans. For each of the seven themes the report presents favourable and unfavourable findings, together with findings where the news is uncertain.

The Committee s overarching messages, Professor Thom said, are:

- Every single Australian has an impact on the environment and we are all responsible for its future.
- Land and water degradation are of critical concern, together with associated loss of biodiversity and heritage values of the landscape.
- Government intervention, particularly regulation, can be effective in protecting Australia s environment and heritage;
- Institutional barriers are often a barrier to effective environment and heritage management.
- All Australians have major challenges in the sustainable use of resources and in the maintenance of our natural and cultural heritage despite some areas of recent improvement.
- Managing the activities of people in a way that conserves habitats while conserving resources and industries is extraordinarily complex and difficult. This is no easy task.
- Many indicators developed for SOE reporting at the national level could not be assessed in SOE 2001 as there were large data gaps and problems of consistency.

The report and the supporting theme reports can be found at www.ea.gov.au/soe/2001. A Key Findings brochure and a set of fact sheets can be found at www.ea.gov.au/soe.

### *Federal Budget 2002-2003*

The Commonwealth Government has announced that it will spend over $1.8 million to protect the environment in 2002˜2003, an increase of $198 compared with 2001˜2002. This includes provision for a new National Coastal Policy and a national rescue effort for the Murray˜Darling Basin.

Environmental funding and initiatives announced in the Federal Budget for 2002˜2003 includes:

- extension of the Natural Heritage Trust for the next five years and an injection of $1 billion, with an estimated expenditure from the Trust of $250 million in 2002˜2003;
- expenditure of $103.57 million in 2002˜2003 from the Natural Heritage Trust Coastcare and Rivercare programs to improve the condition of Australia s coasts and waterways ;
- expenditure of $100.7 million on the National Action Plan for Salinity and Water Quality, out of a seven-year provision of $1.4 billion;
- a budget of $113 million for the Australian Greenhouse Office;
- $9.1 million for the National Oceans Office to finalise the development of the South-East Regional Marine Plan and to begin the development of a marine plan for the Gulf of Carpentaria and the Torres Strait region;
- $10.5 million for the Sydney Harbour Federation Trust to rehabilitate and return Sydney Harbour foreshore lands to the public;

- $38.7 million for the ongoing operation of the *Environment Protection and Biodiversity Conservation Act 1999*, including provision of streamlined processes and information, education and training;
- $10.2 million for in-service emissions testing of diesel and petrol vehicles and $2.3 million to implement the new national fuel quality standards legislation;
- $4.5 million to promote eco-efficiency and to work with the packaging, construction and mining industries to improve the environmental performance of these industries; and
- improved protection for the Great Barrier Reef, with a commitment of $31.2 million in 2002˜2003.

### *Regional Forest Agreement Developments*

(See also National Environmental Law Review No1/2002)

With the support of the Australia Labor Party, the Regional Forest Agreements Bill has passed the Senate and the House of Representatives. The Bill received Assent on 2 April 2002 and the Act came into force on 3 May 2002.

The *Regional Forest Agreements Act 2002* provides legislative backing for regional forest agreements (RFAs), especially the resource security provisions of RFAs. The Act provides that:

- RFA forestry operations are excluded from Commonwealth legislation relating to export controls, the environment and heritage;
- the Commonwealth is bound to the termination and compensation provisions of RFAs;
- information about RFAs is published;
- RFAs and related reports and reviews are tabled in Federal Parliament;
- the Forest and Wood Products Council continues as an industry consultation forum, to be reviewed in 2004; and
- the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) is amended so that the RFA Act and the EPBC Act have identical provisions concerning the application of the EPBC Act to forestry operations.

The Tasmanian Resource Planning and Development Commission is currently conducting an inquiry into Progress with Implementation of the Tasmanian Forest Agreement (1997) and has released a Background Report for public comment. Closing date for submissions is 1 July 2002. Further information and copies of the Background Report are available via the RPDC website at www.rpdc.tas.gov.au.

### *EPBC Act Developments*

#### ***Christmas Island Immigration Reception and Processing Centre***

The Environment and Heritage Minister, Dr David Kemp, announced on 17 April 2002 that he had decided to grant exemptions from some of the provisions of the *Environment Protection and Biodiversity Conservation Act 1999* in relation to the proposed Immigration Reception and Processing Centre and associated infrastructure on Christmas Island.

Although the environmental assessment and approval processes under the Act will not apply, the *Environment Protection and Biodiversity Conservation Regulations 2000* that protect biodiversity in Commonwealth areas (such as Christmas Island) will still apply. Any works that may affect the Christmas Island National Park will also need to comply with the management plan for the Park and will require appropriate authorisation. The proposal will also need to comply with other requirements designed to ensure best practice in environmental management for the Centre.

### *Great Barrier Reef*

On 5 April 2002 the Minister released for pubic comment draft guidelines for an environmental impact statement under the EPBC Act, for a proposal to conduct a seismic survey in the Townsville Trough, about 200 kilometres off the North Queensland coast.

### *Wildlife Trade Public Notification and Participation*

The new wildlife trade provision in Part 13A of the *Environment Protection and Biodiversity Conservation Act 1999* allows for public comment on:

- proposed amendments to the list of specimens approved for live import;
- Australian wild harvesting proposals; and
- applications for exceptional circumstances permits.

In order to assist the public to become familiar with the new public notice arrangements, Environment Australia is providing an email service whereby an email will be sent to interested persons when a new notification is added to the EPBC Act web site. People who wish to receive these emails should send an email to darryn.van.someren@ea.gov.au, with the subject heading Public Notices.

## *Great Barrier Reef Marine Park (Boundary Extension) Bill*

On 21 March 2002 Senator Bartlett (Australian Democrats) introduced the Great Barrier Reef Marine Park (Boundary Extension) Bill. The Bill seeks to provide additional protection to the Great Barrier Reef Marine Park and Region by extending the boundaries of the Region out to the boundaries of the Exclusive Economic Zone, thereby preventing oil exploration and production in the extended region.

Under the *Great Barrier Reef Marine Park Act 1975,* operations for the recovery of minerals (including prospecting and exploration) are generally prohibited within the boundaries of the Park. Under the *Great Barrier Reef Region (Prohibition Of Mining) Regulations 1999* (the Regulations), mining operations within the Region but outside the Park, are also prohibited. The Bill therefore seeks to extend the geographical scope of the Regulations by widening the boundaries of the Region.

## *Independent Review of the Australian Greenhouse Office*

On 1 May 2002 the Environment and Heritage Minister, Dr David Kemp, announced the commencement of an independent review of the Australian Greenhouse Office, fulfilling a commitment made when the AGO was established as an Executive Agency two years ago.

The Hon Warwick Smith, a former Federal Minister and Shadow Minister for Science and Energy, and now an Executive Director with Macquarie Bank, will carry out the review.

The review is to report to the Government by 30 June 2002, and is to be conducted in accordance with the following terms of reference:

Taking into account:

- Australia s international obligations under the United Nations Framework Convention on Climate Change and its commitments on greenhouse;
- Developments in international negotiations;
- The interaction between greenhouse policy and other government objectives; and
- Australia s forward strategy for addressing climate change.

Provide advice on:

- Whether the scope of the operations of the Australian Greenhouse Office remains appropriate and
- The efficiency and effectiveness of the Australian Greenhouse Office in delivering government policy and communicating the government position.

### *South-East Regional Marine Plan—Reports Released*

In connection with the development of the south-east regional marine plan, the Environment and Heritage Minister, Dr David Kemp, released on 10 May 2002 seven reports, an associated summary report and a discussion paper.

The seven reports deal with:

¸ Ocean management the legal framework;

¸ Resources using the ocean

¸ Ecosystems nature s diversity;

¸ Communities connecting with the ocean;

¸ Impacts identifying disturbances;

¸ Sea Country an Indigenous perspective; and

¸ Resources Macquarie Island s picture.

The National Oceans Office is seeking public comment on the reports. They are available at the Oceans Office web site www.oceans.gov.au.

### *Environmental Code of Practice Announced for Firewood Merchants*

On 1 June 2002 the Environment and Heritage Minister, Dr David Kemp, announced the first code of practice for the Australian firewood industry. Firewood merchants who sign the code commit their companies to ensuring that the firewood they sell is not sourced from the habitat of endangered species and to promoting firewood from plantations and sustainably managed forests.

The Voluntary Code of Practice for Retail Firewood Merchants is available from www.ea.gov.au/firewood.

### *Changes to various environmental statutes*

The Government has introduced a Bill which will amend the *Contaminated Land Management* Act 1997, the *Protection of the Environment Operations Act 1997*, the *Radiation Control Act 1990* and the *Road and Rail Transport (Dangerous Goods) Act 1997*. While many of the changes are relatively minor some may have an impact on your operations.

Contaminated site auditors will be relieved to know that the Bill reduces their administrative burden by enabling them to be accredited for up to three years rather than the current one year period under the existing provisions of the *Contaminated Land Management Act 1997*. This will increase the consistency between the NSW and Victorian schemes.

The investigatory powers of inspectors under the *Radiation Control Act 1990* will be changed to reflect the powers under the *Protection of the Environment Operations Act 1997*. Penalty notices will also be implemented and issued where the *Radiation Control Act* is breached.

If the Bill is successful, breaches under the *Road and Rail Transport (Dangerous Goods) Act 1997* will also result in more thorough investigations.

The *Protection of Environment Operations Act 1997* is being amended to allow for more effective implementation. The changes include:

- giving local councils greater powers to deal with noisy vehicles and vessels and to remove smoky vehicles from the roads. They will also be able to prosecute offences in the Land and Environment Court, provided they obtain permission from the Court first.
- simplifying existing water pollution offences to one general offence.
- creating a new offence for knowingly making a false or misleading representation that the Environment Protection Authority approves or uses particular goods or services.
- extending the powers of officers who issue penalty notices and other officers for purposes related to their functions.
- clarifying the circumstances where authorised officers may apply for a search warrant.
- clarifying that appropriate regulatory authorities may prosecute offences with the leave of the Court.
- making persons who have failed to comply with obligations to do something or cease to do something to be guilty of a continuing offence for each day the contravention continues.

### ***Environment Planning and Assessment Amendment (Ski Resort Areas) Act 2001***

Property owners and developers should be aware that the ski resort areas in Kosciuszko National Park will shortly be subject to the *Environmental Planning and Assessment Act 1979*. When in force, the *Environment Planning and Assessment Amendment (Ski Resort Areas) Act 2001* will provide the framework for managing the planning of ski resorts within Kosciuszko National Park.

The Amending Act will also amend the *National Parks and Wildlife Act 1974*. The Minister for Planning will be able to issue orders in relation to developments within Kosciuszko National Park. The Minister may for example, order a person to demolish, remove, repair or alter the structure of any building.

### ***National Parks and Wildlife Amendment Act 2001***

The *National Parks and Wildlife Amendment Act 2001* substantially changes the *National Parks and Wildlife Act 1974*. It introduces a clear set of management principles which will assist in the preparation of management plans for reserves.

The Minister for Fisheries will have a concurrence role for plans of management relating to the intertidal zone. The public consultation period for the exhibition of plans of management will be increased to 60 days. The Minister will have greater powers to grant leases and licences for exclusive purposes over structures, buildings and modified natural areas and will be restricted to granting a lease or licence where the use of the building or land is identified in the relevant plan of management. Leases longer than 5 years must be advertised for public comment. Minor changes include increased penalties, new additional defences for some offences, in particular the destruction of an aboriginal place or object, and the breach of a stop work order.

### *The National Parks and Wildlife Service to manage water quality and bio-diversity*

The *National Parks and Wildlife Amendment (Transfer of Special Areas) Act 2001* amends both the *National Parks and Wildlife Act 1974* and the *Sydney Water Catchment management Act 1998*. The amending act transfers special areas of land surrounding the water storage areas for the greater Sydney, Blue mountains and Illawarra regions from the Sydney Catchment Authority to the National Parks Estate.

The special areas of land will be declared National Parks or Nature Reserves. The National Parks and Wildlife Service will be responsible for the management of both water quality and broader ecological issues.

### *Coastal Protection Amendment Bill*

This bill was introduced on 20 March 2002. The Bill will amend the *Coastal Protection Act 1979* as follows:

- The definition of the coastal zone will be changed to include a range of urban areas but excluding parts of Pittwater, Warringah, Manly, Woolahra, Waverley, Randwick and Sutherland not affected by coastal processes;
- The Minister through ??? can require coastal councils to prepare coastal management plans;
- It will be an offence to carry out works contrary to a coastal management plan;
- The common law doctrine of accretion and erosion will no longer apply and property owners will have to establish various matters before property boundaries can be changed.

### *Protection of the Environment Operations (General) Amendment (National Pollutant Inventory) Regulation 2002*

This regulation is to give effect to, and enforce compliance with, the National Pollutant Inventory scheme that has been operating now for some years. The regulation now makes it compulsory to comply with the obligations to report emissions under the scheme. Penalty notices of $1000 can be issued against organisations for failing to provide facility information, providing false or misleading facility information, failing to keep threshold data, and failing to keep emission data.

### *Plan First Reforms*

On 4 June the Government announced that it will not proceed with legislative reform to implement its proposed Plan First scheme. Readers may recall that the Government has gone through a major consultative phase with a outline discussion paper and then a detailed white paper. The Minister for Planning announced that the central aim of the reforms, to integrate into a single document numerous planning documents that apply to NSW land, will be implemented without any changes to the Environmental Planning and Assessment Act 1970. It is proposed that the single document will be available on the web and will then be incorporated into local environmental plans.

### *Environment Protection (Resource Efficiency) Bill*

The Victorian Government has recently introduced a Bill to strengthen Victoria s waste management regime and to promote greater resource-use efficiency.

The *Environment Protection (Resource Efficiency) Bill* introduces a suite of inter-related elements to the Environment Protection Act 1970, most notably:

- Introducing sustainability covenants to enable industries and companies to identify resource efficiency gains and reduce ecological impact;
- Clarifying the roles of key statutory bodies involved in waste management, namely EcoRecycle Victoria, EPA and regional waste management groups;
- Providing additional funding and increased incentives for environmental priorities (such as waste reduction programs) through changes to landfill levies; and
- Integrating the *Litter Act 1987* into the *Environment Protection Act 1970* legislation.

### *Road Traffic Noise Strategy*

EPA is developing a Road Traffic Noise Strategy. The strategy needs a broad range of programs to be effective in reducing traffic noise.

