the official Journal of the **National Environmental Law Association**

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formerly the ***Australian Environmental Law News***

NATIONAL ENVIRONMENTAL LAW ASSOCIATION

who we are and what we do

NELA was established in 1982, following the success of the first Environmental Law Conference in Sydney in 1981. NELA was incorporated in 1989.

Since the settling of our constitution in 1987, NELA's primary objective has been to promote the understanding of the role of environmental law in regulating and managing the conservation and usage of the environment.

NELA NATIONAL EXECUTIVE

The NELA National Executive is made up of elected representatives from every state and territory including office bearers, Committee members and some ex officio members. The elected members are the President, two Vice-Presidents and a Treasurer. The immediate Past-President and Editor of National Environmental Law Review (NELR) are automatically members by reason of their position.

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NATIONAL ENVIRONMENTAL LAW REVIEW (NELR)

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contents

NUMBER 1 • JUNE 2003

NELA 2003: Call to Arms-Support your Association!

Dear Readers,

This is the last edition of the National Environmental Law Review that I will be involved in. Wayne Gumley (also from the Victorian Division and the past Treasurer for Victoria) is taking over from the September edition. I am having a 'rest' with my third child due any day and my PhD due date also looming near.

Whilst I have been the editor it has always been a struggle to get articles, case notes etc for the journal. Whilst we have an enthusiastic National Executive and State editors, the journal also relies upon contributions from its members and readers of the Journal. If I could have any wish for this Journal it would be that it would grow and continue to contribute to discussion and the understanding of both international and domestic environmental law. This can only be achieved with the publication of a wide range of articles.

The National Executive have raised the possibility of have a semi- referred journal for the benefit of those who wish to submit papers on a refereed basis. We envisage establishing a review board for those papers submitted for refereeing with the aim of then publishing papers with a clear indication that they have been refereed. We intend to continue to publish student papers and case notes on a regular basis as well as the regular updates to maintain the currency of the topics covered within the Journal.

To the future of the Journal….

Rachel Baird
National Editor

NELR Editors

NATIONAL EDITOR: Rachel Baird

Lecturer and PhD candidate, The University of Melbourne

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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 at the University of Melbourne and conducting research on the management of Australia's remote fisheries.

NEW SOUTH WALES EDITOR: Dr Nicholas Brunton

Partner, Henry Davis York

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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

Head of the Environmental Law Practice, Minter Ellison

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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

Environmental Protection Officer, EPA Victoria

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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

Senior Policy Officer,
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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

PhD Candidate, The University of Tasmania
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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 EDITORS: Sally Marsh and Lewis McDonald

Sally Marsh
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Sally is the joint Vice President of the WA Division of NELR. She holds degrees in Law and Chemistry, graduating from the University of Western Australia. Sally now works with Blake Dawson Waldron within the Corporate Advisory Group. She currently practices in resources, projects and environmental law. Sally has also used her chemistry background to advise the mining and manufacturing sector on plant emissions.

Lewis McDonald
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Lewis is the joint Vice President of the WA Division of NELR. He graduated from the University of Western Australia with degrees in Law and Environmental Science. Lewis currently works with Mallesons Stephen Jaques within the Corporate Resources section. He practices in resources and projects.

NATIONAL, COMMONWEALTH EDITOR: John Ashe

Environmental Consultant john.ashe@bigpond.com

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.

INTERNATIONAL, ACT EDITOR: David Jones

Solicitor, Baker McKenzie david.jones@bakernet.com

David Jones is currently working with Baker McKenzie in environmental and planning law as well as working towards the completion of PhD on the design of a legal system for the regulation of carbon trading and other climate change management mechanisms in Australia.

David is also a sessional lecturer at Wollongong university, running the environmental and planning law, and government tendering electives in our College of Law equivalent program.

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

Editor: David Jones

Climate Change and Greenhouse – Around the Traps

The changes in what is fast becoming the largest area of international environmental law and policy development, continue almost daily. For the last few months, this has been the main driver behind major negotiations and developments on the international scene. Below is a summary of some of the main highlights:

- The UK government has reported that its voluntary emissions trading scheme saw over 7 million tonnes of carbon dioxide traded during its first year of operation, by 900 companies. The scheme started in April 2002 with the government providing incentives to 32 large companies to assist them in meeting greenhouse gas emission reduction targets. 31 of these companies achieved the targets, and about 5,000 other organisations participated in the scheme, with penalties for missing their targets centred around the potential loss of energy use tax rebates that they would otherwise be entitled to. A total of 31.5 million emissions allowances (1 per tonne of carbon dioxide) were issued by the government during the year.

- The World Bank has established a Community Development Carbon Fund, which aims to carry out small projects in developing countries for the improvement of living conditions, that also have the effect of reducing greenhouse gas emissions. Italy contributed just over A$12 million to the fund earlier this month, and it will receive any certified greenhouse emission reductions that are generated by projects that utilise these funds, in return. These reductions can then be counted towards Italy's target under the Kyoto Protocol. Developing countries currently do not have binding targets under the Protocol.

- The Dutch government, continuing their leading role amongst not only European nations but the world in taking early action to comply with the Kyoto Protocol, have released details of their planned purchase of 16 megatonnes of carbon dioxide reductions. These will be generated from a variety of emissions reduction projects in about 18 different countries.

- Back at home, the Shadow Minister for the Environment, Kelvin Thomson, introduced a private member's bill for the ratification of the Kyoto Protocol on 26 May 2003. As well as calling for the ratification of the Protocol, the Bill sets out requirements for the Commonwealth Environment Minister to prepare systems for involvement in international emissions trading schemes, a National Climate Change Action Plan, and imposes an obligation on the Government to ensure that Australia's target of 108% of its 1990 emissions is not exceeded during the period 2008 to 2012.

- Despite many practical problems in terms of proof and compensation, there are an increasing number of international lawyers raising the possibility of "climate change law suits" in the coming decades. The theory is that people, communities or even countries who suffer from the effects of climate change, may be able to consider legal action at an international level, following the Intergovernmental Panel on Climate Change's scientific determination that it is "likely" climate change is the result of human activity.

- The science of climate change, while it is becoming more generally accepted that global warming as a result of human activity is a certainty, is still under periodical challenge. A recent Harvard scientists' report suggests that similar warming occurred between the 9th and 14th centuries as a natural phenomenon. Scientists meet in Russia in September this year as part of the ongoing international climate change negotiations, to review the latest scientific developments.

Natural Resource Management Ministerial Council Endorses Natural Resource Management Initiatives

The Natural Resource Management Ministerial Council held its fourth meeting, in Brisbane, on 11 April 2003. The Council comprises Federal, State and Territory Ministers with responsibility for the environment, natural resources and primary industries.

The Ministers:

- reviewed progress in implementing the National Action Plan for Water Quality and Salinity (NAP) and the Natural Heritage Trust Extension (the Trust)
- endorsed proposed work to identify the most effective public policy approaches to valuing environmental services in the market place as a means of addressing one of the root causes of natural resource degradation
- considered the development of national management standards defining best practice natural resource management (NRM) by governments
- agreed to best practice governance principles for NRM that will provide a basis for guiding governments in natural resource policy development and program implementation, particularly the NAP and the Trust
- noted progress in developing a national mandatory water efficiency-labelling scheme
- considered a report on water property rights and reform by Council's Standing Committee Chief Executive Officers' Group on Water
- agreed to release the paper, *A Framework for a National Cooperative Approach to Coastal Issues*, for targeted consultation with key stakeholders
- were advised that the review of the Commonwealth Fisheries Policy was close to finalisation, with a Ministerial Statement expected to be tabled on 15 May 2003
- noted the considerable progress on the development of the National Plan of Action for the Conservation and Management of Sharks
- discussed and agreed to further progress a paper on the future development of Australia's protected areas system, *Directions for the National Reserve System—A Partnership Approach*
- discussed water recycling and water-sensitive urban design as a means of facilitating an integrated whole-of-water cycle approach to water management and to encourage the most efficient use of water in the future.

The Council meeting also included a Natural Resource Management Community Forum, in which Ministers met with community representatives from regional and natural resource management organisations, Indigenous representatives and representatives from peak natural resource management-related organisations. Discussion focussed on implementation of the NAP and the Trust, including issues associated with the shift from local project level approaches to integrated regional approaches.

Funding Approved for Market-Based Instruments Pilot Program

On 16 April 2003 the Federal Minister for the Environment And Heritage, Dr David Kemp, and the Federal Minister for Agriculture, Fisheries and Forestry, Warren Truss, announced that the Commonwealth, State and Territory Governments will jointly provide $5 million funding for 10 natural resource management projects under the first round of the National Market-Based Instruments (MBI) Pilots Program. The projects, which were approved by the Natural Resource Management Ministerial Council, will investigate ways to use innovative financial arrangements to encourage better land and water management and to reduce salinity in irrigation-base agriculture.

Environment Protection and Heritage Council Approves Environment Protection Measures

The Environment Protection and Heritage Council (EPHC), comprising Australia's Environment and Heritage Ministers, held its fourth meeting, in Melbourne, on 23 May 2003, and agreed to a range of environmental protection measures.

The Ministers:

- to develop a national mandatory water efficiency labelling scheme applying to domestic water use and appliances
- agreed to strengthen air quality standards to help protect Australians from the adverse health impacts of small pollutant particles by approving advisory reporting standards for fine particles 2.5 micrometres or less in size (known as PM2.5)
- released for public comment a draft National Environment Protection Measure (NEPM) on Air Toxics—substances released into the atmosphere from sources such as wood fires, motor vehicles and some industrial emissions
- approved funding for research to assess the impact of air pollution on daily mortality and morbidity in Melbourne, Sydney, Perth, Canberra, Brisbane, Auckland and Christchurch by early 2005
- renewed their challenge to retailers to help reduce the entry of plastic shopping bags into the litter stream, and expressed their disappointment that the Draft National Code of Practice prepared by retailers failed to deal adequately with the targets set by Environment Ministers in December 2002
- endorsed an agreement towards a cooperative national approach to the safe and sustainable use of chemicals, which will streamline and overcome gaps in existing controls
- released a report promoting sustainable tourism, *Going Places: Developing Natural and Cultural Tourism in Australia in Australia: Key Opportunities*
- welcomed the news that over 20 CEOs of major industries have accepted an invitation to an EPHC Ministerial Business Sustainability Summit, to be hosted by Queensland on 13 June 2003, which will provide a forum for government and business leaders to explore opportunities for pursuing sustainable development initiatives and partnerships
- agreed to undertake a review of the Movement of Controlled Waste Between States and Territories National Environment Protection Measure to more closely monitor the movement of controlled waste between States and Territories and materials sourced from overseas.

Comments Invited on Great Barrier Reef Protection Plan

The Commonwealth and Queensland Governments have invited public comment on the Draft Great Barrier Reef Water Quality Protection Plan. The draft plan aims to protect the reef from land-based pollution. It implements the commitment by the Prime Minister and the Queensland Premier, in the memorandum of understanding announced on 13 August 2002, to address the impact of declining quality of water entering the reef lagoon.

The draft report draws on the *Productivity Commission report on Industries, Land Use and Water Quality in the Great Barrier Reef Catchment* (see National Environmental Law Review No1/2003, 9) and the Science Panel report on the Study of Land-Sourced Pollutants and their Impacts on Water Quality in and Adjacent to the Great Barrier Reef (the 'Baker' report).

The draft plan is available via the website www.ea.gov.au/coasts. Submissions close on 14 July 2003.

Report Released on Environmental Risk and the Insurance Industry

EPA Victoria has released, on behalf of the United Nations Environment Programme Initiatives (UNEP FI) Australasian Advisory Committee on Insurance, the report *Risk, the Environment and the Role of the Insurance Industry.* The report:

- considers risk management in general and the role that insurance plays in risk management for businesses
- examines environmental risk as one of the sources of potential sources of liability for business
- provides illustrations of how some companies manage their environmental risk
- examines what currently happens in Australia in relation to environmental risk issues
- sets out a brief overview of Australian environmental law and how environmental risk management issues might arise for companies under that law
- looks at how insurance addresses liability for environmental risk at present
- considers whether there is a broader role for insurance in an environmentally sustainable future.

Federal Budget 2003–2004

The Government has announced that total Commonwealth spending on the environment in 2003–2004, across all portfolios, will exceed $2 billion for the first time. Environmental initiatives and funding announced in the 2003–2004 Budget, handed down on 13 May 2003, include an additional $353.1 million to fund new environmental measures across the Commonwealth over the next four years. This includes funding of $267 million within the environment portfolio, and an additional $49.3 in related meteorological expenditure.

For the environment portfolio, this includes:

- $40 million of new funding over the next five years for an urban environment initiative called *Sustainable Cities* to address the problems that come with city living and to improve the environment, health and lifestyle of urban Australians, including
  - $24.2 million over five years to improve urban water quality, air quality, the uptake of renewable energy, chemicals and waste management and public access to information
  - $15.8 million over four years to strengthen and enforce national standards for air quality, fuel quality and industrial residues, and the management and control of chemicals, pollutants, hazardous waste and ozone-depleting substances
- $52.6 million (including $13.3 million of new funds) over four years for *Distinctively Australian*, a new system for the protection of places of national heritage significance (conditional on the passage of new heritage legislation, currently before the Parliament)
- $115.5 million of net new funding over eight years for the Sydney Harbour Federation Trust, to restore, rehabilitate and return to the public seven historic sites on the foreshore of Sydney Harbour
- a $16 million program, with $8 million provided by the Commonwealth Government over five years as a new measure, to protect wetlands next to the Great Barrier Reef
- $18.2 million of new funding for the National Oceans Office to finalise and implement the South-east region Marine Plan and to develop a northern region marine plan
- $12.4 million of new funding over four years to maintain the Australian Biological Resources Study.

In addition to funding for the environment portfolio, the measures announced include an additional $86.2 in new funding over four years for other portfolios.

EPBC Act Developments

ANAO Audit Report on Referrals, Assessments and Approvals under the EPBC Act

Audit Report No 38 of 2002–2003 reported on the results of the Australian National Audit Office (ANAO) audit into the administration of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). The objective of the audit was to examine and report on the quality and timeliness of environmental assessments and approvals under the EPBC Act, as well as on activities by Environment Australia (EA) to ensure compliance with the Act.