Elements of the strategy will include:

- *the motor vehicle* ˘reducing noise from individual vehicles and reducing use of the motor vehicle;
- *roads* ˘ reducing noise emitted from traffic flows on the road network; and
- *the noise receptor* ˘ reducing noise impacts on people at home or at noise-sensitive buildings.

Already, initial consultation with stakeholders has identified the need for a State environment protection policy (SEPP) to provide the statutory basis for the strategy.

### *Ecological Footprint*

Ecological footprint is a tool that allows EPA to summarise Victoria s level of sustainability in a single value ˘ the area of land required to sustain our level of resource consumption and waste disposal. The concept is a potentially powerful communication tool because it quantifies, in a simple, readily understandable way, what effect our everyday activities are having on our environment.

Using this measure of our demands on the planet, we can calculate the degree to which simple alternatives to everyday behaviours can reduce the size of our eco-footprint. EPA has established a series of pilots in partnership with a wide range of organisations and businesses to further investigate the practical applications of Ecological Footprint as a communications tool to promote sustainability.

### *Draft Industrial Waste Management Policy (Solid Fuel Heating)*

Correct use of appropriately designed wood heaters produces very low levels of wood smoke and subsequently, significantly reduces the level of pollution produced. In recognition of this, the draft Industrial waste management policy (Solid Fuel Heating) proposes a statutory framework for managing the manufacture and supply of wood heaters. It also proposes measures to improve the use and operating practices of solid fuel heating devices already installed in homes. EPA Victoria is currently undertaking consultations with key stakeholders in regard to this policy.

### *Environmental Assessment (EA) Review*

In April 2002, the Department of Infrastructure released an Issues and Options Paper on the Environmental Assessment Review for public comment. The closing date for submission of comments is Friday 21 June 2002.

The following amendments to the existing EA process are proposed:

- improved assessment procedures at appropriate levels for a range of proposals that may have significant adverse effects on the environment;
- improved openness and equality for all stakeholders involved in the process, in particular improved clarity for proponents and effective opportunities for public involvement at key stages during the process;
- assessments will include analysis of suitable alternatives and their potential impacts;
- implementation of effective monitoring systems will be required;
- improved consistency with other legislation that relates to the planning and *approval of proposed development, particularly the* Planning and Environment Act 1987; and
- integration of environmental, social and economic factors in project planning and statutory decision-making.

### *Victorian Launch of the Earth Charter*

*The following information was prepared by the Earth Charter Initiative.*

The Earth Charter is a concise, but inclusive ethical framework for building a more peaceful, equitable, and just society. The principles of the Earth Charter centre on the following themes:

- Respect and Care for the Community of Life;
- Ecological Integrity;
- Social and Economic Justice; and
- Democracy, Nonviolence and Peace.

The Earth Charter is part of a continuing process generated by the Brundtland Commission s call for a new code of ethics for sustainable development, and the unfinished business of the Rio Earth Summit which attempted adoption of an ethical framework for sustainability, but found political will lacking. The Earth Charter was developed by the Earth Charter Commission through an in-depth civil society participatory process of consultation to identify the contents for such a Charter. This task was completed in 2001 and the current objectives are to encourage the use, implementation, and endorsement of the Earth Charter by civil society, business, and government; and to promote its educational use in schools, universities and other life-long educational settings.

The Earth Charter Initiative seeks endorsement from various organisations and will be exploring some expression of recognition by the United Nations at the Johannesburg Summit in 2002. It is hoped that many organisations will endorse the Earth Charter and support the process of taking the Earth Charter to governments and to the intergovernmental arena as the United Nations.

The exercise to seek endorsement started in 2000 and since then, the Earth Charter has received endorsements and support from many organisations, starting with the adoption by the NGO Millennium Forum. It is an integral part of a 100-hour teacher-training program developed by UNESCO. The Earth Charter was recently adopted by the Parliament of the Republic of Tatarstan/Russia. The International Council of Local Environmental Initiatives endorsed it and is following up by requesting their members to use it as a parameter and guide in the development of local planning.

For additional information on the Earth Charter, visit the following websites: www.earthcharter.org and www.eca.anu.edu.au.

For further information on the Victorian launch of the Earth Charter, please contact: Jennie Slatter, email: Jennifer.Slatter@epa.vic.gov.au. The Victorian launch will be held in Melbourne on Thursday 18 July 2002.

*with contributions as noted*

## *Dangerous Goods Safety Management Act & Regulations*

Significant new Queensland legislation (the *Dangerous Goods Safety Management Act and Regulations*) commenced on 7 May 2002. The Act places safety obligations on:

- occupiers of major hazard facilities, dangerous goods locations or workplaces;
- employees at those sites;
- manufacturers, importers or suppliers of dangerous goods; and
- designers, manufacturers, importers, suppliers or installers of storage or handling systems at those sites.

For occupiers of dangerous goods locations ("DGL's"), these obligations are directed towards minimising the risks associated with the DGL and ensuring that effective safety management systems and emergency plans are in place.

This legislation repealed and replaced the *Building (Flammable and Combustible Liquids) Regulations 1994*, however licences issued under the repealed regulation are now taken to have been issued to the person for the premises under *Dangerous Goods Safety Management Regulation 2001.**

*by Kaylene Perissinotto, Senior Lawyer,Minter Ellison, Brisbane.*

### *Slipways - Best Practice Environmental Management Guidelines & Management Framework*

In April 2002 the Tasmanian State Government initiated a 12-month program to develop a Management Framework and Best Practice Guidelines for Slipways and Slipping Services. The main aims of the project are to manage environmental risks posed by slipway activities and to develop a consistent State approach to Slipways Regulation. The project is currently in Phase Two which involves Project Research and Information Gathering from slipways, local councils and interstate EPAs regarding regulatory standards and management practices, and the identification and management of environmental issues. Public comment will be invited at various stages of the project with the release of draft documents including a Draft Issues and Options Paper (6 week public comment period - Aug-Nov 2002), Draft Best Practice Guidelines (4 weeks - Nov/Dec 2002) and Draft Management Framework (4 weeks -Jan/Feb 2003).

### *Natural Resource Management Bill 2002*

The *Natural Resource Management Bill 2002* was introduced to the Legislative Assembly by the Minister for Primary Industries, Water and Environment on 29 May 2002. The NRM Bill is the enabling legislation for the Tasmanian Natural Resource Management Framework that was finalised in December 2001. The Bill incorporates the Objectives of the Resource Management and Planning System, and provides for the establishment, roles and functions of the new administrative integrating structures being the Tasmanian Natural Resource Management Council and Regional Natural Resource Management Committees. The Bill also provides for the accreditation of regional strategies and establishes a review process to assess Framework performance five years after implementation.

### *Draft Guidelines – Development Proposal and Environmental Management Plans*

The proponents (Waterhouse Community Irrigation Association Inc.) for the construction of dams on the Tomahawk and Boobyalla Rivers in Tasmania s North-East, have been requested to prepare a Development Proposal and Environmental Management Plan (DPEMP), under the *Environmental Management and Pollution Control Act 1994* (EMPCA). The purpose of the DPEMP is to provide a source of information that enables the environmental and planning impacts of the proposal to be considered by interested individuals, groups, government agencies and others. The Board of Environmental Management and Pollution Control have prepared Draft Guidelines for the preparation of a DPEMP. These Draft Guidelines are currently open for public consultation until 5pm, 14 June 2002.

### *Gene Technology Bill 2002*

The *Gene Technology Bill 2002*, introduced into the Legislative Assembly in February 2002 was referred to the Standing Committee on Health on 7 March 2002.

The Bill is the ACT component of the national scheme for the regulation of gene technology, and is based on a model national Bill prepared cooperatively by the Commonwealth, States and Territories. Under the provisions of the Gene Technology Act 2000 (Cth) (the Commonwealth Act), the Commonwealth will wind back the application of the Commonwealth Act as individual States and Territories pass appropriate legislation.

The Committee is particularly concerned in its inquiry with:

- the scope of activities involving gene technology in the ACT now and in the future;
- ethical, environmental and public health issues relating to gene technology;
- the objectives and role of the ACT Government and the Gene Technology Ministerial Council and subordinate committees;
- the relationship between the ACT Government and the Office of the Gene Technology Regulator; and
- the extent of gene technology regulation necessary in the ACT.

The Committee has invited submissions by 21 June 2002. For further inquiries, contact the Committee Secretary on (02) 6205 0490.

### *Preserving the Garden City— Draft Variation to the Territory Plan No. 200*

On 30 May 2002 the Planning Minister Simon Corbell announced a major Draft Variation to the Territory Plan designed to protect the garden city character of Canberra suburbs, build sustainability and restore confidence in the planning system.

The proposals are part of a range of planning reforms foreshadowed by the Labor Party in the Legislative Assembly election in October 2001. They respond to widespread concerns in the Canberra community about urban redevelopment, especially dual occupancy redevelopments.

Key elements of Draft Variation No. 200 include:

- tighter controls on residential redevelopment, and division of planing controls into two groupings General and Suburban Areas ;
- restrictions on subdivisions or consolidation of single dwelling housing blocks;
- much tighter controls on dual occupancies in Suburban Areas, aimed at reducing their impact and with no provision for separate titles;
- focusing higher density development around local centres, close to transport and facilities, with separate unit title to be allowed only in such areas and in identified redevelopment areas along major transport corridors;
- building envelope controls to prevent overshadowing of the rear of blocks; and
- increased standards for the minimum area of private open space, particularly on larger blocks, including restrictions on the amount of impermeable surfaces, designed to reduce urban water runoff and encourage more tree growth and gardens.

Draft Variation to the Territory Plan 192 (DVP 192), introduced as an interim measure in December 2001 to limit dual and triple occupancy housing to 5 per cent of the total number of blocks in any one section, will continue to have interim effect until 5 December 2002.

Provision relating to limitations on separate (unit) title of dual occupancies will take effect from 6 December 2002. The new performance measures controlling building setbacks and building heights will not apply to applications lodged before 1 September 2002.

Draft Variation 200 revises the Residential Policies and a limited number of key provisions in the Residential Codes. The remaining detailed provisions of the Proposed ACT Code for Residential Development are intended to be referred to a Community Advisory Panel before being incorporated into a future draft Variation to the Territory Plan.

Draft Variation 200 also provides a policy framework for Neighbourhood Planning.

Draft Variation 200 has been released for public comment until 29 July 2002. Mr Corbell has promise further consultation and foreshadowed that the Variation will be referred to the Legislative Assembly s Planning and Environment Committee.

Copies of the Draft Variation are available from ACT Government Libraries and ACT Government Shopfronts, and via the Territory Plan web site www.palm.act.gov.au.

### *New Plan of Management for Namadgi National Park in Preparation*

A new plan of management is being prepared for Namadgi National Park, and will replace the current plan, which dates back to 1986. The Park is the largest of the ACT conservation reserves, with an area of 106, 000 hectares, constituting 46 per cent of the land area of the ACT.

The plan is being revised to take account of such issue as changed environmental legislation, an expanded park area, Aboriginal cultural heritage, nature based tourism values, collaborative arrangements under the Australian Alps National Parks system and new flora and fauna information.

The Interim Namadgi Advisory Board has issued a discussion paper which identifies issues on which it has sought public comment. The paper is available at www.environment.act.gov.au.

### *TransGrid Pays Compensation for Damage to Namadgi National Park*

In an out-of-court settlement, the NSW power transmission corporation has agreed to pay $350, 000 compensation to the ACT Government for unauthorised clearing in the Namadgi National Park last year.

This comprises:

- $120, 000 for ongoing monitoring of the damaged area by the ACT Government; and
- $230, 000 compensation to the ACT community to be spent on a range of possible projects such as flora and fauna conservation programs and education programs within the Namadgi Visitor Centre.

An Easement Rehabilitation Monitoring Plan will require TransGrid to appoint an independent specialist to monitor rehabilitation of the easement over the next few years to ensure it returns to its original condition

Measures being put in place to avoid similar incidents in the future include:

- a requirement for TransGrid to obtain written approval for any work in accordance with the approved Environment Improvement Plan; and
- development of a Memorandum of Understanding between Environment ACT and TransGrid and other utilities to ensure all work is approved before any fieldwork takes place.

The Minister for Urban Services, Bill Wood, has undertaken to strengthen the Nature Conservation Act 1980 and the *Environment Protection Act 1997* to ensure that any similar actions in the future are subject to simpler prosecutions and penalties.

### *ACT Vertebrate Pest Management Strategy*

After a public consultation process, the Minister for Urban Services, Bill Wood, announced in April 2002 a new strategy for the control of feral animals in the ACT.

Mr Wood described the ACT Vertebrate Pest Management Strategy as a process for planning, action and evaluation to help with the management of animal pest issues. It promotes a strategic approach to management based on damage prevention and reduction rather than pest control as an end in itself.

The Strategy is not specifically directed at vertebrate pests in the urban environment, but recognises that effective management of non-urban pests may require complementary action in urban locations.

Copies of the Strategy are available at the Environment Information Centre in Lyneham and via the web site www.environment.act.gov.au.

### *A Sustainable Bush Capital*

On World Environment Day, 5 June 2002, Urban Services Minister, Bill Wood, launched *A Sustainable Bush Capital in the New Millennium A New Focus for Nature Conservation in the ACT.*

The new nature conservation plan focuses on four main areas:
¸ Resources more field staff in our parks;
¸ Information improved data management;
¸ Strategic use of resources working smarter; and
¸ Supporting community partners.

Copies of the plan are available on the web site at www.environment.act.gov.au.

### *Appointments to Environmental Advisory Committees*

Urban Services Minister, Bill Wood, has announced appointments to two new advisory committees, which replace the former Environment Advisory Committee. Professor Peter Cullen will chair the Natural Resources Management Committee, and Alan Bradbury (a former NELA President and current member of the NELA Executive) will chair the Environment Protection Technical Advisory Committee.

### *AAT Upholds Tree Protection Decisions*

The Administrative Appeals Tribunal (AAT) has upheld decisions by Environment ACT in the first two cases brought before the AAT in relation to the ACT s interim tree protection legislation.

In one decision the AAT supported a decision to preserve a Mugga Ironbark (Eucalyptus syderoxylon) in Yarralumla. In the second decision the Tribunal upheld a decision to remove an Argyle Apple (Eucalyptus cinerea).

The ACT Legislative Assembly passed the Tree Protection (Interim Scheme) Act 2001 in April 2001 to protect existing large trees pending public consultation on the draft Tree Management and Protection Policy, which was released in April 2001.

### *Free Seminars for Business to Help the Environment*

The Ecobusiness program was established earlier this year by the Urban Services Department to help ACT businesses improve their energy efficiency, waste management and water efficiency. The ACT Chamber of Commerce and Industry support the program.

Under the program the Canberra Institute of Technology has been conducting free seminars for ACT businesses throughout May and June 2002. The initial round of seminars has been aimed at businesses in the Hospitality, Buildings and Offices, Supermarkets, and Retail sectors.

*Ecobusiness* is a component of the ACT Government s two major environmental strategies the No Waste by 2001 Strategy and the ACT Greenhouse Strategy.

For further information contact (02) 6207 3728.

## *Conservation and Land Management Regulations 2002*

The *Conservation and Land Management Regulations 2002* (WA) (the "Regulations") commenced on 3 May 2002. They repeal the *National Parks Authority Regulations 1977* (WA) and Part 6 of the *Wildlife Conservation Regulations 1970* (WA).

The Regulations govern the public use of land protected by the *Conservation and Land Management Act 1984* (WA), including state forests, national parks, timber reserves, conservation reserves and marine parks ("Protected Land"). The new provisions regulate the protection of flora and fauna, non-indigenous animals, pollution and litter, activities causing disturbance to the landscape (for example abseiling and sand-boarding), access to Protected Land, the use of vehicles, vessels and aircraft and camping on Protected Land.

Licences may be obtained for the taking of marine flora and fauna from marine parks for scientific purposes and for the supply of goods and services or carrying on activities for commercial purposes on Protected Land.*

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## *Radiation Safety (Transport of Radioactive Substances) Regulations 2002*

The *Radiation Safety (Transport of Radioactive Substances) Regulations 2002* came into effect on 26 March 2002 ( Regulations ). The Regulations repeal and replace the *Radiation Safety (Transport of Radioactive Substances) Regulations 1991* (WA) and apply to the transport of radioactive materials, and the storing, packing and stowing of radioactive materials for transport in Western Australia.

In doing so, the Regulations adopt for *Western Australia the Code of Practice for the Safe Transport of Radioactive Material (2001)* ( Code ), published by the Chief Executive Officer of the Australian Radiation Protection and Nuclear Safety Agency, and the *International Atomic Energy Agency Regulations for the Safe Transport of Radioactive Materials 1996* ( International Regulations ), which is set out in Schedule A to the Code.

The Regulations require each carrier to prepare a radiation protection programme in accordance with the International Regulations within three months of 26 March 2002. The Regulations also create of offences relating to the transport, storage and packing for transport, and labelling of radioactive materials where these things have not been done in accordance with the Code or the International Regulations.*

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## *Proposed new environmental legislation*

The West Australian Government is presently in the final stages of preparing a number of significant pieces of environmental legislation. These include the:

- Carbon Rights Bill
- Conservation and Land Management Amendment Bill
- Contaminated Sites Bill
- Environmental Protection Amendment Bill
- Waste Management Bill.

All of these except the Waste Management Bill are likely to become law before the end of the year. An overview of the Contaminated Sites Bill is provided in this edition of NELR. Further details of the Environmental Protection Amendment Bill and the Waste Management Bill will be provided after they have been introduced. The following notes are provided in relation to the Conservation and Land Management Amendment Bill and the Carbon Rights Bill.

## *Conservation and Land Management Amendment Bill 2002*

The *Conservation and Land Management Amendment Bill 2002* (WA) ("the Bill") proposes to amend the management planning provisions in Division 1 of the *Conservation and Land Management Act 1984* (WA) ("the Act"). It was introduced to the Legislative Assembly by the Minister for the Environment and read for a second time on 27 March 2002.

The Bill proposes to strengthen the powers of the Conservation Commission in the preparation of forest management plans and the Minister for the Environment's power to approve those management plans.

If the Bill is passed, the Conservation Commission of Western Australia will have responsibility for the preparation of management plans for state forests, timber reserves and land in public water catchment areas in consultation with the Forests Products Commission, the Waters and Rivers Commission and other relevant water utilities. Currently, management plans are prepared by these authorities jointly.

The Bill also proposes to remove the roles of the Minister for Forest Products and the Minister for Water Resources in the approval process for proposed management plans. Instead, the Minister for the Environment will have sole jurisdiction to approve these management plans and there will be no requirement that management plans give effect to submissions made by the other authorities.*

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## *Carbon Rights Bill and related Bills*

The *Carbon Rights Bill 2002* (WA) (the "Carbon Rights Bill"), the *Tree Plantation Agreements Bill 2002* (WA) (the "Plantation Agreements Bill") and the *Amendment (Carbon Rights and Tree Plantation Agreements) Bill 2002* (WA) (the "Amendment Bill") were all introduced to the Legislative Assembly and read a second time on 22 May 2002.

Together, these bills aim to facilitate the establishment of tree plantations and other environmental plantations through a regime of carbon rights and by reducing some of the commercial and legal risks associated with plantations. The regime will apply to all land and to any form of carbon sequestration and is intended to encourage better land management practices and benefit the State's environment.

The *Carbon Rights Bill* is a legislative framework for recognising property rights in tree plantations and carbon sequestration separately from the land itself. It introduces new property rights, a "carbon right" and "carbon covenant," which may be registered on the title at the Department of Land Administration (DOLA). These rights will be separate proprietary rights from the land itself.

A "carbon right" relates solely to the proprietorship of the benefits of any carbon sequestration occurring on a piece of land. Registration of a carbon right will clarify and secure the ownership of the benefits of carbon sequestration, but will not guarantee how much is there, whether it will remain there or what value it has. The market is left to determine the value of the carbon right and issues such as measuring the carbon that has been sequestered, managing the land so that carbon is sequestered and whether a particular type of sequestered carbon can be traded.

A "carbon covenant" is an agreement between the landowner, the owner of the carbon right and anyone else who is required to give effect to the agreement (eg a lessee). It details how much carbon is to be sequestered on the property, over what time, in what form, how it is to be measured and any other commercial terms imposed by the parties. Like any other agreement, the parties to a carbon covenant will rely on civil remedies to enforce their rights. The carbon covenant will benefit the owner of a carbon right because it provides the terms under which the carbon will be sequestered (and hence determines the market value of the carbon right),but burdens the land owner because it will restrict their use of the land. The benefit of carbon rights and carbon covenants will run with the land and may be inherited, traded, mortgaged or otherwise dealt with like any other interest in land.

The *Plantation Agreements Bill* provides for the making of tree plantation agreements and will enable the registration of a plantation interest on the title of land. Tree plantation agreements involve the owner or lessee of land (with the consent of the owner) agreeing to allow another person establish, maintain and harvest a plantation on the land.

Once the plantation agreement is registered, property in the trees will become a plantation interest in the land, a property interest which may be dealt with like any other interest in land, separately from the underlying interest in land. The obligations that bind the owner or lessee of the underlying land run with the land and bind successors in title.

A tree plantation agreement is a separate proprietary interest from a carbon right or carbon covenant, but all three may exist in the one document. However, each right must be separately registered to ensure security of title.

This legislation has been introduced to overcome the difficulty with separating the interest in trees from the interest in land, as the trees are generally considered to be fixtures It is intended to provide security of title to planted trees and to encourage investment in tree plantations.

The *Plantation Agreements Bill* is designed to facilitate private plantation agreements and will not apply to the management, harvest or sale of forest products on public land.

A *Consequential Amendment Bill* is also being prepared to amend other legislation to facilitate the regime contemplated by the *Carbon Rights Bill* and the *Plantation Agreements Bill*. The *Transfer of Land Act 1893* (WA) will be amended to facilitate the registration and dealing of carbon rights, carbon covenants and tree plantation agreements. The *Land Administration Act 1997* (WA) will be amended so that the Minister for Planning and Infrastructure, on behalf of the State, can register a carbon right and enter a carbon covenant. Amendments to the Soil and *Land Conservation Act 1945* (WA) will ensure harvesting of commercial plantations does not breach that Act when undertaken in accordance with an approved code of practice. The initial creation (but not subsequent transactions) of timber sharefarming agreements (under the Conservation and Land Management Act 1984) and tree plantation agreements will be exempt from stamp duty.*

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## *Statement of planning policies*

Statement of Planning Policy No. 11 - Agricultural and Rural Land Use Planning (ARLUP Policy) was proclaimed on 12 March 2002 by the WA Planning Commission (WAPC). Under section 5AA of the *Town Planning and Development Act 1928,* local governments must have due regard to Statement of Planning Policies in the preparation or amendment of town planning schemes, strategies and policies.

The objectives of the ARLUP Policy are to:

¸ Protect agricultural land resources wherever possible;

¸ Plan and provide for rural settlement;

¸ Minimise potential for land use conflict; and

¸ Appropriately manage natural resources.

Local governments are required to make local planning policies and town planning schemes that are consistent with these objectives. Further, the following draft Statements of Planning Policy relevant to natural resource management in WA have been released for comment:

¸ draft Statement of Planning Policy: Environment and Natural Resource;

¸ draft Statement of Planning Policy: State Coastal Planning; and

¸ draft Statement of Planning Policy: Public Drinking Water Source.

The intent of these policies is to enable the WAPC and other local government planning authorities to consider environmental and natural resource management issues when making planning decisions.*

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# *Gerry Bates Essay Prize*

## closes 30 November 2002

The NELA Student Prize has been renamed the *Gerry Bates Essay Prize* in honour of Dr Gerry Bates, a founding member of NELA. It is awarded for the best environmental law essay written during 2002 by a student enrolled in an undergraduate course at an Australian tertiary institute during 2002.

Dr Bates is a past President of NELA, and has been involved with the publication of NELR (or AELN as it was formerly named) for many years. He is the past judge of the NELA Student Prize.

*CRITERIA:*

1. The Gerry Bates Essay Prize is open to any undergraduate student who has written an essay for an environmental law subject taught at an Australian tertiary institution.

2. The length of the essay must be between 3,000-5,000 words.

3. The essay must be annotated by the student's lecturer/course co-ordinator as one which meets criterion 1.

4. The essay must be received at the NELA Secretariat office by 30 November 2002.

*JUDGE:*

The essay competition will be judged by Mr Greg McIntyre, a past President and current National Executive committee member of NELA.

*THE PRIZE:*

- Airfare and registration for the 2003 NELA Conference

- Publication of winning essay in the first edition of the Review for 2003.

# book review

*Pollution Law in Australia,*
Z. Lipman & G. Bates, LexisNexis Butterworths, Chatswood, 2002

reviewed by Simon Marsden, Solicitor, Environment Agency, UK

*Pollution Law in Australia* is intended to be the first comprehensive work on pollution law and policy in Australia. It contains ten chapters, five of which are written by the principal authors, and five of which are written by others with substantial experience in particular areas. The book demonstrates the growing trend in the literature on environmental law and policy to focus upon specialist areas, of which Fisher s *Water Law* (LBC, 2000), is another recent example. This specialisation demonstrates the huge growth in environmental law in Australia (and interest in it), over the last twenty years since the first edition of Bates *Environmental Law in Australia* was published in 1982 (Butterworths). As the general texts continue to grow in scope and size, there is inevitably demand for more texts of this kind.

The book can be divided into two parts. The first five chapters provide context, and consider pollution law and policy with reference to increasingly integrated systems, outlining modern approaches to environmental management (Bates), economic instruments in pollution control (Richardson), civil remedies (Bates), criminal offences and penalties (Lipman), and corporate and directors liability and due diligence (Lipman). The second five chapters examine the specific regimes for waste disposal and management (Malone), hazardous substances (Lipman and Bates), contaminated land (Wilcher), land-based sources of marine pollution (Brunton), and marine pollution from ships (White).

The book follows the content of Bates and Lipmans earlier *Corporate Liability for Pollution* (LBC, 1998 ˘ reviewed in AELN, June 1999) quite closely. *Corporate Liability for Pollution* was designed to provide a detailed explanation of the laws relating to pollution control in Australia, with specific reference to the practical application of the law to the corporate sector. *Pollution Law in Australia* updates *Corporate Liability for Pollution* and makes it redundant. It reflects the fact that the law has moved on since, and the contributions of Richardson, Malone, Wilcher, Brunton and White add important new material and depth to Bates and Lipmans earlier (at the time), comprehensive analysis. The inclusion of this new material justifies the claims of comprehensiveness made.

Chapter 1 considers the legal interpretations given to pollution and environmental harm, and the national environmental protection measures that provide the policy context. The mixture of regulatory controls and economic incentives to manage pollution are well outlined, and the licensing regime is fully explained. Chapter 2 explains the rationale for economic instruments, contrasts them with command and control measures, and helpfully examines their development, application and future in Australia. Chapter 3 looks at the common law and administrative remedies available to take action against polluters, and Chapter 4 criminal offences and enforcement, whether serious or otherwise. Chapter 5 maintains the important focus of *Corporate Liability for Pollution*, and discusses director s liability and due diligence.

Chapter 6 deals with the growing issue of waste; the problems caused by disposal and alternatives to it, and the need for government regulation. Among other things, this includes some consideration of the role of land use planning and development. Chapter 7 examines the particular regimes for regulating hazardous substances, industrial chemicals and environmentally hazardous chemicals, ozone-depleting substances, pesticides, dangerous goods and radioactive substances, some of which are based upon international law.

Chapter 8 considers the problems presented by contaminated land, in particular liability in ownership, sales and development. The focus here is primarily on the NSW system, which is the most developed, with helpful reference to new legislative developments in WA. Chapter 9 deals with land-based sources of marine pollution, and considers Australia s compliance with its international law obligations. Finally, Chapter 10 looks at marine pollution from ships, with the need for international law to be effectively implemented emphasised.

There is no concluding chapter to the book, which is a shame. It would have been helpful for some comment to be made upon how well pollution law in Australia is integrated and co-ordinated in the light of the specialised regimes in the latter five chapters, and for some comment on what the future holds. Perhaps inevitably, economic measures will feature more strongly in government responses to environmental harm in the future as the shift from direct regulation becomes more pronounced, and prevention rather than control is emphasised. Whether or not policy responses are better integrated and co-ordinated however, remains to be seen. The legislative approaches taken to contaminated land around Australia differ greatly, and there is still a need to manage environmental harm to all media concurrently, especially from diffuse sources.