The report concluded that the referral, assessment and approval processes under the Act are generally thorough and well documented. They are also improving as more experience is gained with the operation of the legislation. The report found that EA has established and implemented rigorous processes that provide an assurance that matters required to be considered under the Act are taken into account in a comprehensive manner.

Recommendations include:

- strengthening the approach to monitoring and review arrangements
- strengthening the approach to 'staged referrals'
- strengthening the timeliness of follow-up actions to address complaints and potential breaches under the Act
- continuing to build awareness among stakeholders of their obligations under the Act
- providing clearer information to Commonwealth departments and agencies about the Act.

The Federal Environment and Heritage Minister, Dr David Kemp, has welcomed the report, and announced a range of responses to the report's recommendations. These include:

- introducing a Compliance and Enforcement Policy to strengthen the Department's framework for responding to alleged contraventions of the EPBC Act and to ensure that the Act is enforced in an effective, efficient and accountable manner (see below)
- a review of the Administrative Guidelines on Significance, following feedback from industry and the community, to assist proponents to determine whether an action will have or is likely to have a significant impact and should be referred to EA
- placing greater emphasis on implementing post-approval audit processes.

ANAO Audit Report on Annual Reporting on Ecologically Sustainable Development

In Audit Report No 41 of 2002–2003, the ANAO reported on the results of its audit of Commonwealth agencies' annual reports on ESD performance, which are required by s 516A of the EPBC Act. The report concluded that:

- most agencies are still developing appropriate management and reporting frameworks, including performance indicators, for effective performance monitoring and reporting
- there is still considerable scope for improvement in relation to the quality of agencies' annual reports
- EA has a key role to play in terms of assisting agencies to improve the quality of their ESD reports and can do more to provide support to agencies, in publicising the requirements of the EPBC Act and sharing examples of better practice among agencies
- a challenge for EA is that many agencies are focused solely on the impact of their operations on the natural environment, and are yet to come to terms with the broader implications of ESD and its relevance to their operations.

In its response, EA accepted the general thrust of the report's recommendations in relation to EA's role in assisting agencies to undertake effective s 516A reporting, subject to resources being available to undertake the activities identified. Environment Australia commented, however, that no assistance provided by EA will facilitate improved reporting by other agencies unless other agencies recognise that it is their own responsibility to improve their reporting.

EPBC Act: A Planning Guide for Local Government and Regional Natural Resource Management Committees

WWF Australia, Humane Society International and the Tasmanian Conservation Trust have prepared a guide to help local government and regional natural resource management (NRM) committees understand the EPBC Act. The guide provides an overview of the Act, checklists and information about the key elements of the Act that need to be considered when preparing NRM plans, local area plans and site management plans. Copies of the guide are available via the EPBC Unit website at www.wwf.org.au/epbc.

The guide is the latest in a series of guides on the EPBC Act prepared by the three organisations. The other guides, released earlier this year, are:

- EPBC Act: A Guide for Conservationists (52 pages)
- EPBC Act: A Short Guide for Conservationists (2 pages)
- EPBC Act: A Guide for On-ground Conservationists (12 pages)
- EPBC Act: A Short Guide for Rural Landholders (2 pages)

The Environmental Defender's Office (NSW) has also released a guide to the EPBC Act, called *Planting the Seed: Public Participation and the Environment Protection and Biodiversity Conservation Act.* For further information, contact the EDO website at www.edo.org.au.

Environment Australia Compliance and Enforcement Policy

Environment Australia has released *Environment Australia Compliance and Enforcement Policy*, which sets out the policy framework EA will use when dealing with possible contraventions of Commonwealth environment and heritage legislation. The legislation includes a number of different statutory regimes containing a range of criminal, civil and administrative penalty provisions.

The purpose of the policy is to inform the public of the factors that will be taken into account in determining appropriate responses to contraventions, including whether legal proceedings will be pursued. The policy sits within the broader Commonwealth law enforcement policy and is intended to be read in conjunction with other relevant law enforcement policies.

The policy is available via the EA website at www.ea.gov.au.

Maritime Legislation Amendment Act 2003

(See also National Environmental Law Review No 1/2003, 7)

The Maritime Legislation Amendment Act 2003 received Assent on 19 March 2003. The Act amends a number of pieces of legislation and enacts a number of marine environment protection measures.

Maritime Legislation Amendment (Prevention of Pollution from Ships) Bill 2003

The Maritime Legislation Amendment (Prevention of Pollution from Ships) Bill 2003 was introduced in the House of Representatives on 25 March 2003. It amends the *Navigation Act 1912 and the Protection of the Sea (Prevention of Pollution from Ships) Act 1983* to update cross-references and reflect the Regulations for the Prevention of Pollution by Sewage from Ships, set out in Annex IV of the International Convention for the Prevention of Pollution from Ships. This is to ensure that the level of environmental protection from marine sewage in Australia is consistent with internationally adopted standards.

Renewable Energy Legislation Review

On 25 March 2003 the Minister for Environment and Heritage, Dr David Kemp, and the Minister for Industry, Tourism and Resources, Ian McFarlane, named the members of the panel and the terms of reference for the review of the Commonwealth's Mandatory Renewable Energy Target (MRET) legislation.

The Renewable Energy (Electricity) Act 2000 established the MRET, which requires Australian electricity retailers and other large buyers of electricity to collectively source an additional 9500 gigawatt hours of electricity from renewable sources by 2010.

Senate Inquiry into Invasive Species Bill

The Senate referred the Environment Protection and Biodiversity Conservation Amendment (Invasive Species) Bill 2002 to the Senate Environment, Communications, Information Technology and the Arts Legislation Committee for inquiry and report by 25 November 2003.

The Bill is a Private Senator's Bill, introduced by Senator Bartlett (Australian Democrats). It seeks to regulate invasive species by preventing the introduction of further species into Australia and eradicating or controlling those already here.

Senate Inquiry into Proposed Plastic Bag Legislation

The Senate has referred the Plastic Bag Levy (Assessment and Collection) Bill 2002 and the Plastic Bag (Minimisation of Usage) Education Fund Bill 2002 to the Senate Environment, Communications, Information Technology and the Arts Legislation Committee for inquiry and report by 7 October 2003.

The Bills aim to provide for the collection of a 25 cent levy on plastic bags at the retail point of sale, which would be paid into a national environment fund, to be used for education about the environmental impacts of plastic bags.

House of Representatives Inquiry into the Recent Australian Bushfires

The House of Representatives agreed on 26 March 2003 to establish a Select Committee to inquire into the recent Australian bushfires. The terms of reference require the committee to identify measures that can be implemented by governments, industry and the community to minimise the incidence of, and impact of, bushfires on life, property and the environment. The committee is to report by 6 November 2003.

Productivity Commission Inquiry into Native Vegetation and Biodiversity Regulation

The Productivity Commission has been instructed to undertake an inquiry into the impacts of Commonwealth, State and Territory regulations relating to native vegetation and biodiversity. The 12-month inquiry will examine the regulatory impact in a range of areas, including farming practices, productivity, sustainability and property values and returns. The inquiry will also examine whether there is any overlap or inconsistency between Commonwealth and State/Territory regimes, including their administration.