*Victorian Environment Protection Authority Prosecution Update*
*February – May 2002*

# Prosecutions under the Environmental Protection Act 1970 and the Pollution of Waters by Oil and Noxious Substances Act 1986

by Henry Jackson, Solicitor, Environment Protection Authority, Victoria

*Rosedale Leather Pty Ltd*

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|---|---|
| Offence | Section 41(1)(a) of the Environment Protection Act 1970 "the EP Act") - air pollution (offensive to the senses) |
| Maximum Penalty | A fine of $20,000 |

On 4 February 2002 at Moe Magistrates' Court, Rosedale Leather Pty Ltd ("the Company") pleaded guilty to one charge of air pollution related to the discharge of offensive odours from its wastewater treatment facility at the Company s tannery.

The Court placed the Company on a 12 month good behaviour bond, without conviction, subject to the following conditions:

(a) The Company make payment of $20,000 to the Wellington Shire Council for streetscape beautification works in Rosedale;

(b) The offence be published in relevant local papers; and

(c) The Company be prohibited from referring to the payment of the $20,000 without reference to the court proceedings.

The court also ordered the Company to pay EPAs costs of $6,896. No conviction was recorded on the basis that it was the Company s first offence.

Problems with the Company s wastewaster treatment plant led to elevated levels of hydrogen sulfide which escaped beyond the premises boundary. The discharge of odour was made more problematic due to the fact that the Company did not have a supply of compressed air for breathing apparatus used by maintenance crews. No explanation was given as to why the Company had run out of compressed air for its breathing apparatus.

Although the new "alternative sentencing" provisions of the EP Act did not apply to the offence*, discussions between EPA and the Company resulted in a joint submission to the court as to the appropriateness of the above penalty.

* The new penalty provisions, especially s67AC of the EPAct were inserted by the *Environment Protection (Enforcement and Penalties) Act 2000* which came into effect on 9 July 2000.

### *Kevin Dowling*

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|---|---|
| Offence #1: | 1. Section 48B(1) of the EP Act ˘ non compliance of motor vehicle with noise emission standards |
| Maximum Penalty | A fine of $3,000 |
| Offence #2: | Section 55AC(3) of the EP Act ˘ failure to comply with a requirement of a certificate of compliance |
| Maximum Penalty | A fine of $6,000 |

On 6 February 2002 at Sunshine Magistrates' Court, Kevin Dowling was found guilty of:

(a) being the driver/registered owner of a vehicle that failed EPA noise standards; and

b) failing to provide a certificate of compliance in relation to the vehicle by the date specified in the certificate.

The Court convicted Mr Dowling and fined him $1500 as part of an aggregate order. He was also ordered to pay EPA costs of $1,120.10.

Mr Dowling's vehicle, a 1973 Mack Prime Mover, was tested in Francis Street, Yarraville by EPA on 13 November 2000, as part of a noisy vehicle blitz. Mr Dowling elected to have the matter determined by a court on the basis that he believed the testing of the vehicle was not done in accordance with the Environment Protection (Vehicle Emissions) Regulations 1992. This argument was dismissed by the court.

Mr Dowling also raised an argument that the testing methods did not in any way relate to the way in which a truck of this type was actually driven. The court acknowledged that this may be true. However, the court explained that it was required to base its decision on the testing method in the Regulations rather than any other standard that Mr Dowling believed should apply.

No explanation was given by Mr Dowling as to why he failed to supply to EPA the certificate of compliance by the specified date.

### *Western Region Water Authority*

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|---|---|
| Offence | Section 39(1)(e) of the EP Act ˘ water pollution (detrimental to any beneficial use) |
| Maximum Penalty | A fine of $240,000* |

On 7 March 2002 at Sunshine Magistrates' Court, Western Region Water Authority ("the Water Authority") pleaded guilty to one charge under s39(1)(e) of the EP Act arising from two related incidents on 4 and 5 April 2001 which resulted in over a million litres of sewage being discharged into Toolern Creek, part of the Werribee River Catchment near Melton.

The Water Authority was convicted and ordered to pay EPAs costs of $14,739. In addition, the Court agreed that an order under s67AC was appropriate in the circumstances and ordered the Water Authority to:

(a) Make payment of $39,500 to the Melton Shire Council within 60 days with the money to be used specifically by Melton Shire Council for revegetation works in the Werribee River Catchment;

* Of which $100,000 is available in the Magistrates Court.

b) Publish details of the offence in relevant local Melton papers as well as the Herald Sun and the Age newspapers;

(c) Publish details of the offence in the 2002 Annual Report of the Water Authority; and

(d) Refrain from referring to payment of the $39,500 without reference to the court proceedings.

Additionally, the Court ordered the Shire of Melton to provide to EPA, within 12 months, a report which details how the money has been used for waterway revegetation works in the Werribee River catchment.

The first incident on 4 April 2001 resulted from a sewer blockage. As a result of a build up of pressure sewage overflowed from a manhole, into a stormwater drain and then into Toolern Creek. The second incident on 5 April 2001 occurred during the clean up of the first incident. An employee of the Water Authority failed to consult appropriate plans and as a result 'flushed' the initial spill with further sewage - not clean water. This 'flushing' continued for up to 18 hours until the mistake was noticed and flushing with clean water commenced.

In agreeing to utilise s67AC of the EP Act in making the relevant orders, the Court observed that "the people immediately effected will be the beneficiaries of the order. That is a better result than a fine".

### *Goodman Fielder Consumer Foods Limited*

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| Offence #1 | Section 45(1)(f) of the EP Act - land pollution (contrary to beneficial uses, specifically aesthetic enjoyment) |
| Offence #2 | Section 39(1)(e) of the EP Act ˇ water pollution (contrary to beneficial uses, specifically aesthetic enjoyment and the maintenance of aquatic ecosystems and associated wildlife) |
| Maximum Penalty | A fine of $240,000 for each offence* |

On 28 March 2002 at Sunshine Magistrates' Court, Goodman Fielder Consumer Foods Limited ("the Company") pleaded guilty to one charge each of land and water pollution in relation to two separate incidents at the Company s West Footscray premises.

The Company was convicted on both charges and ordered to pay EPAs costs of $12,421. The Court also made the following orders pursuant to s67AC of the EP Act:

(a) The Company was ordered to pay $43,510 to the Maribyrnong City Council to carry out a one year water quality monitoring program of Stony Creek. It was also ordered that the Maribyrnong City Council provide EPA with six monthly reports of the program;

(b) The Company was also ordered to publish a notice of the offence/proceedings in two local newspapers within 30 days and in its 2002 Annual Report; and

(c) The company was ordered to not refer to the payment to the Council without reference to the proceedings.

The land pollution charge related to an incident on 25 April 2001 where wastewater containing edible oils leaked through bund walls into Hansen Reserve, West Footscray. Subsequent to the offence the Company has undertaken rectification works. Hydrostatic testing of the bund walls by the Company indicated that the measures taken have been successful.

The water pollution incident on 29 April 2001 related to the discharge of wastewater containing edible oils caused by a failure of a joint in the policeman's pit connection pipe. The court heard that the spill was visible for a two kilometre stretch and adversely affected the aquatic ecology of Stony Creek.

* Of which $100,000 is available in the Magistrates Court.

### *Bruce Simpson*

| | |
|---|---|
| Offence | Section 27A(1)(c) of the EP Act ˘ permit an environmental hazard |
| Maximum Penalty | A fine of $240,000* |

On 26 April 2002 at Melbourne Magistrates' Court, Bruce Simpson pleaded guilty to a charge of permitting an environmental hazard. He was convicted and fined $2,500 and ordered to pay the Authority s costs of $2,000.

The charge arose from a spill of unleaded petrol at the 'Shell' Auburndale service station, corner of Riversdale Road and Hunter Street Hawthorn on 12 September 2000. The Defendant, an employee of Triton Petroleum (Vic) Pty Ltd, was making the delivery shortly after mid-night, after the service station had closed.

The environmental hazard resulted from three errors by the Defendant. First, he wrote the pre-dip reading on his glove instead of on the delivery docket, and the figure was later almost erased while he was mopping up some of the spilled fuel. Thus Mr Simpson could not be sure exactly how much fuel had been in the underground tank before he started to fill it up. Secondly, he did not fully secure the vapour recovery line, and the loose connection may have contributed to the spill. Thirdly, even allowing for the unclear figure on his glove, he made a calculation error and thereby underestimated the amount of the spill. Accordingly, he did not take steps to contact emergency services. As a result, the spill was not reported to them for some 6-7 hours, extending the period of hazard.

When emergency services (Metropolitan Fire Brigade) personnel attended, they spent a further 6-7 hours flushing the stormwater drains until the potential for explosion was reduced to a safe level. An estimated 600 litres was educted by the Shell recovery team from nearby Telstra pits.

In addition to the prosecution taken by EPA, a pollution abatement notice was served on The Shell Company of Australia Limited and the service station operator, Care Retail Services Pty Ltd, to require the installation of overfill and spill containment facilities, to stop spilled fuel from entering the nearby drains and pits. These facilities were duly installed and can now pre-vent an environmental hazard arising from any future spills.

### *Shell Tankers BV and Capt. Christopher Bailey*

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|---|---|
| Offence | Section 8(1) of the Pollution of Waters by Oil and Noxious Substances Act 1986 ("the POWBONS Act") ˘ discharge of oil to state waters |
| Maximum Penalty | A fine of $1,000,000 for the corporate entity# and $200,000# and/ or two years imprisonment for the individual |

On 9 May 2002 in Geelong Magistrates Court, Shell Tankers BV and Capt. Christopher Bailey (the owner and Master of the oil tanker MV Sericata respectively) each pleaded guilty to a charge of discharging oil into state waters contrary to s8(1) of the POWBONS Act in relation to a discharge of oil into Corio Bay on 23 May 2001.

The Court convicted Shell Tankers BV ("the Owner"), fined it $25,000 and ordered that it pay EPAs costs of $5,682.00. Captain Christopher Bailey ("the Master") was fined $10,000 without conviction.

The discharge of oil occurred during the draining of shore based equipment of oil into the ships waste tanks. A valve for the draining of drip trays into those waste tanks was open at the time with the result that a 1000 litre fountain of crude oil shot out over the sides of the vessel onto the jetty. The Court accepted that about 200-400 litres of that oil made it into the water of Corio Bay.

* Of which $100,000 is available in the Magistrates Court.

\# Of which $50,000 is available in the Magistrates Court.

The valve in question had been 'lashed' with rope. Such lashing is done to indicate that a valve is closed. The systems in place to prevent this weren't followed on the day or days preceding. It was the Chief Officer s responsibility to ensure the lashings were right and the 3rd Officer s responsibility to do the lashings and valve checks.

In sentencing, the Court noted that the area around the Shell wharf was highly prized by locals and was well used by sailors, fisherman and school children. He also noted that although there was no "oiled penguins or gasping fish", he had no doubt that micro fauna had been impacted.

Counsel for the Owner informed the court that it had altered the valve checking systems on the ship, changed the valves to a more visible type and sacked the Chief Officer.

### *Pivot Limited*

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|---|---|
| Offence | Section 41(1)(a) of the EP Act ˘ air pollution (offensive to the senses of human beings) |
| Maximum Penalty | A fine of $240,000* |

On 24 May 2002 at Geelong Magistrates' Court, Pivot Limited ("the Company") entered a plea of guilty to one count of air pollution. The charge related to the discharge of odours from the Company s premises at North Shore on 26 May 2001.

The Court convicted and fined the Company $10,000. In addition, the Court ordered the Company to pay the EPA's costs of $6,275 and made the following orders pursuant to section 67AC of the EP Act:

(a) The Company was ordered to pay $30,000 to the City of Greater Geelong towards the restoration of vegetation at Moorpanyal Park. The payment is to be used to fund the following 2 projects:

  (1) $20,000 towards extensive tree surgery (including removal of senescent vegetation); and

  (2) $10,000 towards replacement of removed trees using advanced stock;

(b) That the City of Greater Geelong provides to the EPA a report six months from the date of the court order that the payment had been made to fund the said projects;

(c) The Company be prohibited from referring to this payment without reference to these proceedings; and

(d) The Company was ordered to publish a notice in relation to the proceedings in its 2002 Annual Report, the Geelong Advertiser, the Geelong News and the Geelong Independent.

Pivot Ltd operates the premises at North Shore Geelong that manufactures granular fertiliser by reacting sulfuric acid and phosphate rock and holds an EPA licence EM32252 for emissions to the air environment.

* Of which $100,000 is available in the Magistrates Court.

### *Capral Aluminium Limited*

| | |
|---|---|
| Offence | Section 39(1)(e) of the EP Act ˘ water pollution (detrimental to beneficial uses) |
| Maximum Penalty | A fine of $240,000* |

On 29 May 2002 at Broadmeadows Magistrates' Court, Capral Aluminium Limited ("the Company") pleaded guilty to one charge of water pollution in relation to the discharge of several hundred litres of hydraulic oil to Merri Creek on 11 July 2001.

The Company was fined $5000 without conviction and ordered to pay the EPAs costs of $14,227.30. The Court also made orders pursuant to s.67AC of the EP Act that:

(a) the Company pay to Hume City Council the amount of $32,000 for the installation of a gross pollutant trap;

(b) the Company publicise the offence by publishing a notice in its 2002 Annual Report, the Hume Moreland Leader, The Age, Herald Sun, Financial Review; and

(c) the Company be prohibited from referring to this payment without reference to the proceedings.

The discharge of oil to Merri Creek occurred as a result of the failure of an extrusion press failed which then discharged 1400L of hydraulic oil. A significant portion of the oil drained to the internal stormwater system of the Company s premises and subsequently discharged to the stormwater system in Barry Road and ultimately into the Merri Creek.

* Of which $100,000 is available in the Magistrates Court.

# *Balancing short term impacts and long term interests in fisheries management decisions:*

## *Justice v Australian Fisheries management Authority*

by Kelly Crosthwaite, Legal Officer, Australian Fisheries Management Authority*
and Warwick Gullett, Lecturer in Law, Faculty of Fisheries and Marine Environment,
Australian Martitme College.

In the latest of a series of merits review decisions by the Administrative Appeals Tribunal (AAT) concerning the correct construction to be given to the Australian Fisheries Management Authority s (AFMAs) statutory objective to ensure that the exercise of the precautionary principle is pursued , the AAT has affirmed the decision under review as having being made reasonably and correctly in pursuit of the principle. This article explains the reason for the AAT s recent decision in *Craig Justice v Australian Fisheries Management Authority and Executive Director, Department of Fisheries Western Australia (hereafter Justice v AFMA)*[1] which affirmed AFMAs implementation of the consultative approach required by legislation and provided further support for AFMAs interpretation and implementation of its statutory requirement to manage fisheries in a manner consistent with the precautionary principle.