Further information about the inquiry and the terms of reference are available at the Productivity Commission website: www.pc.gov.au. The due date for submissions to the inquiry is 18 July 2003.

The Commission work program also includes research projects relating to:

- assessing environmental regulatory arrangements for aquaculture
- incorporating externalities into the pricing of irrigation water
- modelling regional impacts of water reform.

Biodiversity Assessment Report Released

The Commonwealth Government's Land and Water Resources Audit has released its report *Australian Terrestrial Biodiversity Assessment 2002*. The report provides assessments of the condition of Australia's terrestrial biodiversity. It is available via the website www.nlwra.gov.au.

The Land and Water Resources Audit was established in 1997, under the Natural Heritage Trust, to provide an independent, comprehensive, nationwide appraisal of Australia's natural resources and their use.

ABS Report—Environment by Numbers

The Australian Bureau of Statistics released in February 2003 *Environment by Numbers* (Catalogue No 4617.0)—a collection of articles on sustainability and the environment. Topics covered include climate change, Australia's rivers, renewable energy, forest conservation, salinity, and the impacts of transport, construction, fishing, mining and agriculture on the environment.

Victorian Commissioner for Environmental Sustainability

The Victorian Government has passed legislation to establish a Commissioner for Environmental Sustainability.

The objectives of the Commissioner for Environmental Sustainability will be to:

- Enhance the adoption of environmentally sustainable practices by State and Local government;
- Enhance knowledge and understanding of the state of Victoria's environment and issues relating to ecologically sustainable development; and
- decision-making that facilitates ecologically sustainable development.

The Commissioner for Environmental Sustainability will have three key responsibilities:

- Preparing state of the environment reports for Victoria;
- Undertaking an annual strategic audit of the implementation by State Agencies; and public authorities of their environmental management systems; and
- Auditing public education programs in relation to ecologically sustainable development.

The Commissioner will also be able to establish a peer reference group, subject ot the approval of the Minister, to provide advice. A recruitment process will begin shortly.

A copy of the *Commissioner for Environmental Sustainability Act 2003* is available at: http://www.dms.dpc.vic.gov.au. Further information on the role of the Victorian Commissioner for Environmental Sustainability is available at: http://www.nre.vic.gov.au.

VicSuper Sustainability Covenant

EPA Victoria and VicSuper have signed the world's first voluntary sustainability covenant. This sustainability covenant is an agreement between the Environment Protection Authority Victoria and VicSuper to work together to protect the environment and to contribute to a more sustainable Victoria. The covenant falls under section 49AA of the *Environment Protection Act 1970* and was signed on Friday 16 May 2003.

The signing of this first sustainability covenant is an exciting opportunity for VicSuper, EPA Victoria, and Victoria. The financial services industry has the opportunity to enable the community to direct its savings into productive investments that generate acceptable long-term returns and contribute to sustainable economic growth necessary for improving quality of life for everyone. In this way VicSuper, as a part of the financial services industry, can have a positive impact on society and the environment that reaches far beyond the impact of its own operations.

The take up of this sustainability investment style by leaders in the superannuation industry and the growing acknowledgment that the funds themselves should examine their own environmental and social impacts means that covenants with organisations such as VicSuper, in non traditional areas of environment protection and sustainability awareness, are expected to become more common.

VicSuper is one of Australia's largest superannuation funds with more than 170,000 members. VicSuper is proactive in its approach to incorporating sustainability into investment decisions, as well as sustainability principles into its internal operations and operating decisions. For further information, refer to EPA Victoria's website: http://epa.vic.gov.au.

Recent EPBC Approvals and Invitations to Comment

(Reproduced with permission from Environmental Defenders Office (VIC) Ltd.)

Nominations for new species, key threatening processes and ecological communities for listing under the EPBC Act have been made. They are to be considered by the Threatened Species Scientific Committee and public comment is invited before 30 June 2003. This list can be viewed at: *http://www.ea.gov.au/biodiversity/threatened/nominations/public-comment/index.html*

Reference number: 2003/1063 – Barwon Region Water Authority/Waste management/Aireys Inlet/VIC/Establishment of plantation for use of effluent water – Invitation for Public Comment on Referral – Date of Notice: 12 May 2003

Description: proposal for additional 10ha irrigation plantation to the existing 20ha plantation at the Aireys Inlet sewage treatment plant. The Southern Brown Bandicoot, Long-nosed Potoroo and Spot-tailed Quoll, which are listed either as endangered or vulnerable under the EPBC Act, inhabit the proposed site.

Reference number: 2003/1062 – Santos Ltd/Exploration (mineral, oil,gas)/Otway Basin/Commonwealth Marine/Oil exploration wells – Invitation for Public Comment on Referral – Date of Notice: 12 May 2003.

Description: Santos proposes to drill three exploration wells in Commonwealth Waters approximately 50km south-east of Portland off the coast of western Victoria between August 2003 and end March 2004. The drilling may impact upon feeding and migration of Southern Right and Blue whales, as well as other associated mining risks to the marine environment.

Rural News

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Water Study of the Wimmera Mallee Pipeline Proposal

The Federal and Victorian governments have pitched $7.7 million for a design study for the Wimmera Mallee pipeline proposal. Submissions close on June 13.

Farmers Criticise DSE's Interpretation of Native Vegetation Clearing Guidelines

The Victorian Farmers Federation has questioned the Department of Sustainability and Environment's application of the offset mechanism to pruning limbs on trees. A spokesperson for Environment Minister, John Thwaites has denied that department staff have gone too far.

100 Gigalitre Push for Murray River Flows

State and federal agriculture and environment ministers have directed a commission to present water savings options based on scientific and economic analysis as well community consultations to provide immediate ecological relief to the Murray River. This is a separate process to the commission's Living Murray initiative, which has more long-term objectives. The river's inflows for the six months to the end of April have hit their lowest on record causing great concern for the riverine environment.

EcoRecycle's leading on litter small grants finalised

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Twenty-two projects were approved for funding totalling nearly $80,000. Grants from $990 - $5,000 were selected from a representative range of sites, including:

- projects across the state target cigarette butt litter, including: Campaspe, Maribrynong, Rainbow, Edenhope, Swan Hill, The Kurdish Association and Moonee Ponds Creek Litter Project.
- Three projects involve rubbish dumping at Charity Bins in the northern metropolitan region, shopping trolleys in Darebin Creek, and general dumping in East Gippsland.
- Two projects target non-English speaking communities.
- Two projects focus on sporting club litter - Stonnington and Banyule.
- Several projects linked litter with waste reduction and recycling at events (Rutherglen Fair and East Gippsland Field Days) and other public places (Knox, Great Western and Warracknabeal).

Planning Rules – Draft Variation 200

Controversy over the proposed variations to the Territory's planning rules has been blooming since April, when the Legislative Assembly released a report labelling the proposed changes "pre-emptive and confusing". However, the government has said it will be tabling the "Garden City Variations" in parliament during the June sittings.