### *Background to the case*

As with the recent series of AAT appeals concerning AFMA,[2] the argument put by the applicant in *Justice v AFMA* was that AFMA did not exercise its powers correctly in terms of its legislative objectives. Section 3 *Fisheries Management Act* 1991 (Cth) (hereafter FM Act) states that certain objectives must be pursued by AFMA in the performance of its functions. These objectives, expressed in s3(1), as amended in 1997,[3] are:

> (a) implementing efficient and cost-effective fisheries management on behalf of the Commonwealth; and
>
> (b) ensuring that the exploitation of fisheries resources and the carrying on of any related activities are conducted in a manner consistent with the principles of ecologically sustainable development and the exercise of the precautionary principle, in particular the need to have regard to the impact of fishing activities on non-target species and the long term sustainability of the marine environment; and
>
> (c) maximising economic efficiency in the exploitation of fisheries resources; and
>
> (d) ensuring accountability to the fishing industry and to the Australian community in AFMAs management of fisheries resources; and
>
> (e) achieving government targets in relation to the recovery of the costs of AFMA.

In addition, s3(2), as amended in 2001,[4] provides that regard is to be had to the objectives of:

> (a) ensuring, through proper conservation and management measures, that the living resources of the [Australian Fishing Zone] AFZ are not endangered by over-exploitation; and
>
> (b) achieving the optimum utilisation of the living resources of the AFZ; and
>
> (c) ensuring that conservation and management measures in the AFZ and the high seas implement Australia s obligations under international agreements that deal with fish stocks;
>
> but must ensure, as far as practicable, that measures adopted in pursuit of those objectives must not be inconsistent with the preservation, conservation and protection of all species of whales.

The question of whether all or only some of the s3(1) objectives must be pursued by AFMA in making a decision in the performance of its functions, and the corollary issue of what amounts to sufficient pursuit of each mandatory objective, are not settled.[5] The AAT did not address these crucial issues in *Justice v AFMA* but an assumption that the mandatory objectives should be pursued simultaneously does seem to be implicit in its decision.[6] Furthermore, the AAT s reasoning seems to reflect an acknowledgement that the balance between the twin central objectives in fisheries management of biological sustainability and economic efficiency guides decision-making in accordance with the FM Act. More specifically, the decision indicates that ecologically sustainable fisheries management is necessary for the proper pursuit of *long-term* economic efficiency.[7] Furthermore, the AAT noted the complexity of AFMAs fisheries management task and that the bare recital of these objectives and functions masks the reality of translating them into policies, principles and operational administration of the Act. [8]

It is not only the administrative framework of the FM Act that needs to be taken into account in decision-making under the Act. Broader environmental policy statements and international legal instruments need to be taken into account when construing and giving effect to the powers under the Act. For example, the definition of the precautionary principle for the purpose of the Act is contained in the 1992 Intergovernmental Agreement on the Environment (IGAE).[9] Likewise, AFMAs management decisions should be influenced by developments in legal regimes governing high seas areas adjacent to the AFZ, particularly in relation to highly migratory species such as tuna. This requirement has now been specifically incorporated into AFMAs decision-making framework by the recent amendment to the FM Act to include the objective s3(2)(c) (above) to ensure that conservation and management measures in Australia implement Australia s obligations under international fisheries agreements.[10] The High Court of Australia has also expressed the view that there is a legitimate expectation that Commonwealth discretion will be exercised in conformity with the terms of international conventions to which Australia is a party.[11] Of relevance to the case at hand (as discussed below), Australia is a member of the Indian Ocean Tuna Commission (the IOTC) which was established pursuant to a multilateral agreement in 1996.

That fisheries management in Australia is becoming increasingly complex due to greater awareness of the intricacies and interlinked nature of marine ecosystems across state, national and international jurisdictions is evident in the case of *Justice v AFMA*. The case illustrates how AFMA routinely faces the challenge of seeking to discharge its responsibility to pursue statutory objectives that are in tension. This occurs where balance is sought between short-term impacts and long-term benefits such as where AFMA tries to achieve optimum utilisation [12] of fisheries resources and economic efficiency [13] in the exploitation of these resources. For example, in a rapidly developing fishery it is difficult to explore the bounds of exploitation when the impacts on stock are unlikely to be known until the limits of the fishery are reached, at which time it may be too late and remedial management measures will need to be put in place. Yet evidence of costs to operators in the short-term is more readily ascertainable than evidence of the long-term sustainability benefits that will be realised from a particular measure. However, if a precautionary approach is implemented in pursuing optimum utilisation and economic efficiency simultaneously, then cautious management arrangements can legitimately be put in place to ensure that financial gains are realised from the resource but that sustainability is not jeopardised. Yet such an approach may draw criticism from some commercial fishing operators for being inappropriately ˘ and arguably unlawfully under the FM Act ˘ financial burdensome in the short- to mid-term.

### *The AAT application*

The applicant, a commercial fisher, applied to AFMA under s32 FM Act for a 2000/2001 fishing permit for the Southern and Western Tuna and Billfish Fishery (SWTBF) which would authorise the applicant to conduct fishing operations throughout the SWTBF. AFMA granted a fishing permit to the applicant but imposed a restriction permitting fishing only in the area of the SWTBF south of latitude $34^0$ South (which delimits the boundary between the WTBF and the STBF), near Margaret River, WA. The applicant appealed the decision to refuse to grant a

fishing permit for the entire SWTBF on a number of grounds and sought the removal of the restriction line on the permit.

The specific grounds of review were that the $34^0$ South line is arbitrary, has no biological basis and does not meet AFMAs statutory objectives. The applicant s principal arguments were that the decision to restrict the permit area did nothing for the pursuit of AFMAs ecologically sustainable development objective, created economic inefficiencies and was contrary to the implementation of efficient and cost-effective fisheries management.

The Executive Director of the Fisheries Department of Western Australia (Fisheries WA) was joined as a party to the proceedings. The grounds cited for applying to be joined included the fact that Fisheries WA manages waters that overlap with waters for which AFMA has management responsibilities, that there are concerns about bycatch (principally shark bycatch), the sustainability of fishstocks and the potential impacts on WAs recreational fisheries.

### *The fishery*

The SWTBF encompasses both the Western Tuna and Billfish Fishery (WTBF) and the Southern Tuna and Billfish Fishery (STBF). It covers the entire coast of South Australia, Western Australia, the Northern Territory and the Queensland coast west of Cape York to the limit of the AFZ (a distance of 200 nautical miles; shorter where there is a shared Exclusive Economic Zone boundary with Indonesia, East Timor and Papua New Guinea). The STBF (south of $34^0$ South) and the WTBF (north of $34^0$ South) are defined as separate fisheries in the *Fisheries Management Regulations* 1992. However, the fisheries are managed consistently, with the border between them effectively being treated as an internal boundary.

Each of the five principal species taken in the SWTBF ˘ bigeye tuna, yellowfin tuna, albacore tuna, broadbill swordfish and skipjack tuna ˘ is believed to comprise separate Indian Ocean and Pacific Ocean stocks. Pacific stocks are managed as part of the Eastern Tuna and Billfish Fishery (ETBF) and the Indian Ocean stocks are managed in the AFZ as part of the SWTBF. AFMA receives advice from the Southern and Western Tuna Management Advisory Committee (SWTMAC) when making management decisions for the fishery. AFMA also considers reports from the IOTC. The IOTC is, among other things, charged with promoting the conservation and optimum utilisation of tuna species, thus encouraging sustainable development of the species. Conservation and management measures are binding on members of the IOTC. The IOTC has noted concerns about the rapid development of longline fisheries targeting broadbill swordfish off both eastern and western Australia.

### *History of the line at 340 South*

The FM Act came into effect in 1992, however, under transitional arrangements from the *Fisheries Act 1952* (Cth), Commonwealth Fishing Boat Licences (CFBLs) continued in effect until February 1995. Following the expiry of these transitional arrangements, fishing permits were granted allowing fishing for tuna and billfish using a specified method in specified waters. Thirteen sub-areas were designated within the SWTBF to which access could be granted under those permits.. These sub-areas were consistent with areas of access that operators had historically been entitled to in accordance with their CFBLs under the *Fisheries Act* 1952.

In May 1995, AFMA announced that separate Management Advisory Committees (MACs) were to be established for the southern fishery and the western fishery. Then, in August 1998, the AFMA Board decided to remove all internal boundaries other than the line at $34^0$ South. In doing so, the Board indicated that retention of that boundary might depend on a review of all tuna fisheries that was due to take place in early-1999.

Following public consultation on the integration of Australia s tuna fisheries and acknowledging the increase in investment and effort in the SWTBF in the past 12 months ,[14] the AFMA Board decided in December 1999 to:

> (a) determine as a matter of urgency to develop and implement a management plan, that will effectively manage fishing effort, by early-2001;
>
> (b) retain the $34^0$ South boundary until that management plan is implemented; and
>
> (c) that when the management plan is implemented, the $34^0$ South boundary will be removed.

At the same time, the Board also decided to amalgamate the two existing MACs into the one SWTBMAC and to treat stocks as a single fishery.

AFMA acknowledged in its evidence in *Justice v AFMA* that the line at $34^0$ South existed for historical reasons and had developed as an administrative boundary, but that it now served as an effort control that should remain in place until more effective and orderly management of effort could be implemented through a management plan. To that end, in July 2000, AFMA circulated a discussion paper on future management options for the SWTBF and ETBF. The principal proposal contained in the discussion paper was for Statutory Fishing Rights, under which a total allowable catch (TAC) would be established and each operator would be granted a tradeable portion of the TAC in the form of individual transferable quotas (ITQs). An independent Allocation Advisory Panel (AAP) would be established to make recommendations to the Board on allocation of the ITQs. Following extensive consultation, SWTBMAC strongly endorsed this proposal at its meeting in February 2001. The AFMA Board accepted the SWTBMAC recommendation at its meeting on 31 May 2001 and at its 10-11 October 2001 meeting it formally appointed the AAP, which was due to report back at the end of January 2002. As at April 2002, a draft report was being prepared for presentation to the AFMA Board.

In the interim, removal of the line was subject to an earlier AAT application in *Dixon v AFMA*[15] concerning a commercial pelagic longline fishing permit. In that decision, the AAT also affirmed AFMAs decision not to remove the line and allow the applicant to fish throughout the SWTBF. The AAT supported the precautionary approach taken by AFMA in managing the fishery. It confirmed that, on balance, maintaining the boundary was consistent with the pursuit of AFMAs statutory objectives in the long-term. This view was premised on the fact that a management plan was being developed and would be in place within a reasonable timeframe.

### *Contentions of the parties*

The applicant s contentions included, relevantly, that:

> ¸ the policy of retaining the line at 340 South is contrary to the pursuit of AFMAs ecologically sustainable development (ESD), economic efficiency and efficient and cost-effective fisheries management objectives;
>
> ¸ the retention of the boundary will hinder the implementation of a management plan; and
>
> ¸ even if the AAT upholds AFMAs policy, that the applicant has special circumstances that justify departure from that policy in his case. The circumstances listed relate to the investment he has made in the fishery, his legitimate expectation that the line will be removed and the unfair advantage other operators who have access north of the line have.

AFMA contended in response that that the main issues to be addressed in managing the SWTBF include inadequate knowledge of the resource base, an existing management framework with limited ability to constrain fishing effort, the extent to which unconstrained increase in investment and fishing effort reduces the economic efficiency of the fleet as a whole, and the pursuit of ESD. AFMAs principal argument was that the imposition of the area restriction was in pursuit of its statutory objectives; in particular, that it ensures that in

the absence of a management plan the exploitation of fisheries resources is conducted in a manner consistent with the exercise of the precautionary principle. This argument rested on the uncertainty about stock structure of the key tuna and billfish species and the likelihood that removing the $34^0$ South restriction would activate latent fishing effort which would increase catches and cause unknown impacts to the species. The challenge was characterised as finding a way to devise a means of restraining effort and investment while encouraging exploitation of fisheries resources and maximising economic efficiency, as well as keeping the costs of fisheries management to a minimum. [16]

In meeting this challenge, AFMA noted that the pursuit of sustainability requires that the impacts on particular species within the AFZ must be weighed against implications for the Indian Ocean stocks as a whole. In view of the uncertainty about stock structure of the key target species, it was contended that the precautionary approach to management dictates that AFMA should limit the growth and effort of catches, at least until more information is available to develop more sophisticated management arrangements. As such, AFMA contended that the line at $34^0$ South plays a significant role in restraining additional investment and effort in the fishery and should therefore be retained until those management arrangements exist.

In relation to the development of management arrangements, AFMA noted that the development of a management plan is a protracted and complex process, requiring extensive consultation with the fishing industry, other government agencies, conservation groups and State and Territory governments. Removing the boundary would introduce a degree of instability into the fishery, with increases in fishing effort and the number of active fishers leading to tension within the industry and pressure for the imposition of new constraints on operators. That tension and pressure would impede the effective development of a management plan.

Fisheries WA contended that the fisheries management regime that existed under State law, as well as international considerations, were relevant to AFMAs exercise of its statutory functions. Its concerns about the potential impacts on recreational fisheries, bycatch and sustainability of fish stocks within WA also extended to Indian Ocean fish stocks within the jurisdiction of the IOTC. It argued that the fisheries issues involved constituted a case of adaptive but cautionary management .[17]

### *Issues to be decided*

The AAT characterised the issues to be decided in the following terms:

> Whether AFMAs policy to retain the line as a fishing boundary on the permit is unlawful, or not warranted in the light of its legislative objectives, requires consideration of current knowledge of the fishstocks in the fishery and the wider Indian Ocean stock, and any concerns about overall sustainability. In order to establish such parameters a range of other issues must be examined, including the question of whether the effect of retaining the line is likely to constrain effort and investment in the fishery, possibilities of latent effort being activated, and the need to meet Australia s international obligations.
>
> There is also the question of whether removal of the boundary would threaten pursuit of AFMAs statutory objectives, including ecological sustainable development (ESD). The latter also involves consideration of whether the precautionary principle might be triggered by some threshold test. The implications of retaining the line must also be assessed in terms of whether it induces economic inefficiencies in the fishery in the short-term until a management plan is established. If the policy is found to be lawful, it must also be determined whether there are cogent reasons for departing from the decision under review. [18]

### *Decision of the AAT*

The AAT found that AFMAs policy was lawful, and that retention of the line is consistent with the pursuit of all of its objectives,[19] particularly in terms of long-term sustainability. The AAT also noted that given the multiple functions that AFMA is charged with fulfilling, trade-offs are inevitable in its decision-making.[20]

The AAT found that the effect of the line at $34^0$ South was to act as a de facto biological boundary between species mainly inhabiting subtropical waters, compared with cooler southern waters. It relied on the scientific evidence presented by witnesses for AFMA and Fisheries WA in coming to this conclusion. The AAT noted in its decision that there was not complete agreement as to whether retention of the line acted as a disincentive to overcapitalisation or whether latent effort would be activated if the line was removed.[21] Nevertheless, the decision supports AFMAs view of the line as a useful interim control at the current stage of development of the management plan, even though it is not an optimum means of attempting to limit overcapitalisation or effort in the SWTBF.

Retention of the line was found to be consistent with the pursuit of ESD in the long-term. This is because overall the scientific evidence presented revealed that there is currently limited knowledge of some fishstocks that are targeted in the fishery. According to the AAT, the evidence urges a precautionary approach until better information becomes available and the impacts can therefore be managed more effectively. The AAT noted the evidence of CSIRO Principal Research Scientist, Dr John Gunn, in which he drew a distinction between a precautionary approach at the policy level, and the more severe scientific test (as embodied in the IGAE formulation of the principle), in deciding whether a threshold has been reached which would then invoke the precautionary principle. In the present case, there was no suggestion that serious or irreversible damage is currently being caused to fishstocks to an extent that necessitates urgent and severe restriction. Rather, the suggestion was that a careful evaluation to avoid such a predicament, through an assessment of the risk-weighted consequences of various options, is advisable. As such, constraint of catch levels in the short-term is consistent with the pursuit of ESD. The approach the AAT took in this regard is more consistent with the meaning of the precautionary principle as it has developed internationally rather than the restrictive meaning given to it in Australia as encapsulated in the IGAE formulation of it.[23] It did this by supporting AFMAs decision to refuse to extend fishing effort north of the line at 340 South in recognition of the need to avoid where possible allowing activities in the absence of confident predictions of future environmental effects. The decision provides further confirmation that AFMA can lawfully pursue the precautionary principle in circumstances where the threshold test of serious or irreversible damage has not been met.[24] Although this would only be the case to the extent that such an approach is not inconsistent with other mandatory objectives.

The AAT applied the same long term approach in finding that retention of the line was also found to be consistent with the pursuit of economic efficiency for the fishery as a whole. It supported AFMAs decision to countenance short-term inefficiencies rather than put at risk the long-term viability of the industry and was consistent with the decision of the Federal Court in *Bannister Quest*[25] that it was out of place for AFMA to have regard to social or equity considerations or the efficiency of an individual fisherman s operation relative to that of other fishermen. [26]

In making these findings the AAT also concluded that AFMA had been thorough in its policy-making process and had followed due process in a very consultative manner, hence policy is well grounded and interested parties cannot complain of lack of natural justice. Policy development has not been arbitrary, but formulated using well established procedures, permitting all industry participants to have a voice. [27] Furthermore, the AAT rejected the applicant s contention that retention of the line would hinder development of the management plan. Rather, it preferred the view that removal of the line at this stage in the development of the management plan would create confusion and complexity in the allocation of ITQs and would

therefore be contrary to the pursuit of the efficient and cost-effective fisheries management objective. In relation to the special circumstances cited by the applicant as disadvantages to him, the AAT found that the same conditions could be said to apply to other participants in the fishery and no evidence was produced to indicate that the applicant had been discriminated against individually or had markedly different circumstances to others.

### *Conclusion*

The AAT affirmed the decision under review and concluded that what is clear from the evidence is that at this stage of the SWTBF a cautious management approach is essential. [28] The decision confirmed that AFMAs purported implementation of the precautionary principle in the circumstances of the case was consistent with its legislative objective and indicates that the AAT will afford AFMA a degree of flexibility in how it decides to pursue the precautionary principle when fulfilling its fisheries management functions. Its willingness to do so seemed to be in recognition of the complexity of the task AFMA faces, and in reliance on the thorough consultative processes that are followed in making contentious decisions.

** The views expressed in this article are those of the authors and not necessarily those of the Australian Fisheries Management Authority.*

1. [2001] AATA 49. Decision 30 January 2002.

2. See, e.g. *Dixon v AFMA* [2000] AATA 442, *Arno Blank v AFMA* [2000] AATA 1027, *Latitude Fisheries v AFMA* [2000] AATA 1025, *AJKA v AFMA* [2001] AATA 258. The decision of the AAT in *AJKA v AFMA* is currently subject to a Federal Court review. See Gullett, W., Paterson, C. and Fisher, E. 2001. Substantive precautionary decision-making: the Australian Fisheries Management Authority s lawful pursuit of the precautionary principle. *Australasian Journal of Natural Resources Law and Policy*. 7: 95-140.

3. Schedule 2 *Fisheries Legislation Amendment Act* 1997 (Cth) (re inclusion of the precautionary principle in s3(2)(b)).

4. *Fisheries Legislation Amendment Act* (No. 1) 1999 (No. 143) (re inclusion of s3(2)(c)). Schedule 2 commenced 11 December 2001.

5. See Gullett, Paterson and Fisher, n. 2.

6. The AAT stated (at para 77) that long-term economic benefit of the industry and ESD are equally important statutory objectives.

7. Para 79. Cf Nicholls, D. and Young, T. 2000. Australian fisheries management and ESD ˇ the one that got away? *Environmental and Planning Law Journal*. 17: 272-93 at 275.

8. Para 27.

9. Section 4 *Fisheries Management Act 1991* (Cth).

10. *Fisheries Legislation Amendment Act* (No. 1) 1999 (No. 143).

11. *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287-88 per Mason CJ and Deane J; at 298-303 per Toohey J; at 303-5 per Gaudron J.

12. s3(2)(b).

13. s3(1)(c).

14. Para 15.

15. [2000] AATA 442. Decision 5 June 2000.

16. Para 29.

17. Para 73.

18. Paras 38-39. See Re Drake and Minister for Immigration and Ethnic Affairs (No. 2) (1979) 2 ALD 634 at 645.

19. However, the AAT did not specifically consider all objectives, such as s3(1)(e).

20. Para 27.

21. Para 74.

22. Para 71.

23. See Gullett, W. 1997. Environmental protection and the precautionary principle : a response to scientific uncertainty in environmental management. *Environmental and Planning Law Journal.* 14(1): 52-69 and Fisher, E. 2001. Is the precautionary principle justiciable? *Journal of Environmental Law.* 13: 315-34.

24. See also *AJKA v AFMA* [2001] AATA 258 at para 86.

25. *Bannister Quest Pty Ltd v AFMA* (1997) 77 FCR 503.

26. At 521.

27. Para 69.

28. Para 95.

# *Ethical Investment and the Commonwealth's Financial Servives Reform Act 2001*

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## *Introduction*

Recent changes to Australian financial institutional law introduced by the Financial Services Reform Act 2001 (Cth) have opened new possibilities for promoting environmental investment and other forms of ethical business funding. Environmental investment is increasingly being recognised as an important pathway for promoting sustainable development and hence is a sector of the economy that should be targeted by environmental regulation.[1] Capital markets are where wholesale decisions regarding future development and thus pressures on the environment begin. Today, capital markets are dominated by large institutional investors, rather than by individual shareholders.[2] Given its strategic market significance, a key challenge is to find ways to encourage the investor community to be more sensitive in their decision-making to environmental policy considerations.

In an era where direct government regulation is frequently discredited for its cost inefficiencies and implementation failures, methods to mobilise institutional investors to take account of the environmental sequelae of their financial decisions are likely to reside in a range of indirect, information- and incentive-based tools. Through such tools, investors can provide a means of conveying and amplifying primary regulatory controls through the market. Various legal theorists argue that regulators operate increasingly in a pluralistic setting where effective governance resides in flexible, collaborative mechanisms in which state functions are shared with or devolved to private interests.[3] Osborne and Gaebler, for instance, favour governments using their leverage to facilitate rather than command, so that governments "steer" the private sector towards desired public policy goals.[4] On the other hand, too much market autonomy can generate unacceptable wider consequences. There is substantial literature in economic theory that posits serious market failures to properly incorporate in economic decisions the impacts of resource depletion and pollution.[5] Overall, sustainable development will probably be unachievable unless markets place greater emphasis on long-term investment and appropriately value the environmental costs and benefits of corporate decisions.

Traditionally, financial market organisations have been sceptical of environmental concerns and seldom sought environmental information beyond that pertaining to the financial risks associated with project developments that could directly affect the loan security or insurability of a site, or activities that could affect the value of corporations in an investment portfolio.[6] Intense market competition creates pressures on financial institutions to reduce costs, thus squeezing out consideration of ostensibly expensive environmental supervisory systems except in cases of obvious financial liability. Corporate assets have commonly been perceived by investment houses as "passive pools of income-generating securities", rather than as resources for sustainability.[7] Consequently, to the extent environmental issues are considered, they may merely be an "add on" to normal business practices, rather than an integral factor in the culture of financial decision-making.[8]

Recently, evidence is emerging that environmental issues are becoming a more mainstream concern for financial markets because of changing government regulation, public pressure and the perceived financial benefits identified from favouring environmentally sound businesses. Its strategic location in capitalist markets means that policy-makers cannot ignore the financial services sector. The task is to identify ways in which the environment can be made more financially relevant to economic managers and to correspondingly design an appropriate legislative and policy framework.[9] The process of regulatory and policy reform must address the rules and incentives governing investors and other financial entities, as well as the functions of those government authorities which supervise them. Financial organisations and markets have long been regulated and monitored to ensure transparency, accountability and prevention of unfair dealings.[10] The challenge is to graft onto the financial services regulatory systems an additional stratum of environmental controls to steer agents more strongly towards sustainable development objectives.

### *Institutional Investors*

Institutional investors increasingly dominate capital markets in the industrial market economies.[11] In recent decades, institutional savings have surged as people make private provision for retirement in the face of shrinking state welfare benefits. As financial intermediaries, investors assist with risk reduction by pooling and diversifying assets, and lowering the transaction costs of contracting and information processing.[12] Institutional investors are not a homogenous group, and there exist an array of investment entities, including public and private pension funds, mutual funds, life insurance companies, university foundations and funds managed by banks. Although they invest for different purposes and with different obligations, most institutional investors can be characterised as managers of assets on behalf of someone else, to whom they owe a duty as fiduciaries.[13]

In making investment decisions to maximise beneficiaries wealth, investment fund managers are primarily interested in information regarding corporate assets, earnings and overall profitability. Investors may revise their expectations about a business when they receive new information concerning projected increased production costs or reduced revenues arising from environmental regulation changes. Poor environmental performance that threatens firm profitability is a basis for intervention in corporate management or "taking the exit" option to switch investments. Empirical evidence suggests a correlation between corporate environmental performance and share price movements.[14] Environmental issues can alter the economic assumptions that underlie an investor s decision to commit capital to an enterprise. Excessive materials and energy consumption usually adds to a firm s production costs, whilst waste emissions that incur government charges obviously can diminish profitability. More seriously, environmental liabilities may result in substantial financial penalties being imposed on culprit businesses. These are costs that may affect the investment choices of financial organisations.

A shift in market values may create strong incentives for companies to investment in environmental care since losses of market value (the "reputational penalty") may be larger than concomitant regulatory sanctions.[15] Evidence of good environmental performance may indicate to capital markets a superior ability to generate costs savings and improve revenues, whilst evidence of pollution violations and prosecution may result in markets down-grading a profits forecast. But existing research suggests that environmental liabilities, such as corporate spending on contaminated land cleanups, are regarded as more salient to market valuations than "beyond compliance" efforts, such as voluntary investments in energy efficiency.[16] Company environmental policies and procedures also tend to be less useful to financial analysts than environmental information translated in terms of its impact on business earnings and profitability.[17]

Environmentally responsible investment portfolios have blossomed lately across various countries, and ethical investing is maturing from niche to mainstream in some markets.[18] Apart from the plethora of specialist ethical investment funds being created, mainstream general investors, such as occupational pension funds and life insurance companies with long-term financial liabilities, are recognising that they have a structural incentive to favour long-term sustainable investment.[19] The emergence of several indices to track ethical investments epitomises the growing legitimacy of this sector. Leading ethical investment indices include the Dow Jones Sustainability Group Index (DJSGI)[20] and the United Kingdom s (UK) Financial Times Stock Exchange (FTSE) Ethical Index.[21] Responsible investment is commonly articulated through "ethical screening", entailing the inclusion or exclusion of stocks in investment portfolios on environmental grounds.[22] An effective screening approach entails follow-up monitoring to ensure that preferred enterprises are meeting environmental performance expectations. A second method of responsible investment is shareholder activism, by which investor shareholders seek to improve a company's environmental behaviour by means of dialogue, pressure or support for responsible management.[23] Shareholder resolutions concerning social policy, governance and board composition, and voting at annual general meetings, are methods by which investors may seek to direct a company towards more ethically laudable goals.[24]

Although investors are becoming more attuned to the environmental dimensions of companies, there is a paucity of government laws and policies to encourage them to do so explicitly, and hence this potential for market change is not being fully realised. Almost every institutional investor is governed by a regulatory envelope. Public intervention into capital markets has typically been a response to market failures regarding information asymmetry, externalities and monopolistic practices.[25] Among the extensive menu of regulations are requirements for disclosure of reliable information to investors, fair valuation of investor purchasers, controls on management fees and specification of investor objectives and policies.[26] Traditionally, regulatory supervision of institutional investment concentrated on solvency issues and prudential controls to ensure that institutions would be able to fulfill their respective obligations to policyholders, plan participants and other beneficiaries.[27] Fund managers also have fiduciary responsibilities in trust law and statute to take an active interest in corporate governance to ensure portfolio investments are not eviscerated by poor management decisions.[28] But in most jurisdictions, the environmental dimensions of investment have hardly been a feature of financial services regulation so far.