The changes cover a range of issues, including:

- expanded provisions for private open space;
- a requirement for all new developments to follow processes set out in the recently amended *Designing for High Quality and Sustainability* guidelines;
- controls on dual occupancy developments, restricting minimum block size to 800m2;
- measure to prevent overshadowing of the northern boundaries of land; and
- and removes basement carparking and "loft" spaces from all suburban developments.

The New Planning & Land System

A central part of the latest government's election promises was the establishment of new and independent planning authorities, together with amendments to the planning system. A year after the initial bills were tabled in parliament, the new system will begin on 1 July this year.

One of the central pieces of these amendments is the Planning & Land Council, nominations for which have recently been announced. The Council is to serve as an expert / senior adviser to the Minister for Planning, and the new Planning and Land Authority. Nominations for the Council currently include people from the Planning Institute of Australia, academics in urban management, applied ecology and landscape architecture, and an urban designer.

The Planning and Land Authority is required to refer proposals that may change planning policy, raise policy implementation / interpretation issues or otherwise have the potential to substantially impact on a particular environment, to the Council for advice.

Building Act Amendments – Construction Certifiers

With property prices booming in Canberra and a spate of construction flowing out of the recent bushfires, the government has taken the opportunity to fix some gaps in its planning and related legislation.

The Construction Practitioners Legislation Amendment Bill 2003 establishes procedures for the appointment of government building certifiers, to function essentially as inspectors / certifiers in a 'last minute' role. Under previous legislation, the Government was not able to appoint building certifiers for certification purposes, so there was a risk that where building work was unfinished and the land owner was unable to find a replacement certifier, the work could not be completed. These amendments were aimed at preventing this in future.

A New Department of Environment

The Western Australian government has recently released three reviews of the Department of Environmental Protection's management structure (by Derek Carew Hopkins), pollution licence conditions (by Welker Consulting) and enforcement and prosecution guidelines (by Dr Brian Robinson). The reviews were partly a response to community criticism of the DEP's ability to ensure industry protects the environment.

NELA WA members were privileged to hear Derek Carew Hopkins (Acting Director, Department of Environment), Senior Police Superintendent Richard Lane (Director, Environmental Enforcement Unit) and Robert Atkins (Acting Director, Environmental Regulation Division) outline the significant recommendations and imminent changes at the Department in a lunch time seminar on 29th May.

The recommendations are far-reaching and changes are already apparent. The Department has been re-named the Department of Environment, an Environmental Enforcement Unit has been formed (headed by Senior Police Superintendent Richard Lane) and a working group has been formed to review licence conditions.

Most significantly, the recommendations emphasise the need for greater enforcement action. Coupled with new environmental offences like environmental harm, land clearing and the contaminated sites legislation, enforceable licence conditions, more publicly available information and new enforcement mechanisms, industry will be under greater scrutiny in the future to ensure its environmental performance is acceptable.

Other key recommendations included:

- Community awareness being promoted through a public licensing database, public non-compliance and enforcement database, a public register of contaminated sites, a monthly information bulletin which summarises enforcement action and magistrate's decisions or other significant legal action.
- Concurrent environmental impact assessment (Part IV), works approvals and pollution licences.
- Increased community consultation in determining licence conditions and public reporting of environmental performance.
- A review of licence conditions to ensure they are within statutory power, they reflect sustainability principles, they prescribe enforceable conditions and that emission limits are determined based on achieving environmental outcomes.
- Ensuring licences describe the characteristics of all significant emissions that must be complied with for operation to continue. The significance of an emission being based on the inherent and residual environmental risk, taking into account community concern and local environmental circumstances.
- Environmental Improvement Plans to encourage best practice.
- More effective use of the range of enforcement tools provided by the Environmental Protection Act, in particular prosecution, which is to be considered equally with other enforcement mechanisms (rather than as a tool of last resort). All warnings in the future will be written.

In light of these changes those in industry ought to review the legal obligations which specifically apply to their operations and ensure their operations are being conducted with due diligence to avoid enforcement action and adverse publicity. It is also an opportune time to review licence conditions to ensure they are achievable.

The reports are available on the Department of Environment's website: http://www.environ.wa.gov.au

New Appointments at the Environmental Protection Authority

Since the end of March 2003, four new members of the EPA have been appointed. The new members include: Professor Wally Cox (Chairman), Dr Roy Green (Deputy Chairman), Ms Joan Payne and Dr Andrea Hinwood. Denis Glennon remains a member.

In a recent presentation, Professor Cox indicated that the EPA is seeking feedback for a strategic plan. They are particularly interested in exploring methods of improving the impact assessment process in Pt IV of the Act and priorities for policy development, including mechanisms for the management of natural resources, particularly water and biological diversity. The strategic plan is currently being developed and will soon be released for public comment.

The background of each of the members of the EPA is available on the EPA's website: http://www.epa.wa.gov.au

2003 Goldfields SO2 Regulations and Policy

The Environmental Protection (Goldfields Residential Areas) (Sulfur Dioxide) Regulations 2003 (WA) replace the 1992 regulations. They are supported by the new *Environmental Protection (Goldfields Residential Areas) (Sulfur Dioxide) Policy Order 2003.*

The regulations prescribe a licence condition which may be applied to premises discharging sulfur dioxide in the Goldfields area. The prescribed condition is that occupiers must ensure that operations on their premises are conducted in such a way as neither to cause, nor to contribute to causing, the sulfur dioxide concentration to exceed 0.35ppm in the ambient air of Kalgoorlie, Kambalda, Coolgardie or the Kurrawang Aboriginal Reserve. This limit applies in 2003, but will decrease to 0.30ppm in 2004 and 0.25ppm for 2005 and beyond.

Rose Valley Cheese Charged

The Rose Valley Cheese Company Pty Ltd was recently charged for breaching its pollution licence. The Department has alleged that the company failed to irrigate its waste waters or dispose of them on-site. The waste includes wash down waters and other potentially contaminated water.

NELA (WA) 2003 State Conference - Call for Papers

As mentioned in the last NELA Review, the WA Branch of NELA is holding its 2003 State Conference at the Fremantle Maritime Museum on 25 September 2003. The title of this year's conference is "Environmental Aspects of Project Management: from dreaming up to cleaning up". The aim is to provide a range of practical viewpoints from different stakeholders on the various environmental considerations at each stage of a major project. Interested speakers should email abstracts to Conference Convenor Colleen Pratt (colleen.pratt@mallesons.com) by no later than 30 June 2003.

case notes

Victorian Environment Protection Authority Prosecution Update July 2002 – April 2003

Prosecutions under the Environment Protection Act 1970

by Henry Jackson, Solicitor, Environment Protection Authority, Victoria

Calleja Nominees Pty Limited

Offence	Section 43A(1)(b)(i) of the Environment Protection Act 1970 ("the EP Act") - being the registered owner of vehicles which failed to comply with the Environment Protection (Vehicle Emissions) Regulations 1992 (3 charges)
Maximum Penalty	A fine of $6,000 for each offence

On 17 July 2002 at Sunshine Magistrates' Court, Calleja Nominees Pty Limited pleaded guilty to 3 charges of being the registered owner of vehicles which failed to comply with the Environment Protection (Vehicle Emissions) Regulations 1992, thereby breaching section 43A(1)(b)(i) of the EP Act.

The three charges related to vehicles operated by the company emitting smoke continuously for periods exceeding 15 seconds. The vehicles were observed by EPA Officers on 12 February 2001, 2 March 2001 and 21 May 2001.

At the time of the offences, Calleja Nominees Pty Ltd had the most vehicles reported for smoke and the most penalty infringement notices issued by the Authority.

Magistrate Goldsbrough fined the defendant an aggregate of $4,500 and ordered it, pursuant to section 67AC of the EP Act, to pay $4,400 to undertake an environmental audit of its fleet of vehicles and publish a notice (of specified wording) in *The Age, The Herald Sun and Truck and Bus Magazine.* An auditor accredited under the National Heavy Vehicle Accreditation Scheme was to manage the audit program.

The company was also ordered to pay EPA's costs of $2,369.

Shell Refining (Australia) Pty Ltd

Offence	Section 27(2) of the EP Act – breach of licence
Maximum Penalty	A fine of $240,000*

On 5 August 2002, at the Geelong Magistrates' Court, Shell Refining (Australia) Pty Ltd pleaded guilty to one charge of breach of licence for the discharge of offensive odour beyond the boundary of its premises, contrary to section 27(2) of the EP Act.

The charge related to odours investigated by EPA Officers on 5 February 2001 in the Corio residential area. The odours emanated from a waste water treatment plant and waste pits operated by the defendant at its Corio premises. Eight complaints were received from the

residential area and the odour from the premises was the strongest the two investigating officers had ever detected.

Magistrate Moloney convicted the defendant and ordered it, pursuant to section 67AC of the EP Act, to pay $36,500 to the City of Greater Geelong for the completion of an environmental project at the Council's Waterworld recreational facility.

The project involves reducing greenhouse emissions by the replacement of pumps for heating and water filtering, plus replacement of existing indoor lighting by low-energy lights. Magistrate Moloney also ordered the defendant to publish a notice about the offence and the penalty (with specified wording) in the financial pages of *The Geelong Advertiser, The Herald Sun, The Age and The Australian.*

The defendant was also ordered to pay EPA's costs of $16,620.

Pivot Limited

Offence	Section 39(1)(c) of the EP Act – pollution of waters (harmful to fish or other aquatic life)
Maximum Penalty	A fine of $240,000*

On 15 August 2002, at Sunshine Magistrates' Court, Pivot Limited pleaded guilty to one charge of water pollution (harmful to fish or other aquatic life), contrary to section 39(1)(c) of the EP Act.

The charges arose from an investigation that commenced after EPA received a total of 11 complaints from local residents about of dead eels, a brownish discolouration and an ammonia odour in Stony Creek at Cruickshank Park, Yarraville.

Investigation of the creek and the local drainage system determined the source of the odour and discolouration to a warehouse occupied by Pivot Limited and used as a storage facility for pelletised urea. The clip on a fire hose located inside the warehouse had failed, resulting in a discharge of urea-rich water from the premises, which subsequently entered the stormwater system and eventually Stony Creek. Analysis of key water quality indicators confirmed that the creek was severely affected by the discharge with un-ionised ammonia levels detected significantly above State Environment Protection Policy (Waters of Victoria) objectives.

Magistrate Barrett convicted the defendant and, pursuant to section 67AC of the EP Act, ordered the defendant to carry out a project for the restoration or enhancement of the environment, namely the development and implementation of the Stony Creek Neighbourhood Environment Improvement Plan (NEIP) to improve the water quality of Stony Creek.

NEIPs are statutory instruments which are provided for in Division 1B of the EP Act (sections 19AD - 19AK). They are developed by the community, but require approval by the Authority and tabling in Parliament, before coming into operation.

The order required the defendant to pay a total of $40,000 to the Maribyrnong City Council by 13 September 2002, being $30,000 towards the employment of a project officer for the NEIP for a period of 12 months commencing no later than 31 December 2002 and $10,000 towards development and implementation of streamside re-vegetation measures along Stony Creek, to be completed by 30 June 2003.

The order further required the defendant to publish a notice about the offence and the penalty (with specified wording) in the editorial pages of *The Western Times and The Footscray Mail* and in its 2002 Annual Report. Under the order, the defendant was also required to provide to the EPA proof of payment of monies and publishing of notices within 2 weeks of their having been made.

The defendant was ordered to pay EPA's costs of $7,619.

Walter Construction Group Limited

Offence	Section 27A(2)(a) of the EP Act – dump industrial waste at a site not licensed to receive it (2 charges)
Maximum Penalty	A fine of $20,000 for the first charge and a fine of $500,000* for the second charge

On 9 September 2002 at Melbourne Magistrates' Court, Walter Construction Group Limited pleaded guilty to 2 charges under section 27A(2)(a) of the EP Act. The charges alleged the dumping of industrial waste at an unlicensed site between 29 April 2000 and 20 August 2000.

The prosecution arose from the dumping of construction waste which came from works undertaken during the Docklands Infrastructure Project. The waste was dumped alongside and, to some extent, into the Moonee Ponds Creek in the Docklands precinct.

Although the dumping activity occurred as a single, continuing course of conduct over nearly 4 months, two charges were laid because the offence period spanned the date on which the charge became an indictable offence+. With the changeover, the maximum penalty was increased from $40,000 to $500,000. The Court was told that about 90% of the dumping occurred during the summary period.

Charges were also pending against two other parties allegedly involved in the incident and, as part of its plea in mitigation, the defendant undertook to assist the Authority in those proceedings.

Without imposing a conviction, Magistrate Hodgens fined the defendant an aggregate of $10,000 and, pursuant to section 67AC, ordered it to:

1. undertake an environmental enhancement project along the Moonee Ponds Creek, Docklands;
2. pay $10,000 to the Docklands Authority, such money to be devoted entirely to that project;
3. publish a notice (with specified wording) in *The Age and The Herald Sun* within 14 days of the Court Order; and

4. refrain from referring to the project without also referring to the Court proceedings.

The defendant was also ordered to pay EPA's costs of $9,229.75.

Pemray Pty Ltd & Peter Grahame Murray

Offence	Section 41(1)(a) of the EP Act – pollution of atmosphere (offensive to the senses of human beings)
	Section 31A(7) of the EP Act – failure to comply with a Pollution Abatement Notice
Maximum Penalty	A fine of $240,000* in each case

In Wangaratta Magistrates' Court on 7 October 2002 Pemray Pty Ltd and its Director, Peter Murray, each pleaded guilty to nine charges of polluting the atmosphere at Yarroweyah between December 2000 and September 2001 and three charges of failing to comply with a Pollution Abatement Notice in August and September 2001. The charges related to the operation of the corporate defendant's piggery.

The prosecution followed the non-payment of penalties for three penalty infringement notices which had been issued to Peter Murray on 7 August 2001.

Magistrate Raleigh fined Pemray Pty Ltd an aggregate amount of $2,000 without conviction and placed it on an undertaking to be of good behaviour for 2 years, a condition of which was that the company "...contribute the sum of $15,000 to the Yarroweyah Grounds Committee Incorporated to be spent on replacing the playground equipment at the Yarroweyah Playground within three months".