### *Australian Financial Sector Reforms*

Evaluations of the environmental policies and practices of Australia s financial services sector suggest that it trails international trends, such as those in the European Community or the United States. A recent PriceWaterhouseCoopers study commissioned by Environment Australia highlighted scant commitment and awareness among Australian financial organisations, with less demand for and supply of ethical investment products.[29] The *Socially Responsible Investment in Australia - 2001 Benchmarking Survey*, also sponsored by Environment Australia, identified some $10.5 billion of social and environmental investments in Australia, including $1.3 billion managed in dedicated ethical investment funds, and the largest component being $6.3 billion of investments held by religious organisations.[30] Yet, these figures are dwarfed by the total of $500 billion of funds held by Australian superannuation schemes. By comparison, current ethical investments in the United States worth US$16.3 trillion amount to some 13 per cent of that country s investor sector.[31]

Nevertheless, there are positive indications that the Australian ethical investment market is gathering momentum. Assets of ethical investment funds in Australia are reported to have surged 500 per cent between 1996 and 2001, many fold higher than assets of managed funds as a whole.[32] In addition to niche investors such as Australian Ethical Investments, mainstream institutions such as Westpac are launching specialist ethical investment products.[33] VicSuper, one of the largest superannuation funds in Australia, in November 2001 began investing ten per cent of its equity portfolio in domestic and international firms reputed for environmental best practice in their industry sector.[34] In December 2001, VicSuper also opened for members a sustainability investment option, called Equity Growth Sustainability, which allows members to invest up to 100 per cent for their account balance in environmentally sound companies. VicSuper assesses companies  environmental performance by using the methodologies of the Swiss-based Sustainable Asset Management.[35] It is unclear, however, to what extent environmental factors will be considered within VicSuper s mainstream investment portfolio, although VicSuper has stated "all investment decisions made by VicSuper are based on the objective of generating better returns for members. Sustainability is an investment approach that VicSuper believes will add value to members  retirement savings over the long-term".[36]

Efforts to enhance awareness of ethical investment issues are also being articulated through government projects and industry coalition initiatives. These include the work of the Australasian UNEP Finance Initiatives, and the exchange of information through events such as the Australian Ethical Investment Conference of 2001. An Ethical Investment Association, based in Sydney, has recently been established; it is a professional association of interested fund managers, financial advisors and researchers interested in "promot[ing] the concept and practice of ethical investment to the public".[37] Within government, reflecting the emerging salience of the financial services sector to environmental policy-makers, Environment Australia has established within its Sustainable Industries Branch a subsection on

"Sustainable Development and the Financial Services Sector".[38] Its aim is stated to be to "work cooperatively with Australia's financial services sector on the development of government and business policies that facilitate the integration of sustainability issues into the services, products and operations of the financial services sector".[39]

Yet there are barriers in Australia to more widespread institutional investment in environmental-minded businesses and sectors. Because environmental disclosure and reporting obligations on companies are limited, there may be insufficient information available to investors to assess corporate environmental performance and commitment. Investment institutions have also traditionally not been obliged to directly consider environmental factors in making financial decisions, and individual contributors to superannuation schemes have limited say in the way their contributions are invested. The regulatory mandates of government financial regulators also omit reference to environmental policy considerations. The Australian Conservation Foundation (ACF) has argued for mandatory corporate environmental reporting, and establishment of a corporate environmental commission within the Australian Securities and Investment Commission to monitor compliance with such reporting obligations.[40] The ACF has also advocated introduction of an Australian sustainability index by the Australian Stock Exchange.

In very recent years federal legislators have begun to consider incorporating limited environmental measures in financial services law. The Commonwealth Government tabled in 1998 a superannuation legislation amendment, entitled Choice of Superannuation Funds (Consumer Protection) Bill, which aimed to require employers to offer employees receiving superannuation contributions a choice of the fund to which they may contribute. The Bill has not yet passed, having been stalled in the Senate by ALP and Australian Democrat politicians in dispute with the assumption that such fund members could make an informed choice in the proposed circumstances. In a separate initiative, in 2001 an amendment to the Corporations Act (Cth) was passed to improve corporate environmental disclosure. Section 299 of the Act, concerning the content of directors annual financial reports, requires that each report disclose details of an entity s performance in relation to any "particular and significant" environmental regulation it is subject to under Commonwealth, State or Territory law.

Potentially the most momentous development is the Financial Services Reform Act 2001 (FSRA), which introduced new environmental disclosure requirements for financial organisations in Australia, which should engender improved consideration of the environmental dimensions of investment and other financial decisions in this sector of the economy.[41] The FSRA, which makes substantial changes to the Commonwealth s Corporations Law, came into effect on 11 March 2002, although there is a two-year transitional period for industry participants to fully comply with the statutory changes. During preparation of the legislation, parliamentarians acknowledged that the new environmental provisions were inspired by the 1999 amendments to the UK Pensions Act 1995 regarding disclosure of ethical investment policy and practice.[42] The environmental provisions to the FSRA were included during the Bill s consideration by the Senate.

The FSRA provides that financial product issuers must include in their Product Disclosure Statements (PDS) information about the extent to which labour standards and environmental, social or ethical considerations are taken into account in the selection, retention or realisation of the investment.[43] The investment products covered by this provision are defined to include superannuation products, managed investment products and investment life insurance products. Credit facilities are not defined as a "financial product" for the purposes of the legislation. Section 1013DA provides that the Australian Securities and Investments Commission (ASIC) may issue guidelines that must be complied with where a PDS asserts that environmental, social or ethical considerations are considered in the selection, retention or realisation of the investment. During the parliamentary debates, Senator Murray commented on the latter provision: "if a promoter claims that the company s investment choices are made, taking into account environmental, ethical and other non-financial considerations, where is the investor to go to confirm that claim? It will be up to ASIC to have a look at the ethical investments that are presently on offer and to evaluate the sorts of criteria for disclosure that their prospectuses

make - in other words, to provide a guidance note or guidelines".[44] Although there is a two-year transitional period for implementation of the new product disclosure regime, it will apply immediately to any new class of product offered.

The Corporations Regulations 2001, promulgated under the FSRA, detail the financial product disclosure requirements. Clause 7.9.14C of the Regulation states, in part:

> For paragraph 1013D (4) (c) of the Act, the more detailed information to be included in a Product Disclosure Statement about the extent to which labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of an investment is:
>
> (a) [a]
>
> (b) a statement that the product issuer does, or does not, take into account environmental, social or ethical considerations for the purpose of selecting, retaining or realising the investment; and
>
> (c) . . .
>
> (d) if the Product Disclosure Statement includes a statement that the product issuer does take into account environmental, social or ethical considerations for the purpose of selecting, retaining or realising the investment - a statement outlining:
>
> (i) the considerations that the product issuer regards as environmental, social or ethical considerations for that purpose; and
>
> (ii) the extent to which the product issuer takes those considerations into account in the selection, retention or realisation of the investment.

Regulation 7.9.14C thus clarifies the obligation to disclose "the extent to which" social and environmental considerations are taken into account, includes an obligation to disclose if these matters are not taken into account at all. Financial product issuers that take these matters into account "to no extent" consequently will need to disclose this in their PDSs. No further disclosure obligations will apply to them under the Regulation in its current form. Where a financial product issuer does claim to incorporate social and environmental considerations into their investment decisions, two additional disclosure obligations apply. First, a product issuer must outline in their PDS those matters that they will be considering as labour standards or environmental, social or ethical considerations when it comes to making decisions about the investment. Second, the product issuer must give an explanation of the extent to which those matters are taken into account in the selection, retention or realisation of an investment.

Besides the regulation-making powers, the ASIC may issue compulsory guidelines where a PDS claims that labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of the investment.[45] A Treasury commentary on the new regulations has queried whether the regulations should be amended to also require product issuers to include a statement in their PDSs that ASIC has developed guidelines in this area, if any guidelines are developed.[46] The aim of such an additional disclosure would be to draw the existence of the guidelines to the attention of retail clients. Furthermore, the Treasury commentary asks whether the regulations should then require product issuers to include a positive statement that the information disclosed in their PDS regarding ethical investment considerations has been disclosed in compliance with ASIC s guidelines. Depending on whether the ASIC guidance was in a voluntary or mandatory form, product issuers, who did not comply with ASIC s guidelines, could be liable under the Corporations Act 2001 (Cth) for including a misleading or deceptive statement in a PDS. Already ASIC has issued a general policy statement on disclosure in PDSs, but the statement does not discuss ethical investment disclosure requirements, other than noting that: "in the future, depending on the content of any relevant regulations on this topic, ASIC may issue guidelines about this kind of disclosure".[47]

## *Additional Legal and Policy Measures for Promoting Ethical Investment*

The current menu of reforms to Australian financial institutions law and policy are unlikely alone to be sufficient to lead to any revolutionary reorientation of investment patterns towards sustainable development. Encouraging institutional investors to take better consideration of the environmental performance of their portfolio companies will require considerably more than legislating attention to and public disclosure of ethical investment options. The challenge is to change the underlying structure of incentives and information that influence investors interest in environmental issues. It is inconceivable of course that regulation could actually instruct institutional investors when to make ethical investments, as this is essentially a ommercial judgment to be made on a case-by-case basis.

The new Commonwealth measures will at least cement the legitimacy of incorporating social and environmental considerations in investment decision-making. For some years, commentators and fund managers have been uneasy about screening investment choices on ethical grounds for fear of compromising investment institutions fiduciary duties to maximise members financial returns.[48] This is despite growing evidence that ethical investment portfolios can produce financial returns matching or exceeding conventional investment policies.[49] In the UK, to illustrate, notions of fiduciary responsibility in equity were interpreted in the seminal cases of *Cowan v. Scargill* (1984),[50] *Martin v. City of Edinburgh District Council* (1988)[51] and *Bishop of Oxford v. Church Commissioners* (1992)[52] as constraining pension fund trustees from considering ethical factors in investment policy. However, where an investment fund is established explicitly as an ethical investment vehicle, then the trust law constraints against green investment are largely removed.[53]

Beyond legitimating use of ethical investment screens by superannuation funds and other general institutional investors, several other reforms are necessary to promote green investment. These are considered as follows.

### ***Economic instruments***

Introducing economic instruments such as pollution taxes and tradeable emission permits is crucially important to ensure that investors and other financial entities are able to factor the costs and benefits of corporate environmental performance into their financial decision-making. If governments are unwilling to legislate against the environmental externalities of industry, then institutional investors can hardly be expected to respond in kind. By financially penalising or rewarding companies for their environmental behaviour, pollution charges and other economic instruments can help convey appropriate signals to financial markets engaged in valuing, insuring and investing in enterprises. Economic instruments magnify the costs of environmental policy whereas costs under command regulation are less transparent. Since the early 1970s, the Organisation for Economic Cooperation and Development (OECD) has been an active proponent of economic instruments.[54] Until quite recently, however, the extensive public discussion concerning economic instruments had not been fully matched by actual policy reforms. Even today, no jurisdiction yet provides a legislative framework for systematic use of economic instruments in environmental management.[55] But economic instruments are increasingly featuring in Australian pollution and resource management law, and numerous pilot projects and government studies point to more extensive implementation of such instruments in the future.[56]

In evaluating the contribution of economic instruments, it is essential to appreciate their possible down-stream effects in stimulating interest in environmental issues among financial service organisations.[57] Taxes directly affect company balance sheets and thus influence financial markets analysis of companies. Financial institutions would be expected to support environmental taxes because as low-energy users they would not be heavily affected by new charges. Where environmental taxes are based on the polluter-pays principle, a reduction of taxes on environmental-friendly financial products such as eco-investments should also benefit. In relation to tradeable permits, companies that are able to generate cost savings through trade in pollution permits could become more attractive investment opportunities for financial organisations.

Economic instruments could also be introduced to directly reward ethical investment practices. The broad approach should be to reward capital gains and discourage dividends that divert funds away from investment to spending. Government can give the private sector an incentive to invest in longer-term projects by lowering taxes for enduring investments, while raising taxes on short-term trading profits.[58] The Netherlands has gone the furthest in taxation reform to stimulate ethical investment. In January 1995 the Dutch government introduced a green investment scheme that allows banks to offer depositors funds whose interest or dividends are exempt from personal taxation.[59] To qualify, the fund must invest at least 70 per cent of its assets in environmentally friendly projects. Projects currently certified by the government regulators include renewable energy, organic agriculture and environmental technology.[60] Because of this initiative, several Dutch banks moved to set up their own green investment funds. The funds have been heavily subscribed to, and because of the large volume of funds consequently generated, finance has been available to project proponents on very ompetitive terms.[61] The Dutch innovation, in which the government environmental agency is the lending certification body, also points to possible solutions to the broader problems of determining ethical investment criteria.

***Corporate environmental management systems***

In addition to economic instruments, environmental management systems (EMSs) developed by third parties can help generate improved environmental commitments by companies.[62] EMSs are formal structures of processes and standards that corporations adopt in order to improve in-house treatment of flows of materials and energy, and to provide a framework for companies to identify, evaluate and regulate their environmental risks. There are a burgeoning number of ready-made EMSs,[63] and globally the leading examples are those of the International Organisation for Standardisation (ISO). In 1993 the ISO moved to create an explicit EMS standard in the form of the ISO 14000 series, which provides the primary framework for addressing, inter alia, management system principles and techniques, environmental auditing and life cycle assessment.[64] In the European Union, an important regulation aimed at stimulating companies to voluntarily improve their environmental performance is the Eco-Management and Audit Scheme (EMAS) of 1993.[65] The scheme differs from the ISO 14000 series in that it aims to promote *continuous* environmental performance improvements of industrial activities and it requires public disclosure of auditing results.[66]

There is already evidence that financial markets are acknowledging firms accreditation to EMSs when assessing financial risks. For instance, in the insurance sector, discounts on environmental liability insurance premiums have been offered to chemical manufacturers that subscribe to the renowned Responsible Care programme.[67] Stenzel reports that banks may offer finance on preferential terms for corporate clients with a certified EMS.[68] Davies notes, that "by looking for ISO 14001 registration in loan applications, banks can determine several facts relevant to the health of their loan portfolios".[69] But because ISO and other EMSs tend to judge existing rather than future environmental performance, they would need to be supplemented with regular verification by certifiers if they are to be of maximum value to investors and other financial organisations concerned about the costs of environmental risks.

The participation of financial organisations in relevant EMSs is also necessary. Extending EMSs to encompass financial services and products could facilitate the development of environmental competencies in financial organisations. Already several international banks are acquiring ISO 14001 certification, with Swiss Bank UBS becoming the first bank to have its banking business certified on a global basis.[70] By virtue of Annex VI of the recently revised EMAS Regulation of 2001, participating organisations must consider all environmental aspects of their activities, including "indirect environmental aspects" arising from "capital investments, granting loans and insurance services".[71] The new EMAS Regulation provides that it can be applied to an entire organisation s operations, thus overcoming the site-based focus of the original 1993 Regulation.[72] This is significant, as analysing a financial organisation s direct impact on the environment (e.g., energy consumption and waste emission) is usually much narrower than considering the impact of those businesses it sponsors.