The choice of environmental project was determined by local complainants, all of whom were in court for the matter, after the Magistrate adjourned proceedings to give them an opportunity to nominate a local cause to which a financial penalty could contribute.

Magistrate Raleigh fined Mr Murray an aggregate amount of $2,000 without conviction.

Both defendants were also ordered to pay half of the EPA's costs of $4,000.

Detail Excavations (Vic) Pty Ltd

Offence	Section 27A(2)(a) of the EP Act – dump industrial waste at a site not licensed to accept it (2 charges)
Maximum Penalty	A fine of $240,000* in each case

On 10 October 2002, at Melbourne Magistrates' Court, Magistrate Purcell found Detail Excavations (Vic) Pty Ltd guilty of 2 charges under section 27A(2)(a) of the EP Act of dumping industrial waste at a place not licensed to accept it between 29 April 2000 and 20 August 2000.

The facts in this case are as stated in the case note above in relation to Walter Construction Group Limited. Detail Excavations (Vic.) Pty Ltd was the subcontractor directly involved in the dumping activity under the direction of the main contractor - Walter Construction Group Limited. As with Walter Construction, two charges were laid against Detail Excavations because the

dumping period traversed the date of the increase in maximum penalty and the upgrade of the offence from summary to indictable. Again, it was noted that most of the dumping occurred during the summary period,

In rejecting legal argument put forward by counsel for the defendant, Magistrate Purcell reaffirmed the view of *Justice Nathan in Allen v United Carpet Mills* [1989] VR 323 that breaches of the EP Act's obligations involve offences of absolute liability.

Without recording a conviction, the Magistrate fined the company $1,000 and ordered it to pay EPA's costs of $15,666.

Caltex Australia Petroleum Pty Ltd, Pentaco Oil (Aust) Pty Ltd and Thomas Brian Carroll

Offence	Section 27A(1)(c) of the EP Act – cause an environmental hazard
Maximum Penalty	A fine of $240,000* in each case

On 7 November 2002, at Melbourne Magistrates' Court, each of Caltex Australia Petroleum Pty Ltd, Pentaco Oil (Aust) Pty Ltd and Thomas Brian Carroll pleaded guilty to causing an environmental hazard.

The charges arose out of an incident that occurred on 10 August 2002 at an Ampol service station in Hawthorn. Thomas Carroll, delivering product to the Pentaco-operated site on behalf of his employer Caltex, connected the leaded compartment of his tanker to the diesel underground storage tank which had insufficient space to receive the product. An unknown quantity (the Authority estimated 570 litres, Caltex submitted that the figure was closer to 170 litres) of product was spilled, some of which made its way into the stormwater system with an unknown quantity then making its way into the Yarra River.

The Melbourne Magistrates' Court placed Carroll, without conviction, on an undertaking to be of good behaviour for 12 months and fined Pentaco Oil (Aust) Pty Ltd $500 without conviction.

Pursuant to section 67AC of the EP Act, the Court also ordered Caltex to pay $53,000 to the Boroondara City Council to carry out a revegetation project along a 400m stretch of Gardiner's Creek, and to publicise the offence and penalty imposed via notices in specified newspapers.

However, Caltex appealed the severity of the sentence to the County Court on the principles of parity.

Determining the appeal on 19 March 2003 Judge Wood ordered Caltex to pay $30,000 to the Council for the project. His Honour also declined to make any publication order.

Amcor Packaging (Australia) Pty Ltd

Offence	Section 41(1)(a) of the EP Act – pollute atmosphere (offensive to the senses of human beings)
Maximum Penalty	A fine of $240,000* in each case

On 22 November 2002 at Heidelberg Magistrates' Court, Amcor Packaging (Australia) Pty Ltd pleaded guilty to one charge of polluting the atmosphere between 5 January 2002 and 12 January 2002.

Without convicting the defendant Magistrate Cashmore ordered it, pursuant to section 67AC of the EP Act:

1. to pay $45,000 to Yarra City Council for:
   a. preparation, restoration, revegetation, weed control and initial;
   b. maintenance works along the Yarra River Bank abutting the Amcor premises;
2. to provide the Authority with a joint report prepared with Yarra City Council confirming the payment and the status of the project;
3. to be prohibited from referring to the payment without reference to the proceedings;
4. to publish a notice (with specified size and wording) featuring the company's corporate logo within 30 days of the date of the Court Order in *The Metro News, The Northcote Leader, The Melbourne Times, The Financial Review, The Herald Sun, The Age,* the company's 2002/2003 Annual Report and the "news" section of the company's website for 14 days.
5. To provide the Informant with copies of each publication within 14 days of the date of publication.

The defendant was also ordered to pay EPA's costs of $6,500.

Miatech Pty Limited

Offence	Section 30D(3) of the EP Act – contravene the provisions of a Notifiable Chemical Order
Maximum Penalty	A fine of $240,000*

On 4 December 2002 at Dandenong Magistrates' Court, Miatech Pty Limited pleaded guilty to the charge of contravening a Notifiable Chemical Order, which prohibited the storing, handling, transporting and use of polychlorinated biphenyls (PCBs) without an Environmental Improvement Plan (EIP) approved by the Authority.

The charge followed the discovery, on 1 May 2001, of PCBs in approximately 4000 litres of waste oil at the premises of Master Waste Pty Ltd in Footscray.

Miatech Pty Ltd was identified as having provided the contaminated waste oil. Analysis of samples collected from waste oil drums at various Miatech premises showed that the contaminated oil had formerly been used in electrical transformers.

Upon identification of the PCB contamination the defendant was instructed not to transport or remove the contaminated oil from the premises without prior written approval from the Authority.

Magistrate Harding without conviction placed the company on an undertaking to be of good behaviour for 12 months with a special condition to pay $1,000 into the Court Fund. The company was also ordered to pay EPA's costs of $4,100.

Michael Sean Kiley

Offence	Section 53E of the EP Act – contravene a condition of a waste transport permit
Maximum Penalty	A fine of $60,000

On 15 January 2003 at Moe Magistrates' Court, Michael Sean Kiley (trading as Suzanne's Asbestos Removals) was found guilty of one charge of contravening a waste transport permit condition on 18 June 2001.

The charge arose from an incident on Monday 18 June 2001, when the driver of the permitted vehicle (an employee of the defendant), unloaded asbestos-contaminated roof tile at the Morwell Transfer Station, which is unlicensed to receive prescribed waste.

The driver, although given verbal instructions by the defendant to locate the Morwell landfill, mistakenly believed the transfer station and the landfill to be the same entity. The load of asbestos was consequently deposited at the transfer station.

Two Penalty Infringement Notices (each of $1200) were issued for breach of permit. Mr Kiley elected to have the matter heard in the Magistrates' Court and they were withdrawn.

Without convicting Mr Kiley, Magistrate Dugdale placed him on an undertaking to be of good behaviour for 18 months and ordered him to pay costs of $55.