### *Environmental reporting*

Financial markets need reliable information to accurately price securities and allocate capital efficiently.[73] The investment literature emphasises the importance of investors, banks and other financial service providers having timely, meaningful and relevant information to support investment decisions.[74] Effective investor involvement in corporate governance is also linked to better access to corporate information.[75] Disclosure of environmental information can help inform investors about a firm s environmental activities and impacts, which is especially important where such factors may affect enterprise earnings and profitability.[76] Requiring disclosure of environmental costs under securities laws and other company-directed legislation can facilitate investors and other stakeholders scrutiny of the environmental behaviour of firms. In theory, if accurate information is made public, market forces can respond by factoring environmental costs and performance into company valuations. In addition, reporting by financial institutions on their own environmental impacts is crucial to enhance their sensitivity to ethical investment. But according to a 1997 report to the European Commission, so far "there is little practical interaction between environmental reporting systems and the financial services sector".[77]

Corporate communication of environmental behaviour may occur in a variety of formats, including disclosure through financial reporting systems mandated by statute and stock exchange listings, and disclosure requirements to environmental regulators. Traditional corporate reporting statements have not adequately captured the financial consequences of companies environmental behaviour. Corporate accounting has been associated with myopic, profit-centered performance measurement, and encouragement of a stock-market focus on bottom-line profit and standards such as earnings- per-share.[78] Reliable measures of an enterprise s overall environmental performance have yet to be formulated or standardised, although the accounting profession increasingly acknowledges the need to reform its appraisal methodologies in this regard.[79] Corporate environmental reporting so far has occurred mostly on a voluntary basis. Consequently, the scope and quality of corporate disclosure is uneven. Reported information is largely useless to investors unless it is concrete data that can be readily translated into financial nomenclature. Financial institutions are more concerned with attempting to forecast the financial effects of companies future environmental-related performance than in reviewing their current or past performance.[80] Information regarding asset impairment, liabilities and prospective environment expenditure are likely to be of much greater interest to financial institutions than mere corporate policy statements.

In recent years, environmental authorities in Australia, Japan and Finland for instance have issued environmental disclosure and reporting guidelines for business.[81] Mandatory environmental reporting has been instituted in various forms in the Netherlands, Sweden and Denmark.[82] Probably the leading example of an environmental disclosure regime contained within mainstream financial services regulation is the US s Securities and Exchange Commission reporting requirements.[83] The limited mandatory environmental reporting provision in s. 299(1)(f) of the Commonwealth s Corporations Law falls well short of these examples. It is reported that the provision was opposed by the peak accounting associations, the Australian Society of Certified Public Accountants and the Institute of Charted Accountants; they argued that such measures should be narrowly confined to requirements within environmental legislation.[84] In considering the proposed amendment to Australia s corporations legislation, the Parliamentary Joint Statutory Committee for Corporations and Securities (PJSC) concluded:

> it was inappropriate for the Corporation(s) Law to require inclusion in the annual director s report of details of performance in relation to environmental regulation. The PJSC noted and accepted the almost total unanimity of view on this point of submissions from the Australian financial and legal communities, Environmental reporting is not a matter which relates to the Corporations Law [a] the proper place for such reporting is in the environmental law itself.[85]

The imperatives of diffusing environmental policy through financial institutions arguably require that environmental reporting mechanisms be properly embedded in mainstream corporate financial reporting systems so that the links between environmental and market performance can be readily analysed by stakeholders. Nevertheless, mandating environmental performance disclosure must be complemented by policy guidance on the content of reports, given the potential uncertainty regarding environmental reporting methodologies. Problems include uncertainty concerning the environmental integrity of a product or company performance, and the difficulties of comparing corporate environmental performance.[86] Difficulties may also occur in defining the appropriate boundaries of corporate performance ˘ some firms may appear to achieve superior environmental performance by sub-contracting or out-sourcing their dirtier operations, thus raising the question of whether and how, the environmental impact of a company s subsidiaries and suppliers can be included in analyses.[87]

***Corporate governance***

Effective ethical investment law requires more than merely passively conveying information and incentives to fund managers to favour socially and environmentally laudable businesses. Achieving ethical investment may also necessitate means to allow more active participation by shareholders in corporate governance so as to influence management policies and decisions that affect environmental performance. Certainly, ballooning investment funds have given investors potentially greater leverage over corporate management.[88] Through their institutional dominance of the equity market, powerful investors may be able to act as corporate watchdogs, facilitating improvements in corporate governance.[89] According to Monks and Minow, institutional investors "have two indispensable motives for paying close attention to [corporate] ownership; avoiding liability for breach of fiduciary duty and enhancing portfolio values by promoting management accountability".[90] Shareholder proposals sponsored by institutional investors are a key means by which institutions seek to achieve their goals in disciplining corporate management or influencing aspects of company policy.[91] Perhaps reflecting a new trend, in February 2002 plans were announced to establish Australia s first "shareholder activist-style investment fund", to be known as the Focus Fund, with a focus on investing in under-performing companies with the intention of engaging with corporate directors and other shareholders to promote improved enterprise management.[92] The underlying assumption is that improvements to corporate governance correlate to improved company financial performance.

The expanding influence of institutional investors in corporate governance has been noted in various jurisdictions, although shareholder activism has mostly been in the context of takeover struggles or to correct gross managerial failure, rather than to influence more amorphous environmental or other ethical concerns.[93] But in the UK, the recent Myners report revealed "evidence of general reluctance to tackle corporate underperformance in investee companies", attributable to such factors as a culture among investor institutions that "seeks to avoid conflict", and a potential conflict of interest where fund managers hold a financial interest in investee companies.[94] Further, because of legal constraints on concentrated ownership, fiduciary obligations that require extensive diversification to minimise risk and a strong preference for liquidity, institutional investment agents have tended to seek portfolios comprising fragmented holdings across a plethora of companies.[95] This can reduce the influence of an investor or discourage activism because the stakes may be considered too small given the size of the institution s equity holdings.

In Anglo-American company law systems, Parkinson identifies two means by which institutional investors have cooperated to intervene in corporate affairs.[96] First, there has been collective action through peak associations to influence the behaviour of companies. Second, there may be informal collaboration among institutions to apply pressure on individual company boards to induce them to introduce policy reforms or replace senior management. But in the absence of appropriate specialist expertise, institutional activism may be useful only in advancing broad-based policy reforms regarding environmental management rather than solving firm-specific operational issues. Fund managers are recruited for their expertise in portfolio management and not their ability to run companies let alone advise on environmental practices.

An important aspect of law reform to promote ethical investment must therefore be an examination of the structure of corporate governance that may impede legitimate shareholder activism. The regulatory trend in industrial nations has been for securities watchdogs to progressively liberalise rules restricting shareholder proposals from management s proxy statement.[97] In Australia, a modest reform was the Company Law Review Act 1998 (Cth); s 249D was amended to allow at least 100 registered shareholders to request a general meeting of a company, thus in theory enabling institutional and other shareholders to challenge more effectively directors on the environmental performance of a company. Financial regulators could also review share ownership restrictions so as to ease limitations on significant holdings and relax the portfolio diversification rules that can hamper investor activism. Further, investment institutions could be required to register their share votes, so as to encourage institutions to formulate and express a view on all issues put to a vote at shareholder meetings.[98] However, because institutions may simply delegate voting decisions to fund managers in the matters under consideration, additional measures would be needed. One possibility suggested by Gilson and Kraakman is the appointment of minority independent directors to corporate boards, nominated by institutional investor groups rather than enterprise management.[99] The expert independent directors would function as well-informed monitors of portfolio companies, providing a meaningful check upon management and affording a valuable source of external expertise. This may be a more practical alternative to existing proposals to extend the accountability of corporate management to other stakeholders beyond the equity holders (e.g., labour and local communities).[100] Commentators predict that introducing a stakeholder approach to corporate governance actually risks shifting power to management because of the difficulty of providing a means of balancing and reconciling the array of additional stakeholder voices to be considered.[101]

Beyond measures to stimulate accountability and shareholder involvement, there is also the question of whether corporate liability should be broadened to discourage environmentally risky activities. The corporate law doctrine of limited liability is now legislated for in nearly all jurisdictions including Australia,[102] and it means that, absent exceptional circumstances, investors (i.e., shareholders) in the company are not liable beyond the amount they invest.[103] Corporate limited liability has the potential adverse effect of transferring uncompensated business risks to third parties, and can undermine the polluter pays principle to the extent that insolvent firms are able to abandon environmental debts. Thus, in principle, imposing liability on institutional shareholding investors for the environmental impacts of their portfolio companies could promote more environmentally responsible investment. But extending shareholder liability would be politically contentious and could create major economic disincentives to new investment.[104] A variety of mechanisms have been devised to neutralise the adverse effects of limited liability. These include equitable corporate-veil piercing rules and statutory exceptions purporting to override limited liability rules where actions inconsistent with the separate personality of entity and owners have been taken.[105] In general, however, courts rarely pierce the veil, usually requiring the presence of a highly dominating shareholder that has manipulated the corporate structure to defeat some public convenience or perpetrate a fraud or other crime.[106] Another option, involving the financial services sector, would be to mandate insurance for businesses engaged in environmentally hazardous or other risky ventures.[107]

## *Conclusion*

This brief article has canvassed some measures to stimulate ethical investment, suggesting that more systematic reforms are needed beyond the changes introduced by the Financial Services Reform Act 2001 (Cth). Harnessing institutional investors as a means of diffusing environmental policy in effect contributes to the creation of an environmental law *diaspora*, in which environmental regulatory norms are dispersed and embedded in those market processes that shape underlying patterns of development and thus environmental pressures. In seeking to integrate environmental controls and standards into the financial services sector, it is nonetheless important to appreciate that this sector has certain structural limitations, which suggests its potential exists in complementing rather than substituting for existing environmental

policy processes. Financial organisations obviously cannot manage national parks, engage in urban planning and other traditional environmental management functions. But they could help reduce the regulatory load further down the environmental decision-making pipe, because environmentally sound companies and industries seeking development consents could achieve faster processing where they have already passed the environmental appraisal systems of financial institutions. In contrast, firms associated with environmental damage could find their proposals grounded without the support of financial institutions, and government agencies would not be burdened with assessing such problematic cases.

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5. See, e.g., G Heal, *Valuing the Future: Economic Theory and Sustainability (1998); M Common, Environmental and Resource Economics: An Introduction* (1996); R Costanza, et al, *An Introduction to Ecological Economics* (1997).

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8. See, e.g., European Commission, *Workshop on Sustainable Development ˇ Challenge for the Financial Sector* (1998) 14.

9. See S F Frowen, "The Functions of Money and Financial Credit: Their Objectives, Structure and Inbuilt Deficiencies" in S Frowen and F P McHugh (eds), *Financial Decision-Making and Moral Responsibility* (1995) 31.

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13. See Tasch and Viederman, above n 7.

14. See P Lanoie, B Laplante and M Roy, "Can Capital Markets Create Incentives for Pollution Control?" (1998) 26 *Ecological Economics* 31.

15. Ibid 35.

16. L Descano and B S Gentry, "Communicating Environmental Performance to the Capital Markets" (1998) 5(3) *Corporate Environmental Strategy* 14, 16.

17. See Business in the Environment and Extel Financial Ltd, City *Analysts and the Environment: A Survey of Environmental Attitudes in the City of London* (1994).

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19. P L Davies, "Institutional Investors in the United Kingdom" in D D Prentice and P R J Holland (eds), Contemporary Issues in Corporate Governance (1993) 69, 79.

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33. PriceWaterhouseCoopers, above n 29, 4.

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36. See VicSuper: <www.vicsuper.com.au/sustainability.asp#top >.

37. Ethical Investment Association: <www.eia.org.au/frame_files/about_frame.html>.

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# Infocus

## *A Sustainable Bush Capital*

This edition we interviewed Mr Bill Wood MLA, ACT Minister for Urban Services and Environment. Appropriately, with the World Summit on Sustainable Development to be held in a few months, the focus of the ACT environmental policy is on sustainability.

The focus of the ACT s environmental program is on sustainable development. In February 2002, Minister Wood delivered a speech to the ACT Division of the Environment Institute of Australia entitled *Towards an Environmentally Sustainable ACT* . The Minister views sustainability as the key challenge facing the ACT community. In particular, the maintenance of water quality, promotion of energy efficiency, waste reduction and the preservation of biodiversity are the major issues requiring attention.

An Office of Sustainability has since been established and is responsible to the Chief Minister. The reason for this is that the ACT Government is taking a whole of government approach to environmental, economic and social decision-making. Initiatives to involve the whole community will also be encouraged. The operating principles for the Office of Sustainability are still being finalised.

In February 2002 the Minister launched the Ecobusiness Program, an extension into the commercial sector of the Act Government s existing Greenhouse and No Waste by 2010 strategies. Developed in collaboration by the Government and the ACT and Region Chamber of Commerce, the program is designed to educate small and medium sized businesses about improving environmental performance. A series of workshops and supporting materials will assist in educating businesses about waste reduction and improving energy and water efficiency.

## *Sustainable Capital*

On World Environment Day, 5 June 2002, the Minister launched a major program aimed at conserving the natural heritage within the ACT. With 53% of the Territory reserved for environmental conservation, it is appropriate that such a plan be launched. A $1.5 million package will funds four key areas: improving staffing in parks and reserves; improving data management; developing smarter ways of using resources and supporting community partners in maintaining natural heritage.

The aim of the plan A Sustainable Bush Capital in the new Millennium- A New Focus for Nature Conservation is to preserve the bush capital image of Canberra and to work to develop more efficient and effective nature conservation practices.

## *Sustainable Water Use*

As an inland capital, Canberra must source water resources from local river systems. All of the ACT s water for urban development is sourced from the Murray Darling System, in particular the Cotter and Queanbeyan Rivers. At the other end of the water use cycle, all stormwater run off and discharges from tertiary treated effluent enter the Murray Darling System.

The potential for impact on the River System is thus considerable. The Murray Darling System is a fragile ecosystem which has withstood much environmental damage and degradation over the past century. The ACT has a part to play as a significant user and custodian of the system s health. The Government has adopted a comprehensive system of environmental flow requirements and feels there is now community acceptance of the value of water as a resource and the importance of sustainable management.

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