Balgee Oil Pty Ltd

Offence	Section 27A(1)(c) of the EP Act – cause an environmental hazard
Maximum Penalty	A fine of $20,000#

On 21 January 2003 at Geelong Magistrates' Court, Balgee Oil Pty Ltd pleaded guilty to one charge of causing an environmental hazard at Apollo Bay between 1 May 1999 and 9 August 1999, contrary to s.27A(1)(c) of the EP Act.

Balgee Oil Pty Ltd ("Balgee") operates a 'Mobil' service station on the Great Ocean Road, Apollo Bay. High loss figures in mid-1999 prompted Balgee to remove a 'super' underground petrol tank on 9 August 1999 and install a replacement tank.

However, the company made no proper investigation of the extent of the leakage and undertook no containment or remediation measures. The seriousness of the situation only became apparent one year later, when the leaked petrol - which had already polluted the groundwater under and around the site - made its way into the sewers, causing a potential fire and explosion risk. EPA and other agencies then intervened, and the service station was closed for a week.

Over the ensuing 6 months, in compliance with a comprehensive EPA Clean Up Notice issued to Balgee pursuant to s62A of the EP Act, consultants oversaw the vacuum extraction of 2,000 litres of free phase hydrocarbon from the site and surrounds. The Court was told that remediation and monitoring were still continuing and that the total cost for Balgee was estimated to reach $1.5 million. Balgee had voluntarily come under external administration in December 2001 and was operating under a deed of arrangement at the date of sentencing.

Without recording a conviction, Magistrate von Einem placed the defendant on an undertaking to be of good behaviour for 24 months. Three further conditions were part of the undertaking. They required the defendant to:

(a) pay $12,000 to the Apollo Bay/Kennett River Public Reserves Committee of Management by 22 February 2003, to be used on a project determined by the Committee in consultation with the Authority;

(b) comply with all lawful notices issued by the Authority in respect of the clean up and monitoring of areas affected by the contaminant from the Balgee Apollo Bay Service Station; and

(c) pay EPA's costs of $18,689 by 22 February 2003.

Multitex Corporation Pty Ltd

Offence	Section 39(1)(e) of the EP Act – pollute waters (detrimental to a beneficial use)
Maximum Penalty	A fine of $240,000*

On 23 January 2003 at Heidelberg Magistrates' Court, Multitex Corporation Pty Ltd pleaded guilty to one charge of polluting waters (detrimental to any beneficial use - aesthetic enjoyment) between 4 and 7 February 2002.

The charge followed an investigation into a complaint concerning the white colouration of the Darebin Creek in Preston which was traced to the premises of Multitex Corporation Pty Ltd in the early hours of 5 Feb 2002.

Investigations confirmed that there had been a spill at Multitex of approximately 100 litres of latex during the unloading of a 1000 litre container from a truck in the driveway of the premises. The spill was then hosed to stormwater drains in the street by an employee. No further actions were taken by the company.

Magistrate Spanos without conviction made an order pursuant to section 67AC of the EP Act that the defendant pay $4,400 to be used by Darebin Creek Management Committee Inc. to install side entry drain covers ("gutter guards") at identified high risk litter areas within the Darebin Creek Catchment.

The defendant was also ordered to pay EPA's costs of $5,000.

Captain Jan Osmundsen (Master of MT Bow Sky) and Star Tankers AS (Owner of MT Bow Sky)

Offence	Section 39(1)(c) of the EP Act – pollute waters (potentially harmful to fish and other aquatic life)
Maximum Penalty	A fine of $240,000*

At Melbourne Magistrates' Court on 7 March 2003 Captain Jan Osmundsen (Master of MT Bow Sky) and Star Tankers AS (Owner of MT Bow Sky) both pleaded guilty to one charge of water pollution at No. 1 Maribyrnong Berth on 9 June 2001.

The MT Bow Sky is owned by Star Tanker AS of Haugesund Norway and was carrying a cargo of cumene (isopropylbenzene) which was being transferred to tanks located in the Coode Island tank farm when the discharge occurred.

The discharge occurred as the result of a leak onto the deck from a pipe on the ship connecting the cumene product tanks to the ship's manifold. It was agreed that not more than 500 litres of cumene made its way into port waters.

Magistrate Barbara Cotterell convicted Star Tankers AS and fined it $15,000. Star Tankers AS was also ordered to pay the EPA's costs of $9,229. Captain Osmundsen was fined $500 without conviction.

IT Environmental (Australia) Pty Ltd and Abigroup Contractors Pty Ltd

Offence	Section 41(1)(a) of the EP Act – pollute atmosphere (offensive to the senses of human beings)
Maximum Penalty	A fine of $240,000*

At the Melbourne Magistrates' Court on 23 April 2003, IT Environmental (Australia) Pty Ltd and Abigroup Contractors Pty Ltd pleaded guilty to one charge of air pollution contrary to section 41(1) of the EP Act.

The charge related to offensive odours emanating from the former Gas Works site located between Colonial Stadium and the Yarra River on 26 October 2001. The odours affected workers in the Victoria Police Complex located within the World Trade Centre at 637 Flinders Street.

The defendants had formed a joint venture known as the Enterra Joint Venture and were engaged by the Docklands Authority to remediate the heavily contaminated soil at the former Gas Works site.

The defendants failed to adequately employ various available measures to control odour, including minimising the area of contaminated soil left exposed to the atmosphere or covering the excavated area with soil. The remediation area was left unattended by the defendants, with only "chemical fogging" in place, which was insufficient to mask the odour.

Magistrate Purcell found the charge proven and without conviction, pursuant to section 67AC of the EP Act, ordered IT Environmental (Australia) Pty Ltd and Abigroup Contractors Pty Ltd:

1. to contribute $10,000 each to the Upper Maribyrnong Catchment Group Inc. to be used for the purpose of enhancing the environmental quality of the Wallan Creek by removing invasive species, mulching, noxious weed control, re-vegetation of riparian zone and biodiversity enhancement; and

2. to publish a notice (with specified size and wording) featuring both defendant's corporate logo in The Herald Sun and The Financial Review as well as on each defendant's website and in each defendant's 2002/2003 Annual Report.

The Defendants were ordered to each pay half of EPA's cost of $4,466.14.

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

\+ The Environment Protection (Enforcement and Penalties Act) 2000 came into effect on 9 July 2000. This amending Act had the effect of making many offences under the EP Act indictable and increasing the maximum penalties to many times their former level.

\# The offences were comitted prior to 9 July 2000 and there were summary in nature and attracted the former maximum penalty of $20,000

False or misleading referrals under the EPBC Act

Mees v Roads Corporation [2003] FCA 306

By Chris McGrath, Barrister-at-Law

In *Mees v Roads Corporation [2003]* FCA 306 (8 April 2003), Justice Gray of the Federal Court found that a referral by the Victorian Government of part of the proposed Scoresby Freeway near Melbourne to the Federal Environment Minister under s68 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("EPBC Act") contained information that was misleading. The Court found that the failure to state in the referral that it was likely that a further freeway link would need to be constructed across a particular area of environmentally sensitive land in the future as a consequence of the construction of the Scoreby Freeway was misleading in the context of the referral. The referral therefore potentially contravened s489 of the EPBC Act, which makes it a criminal offence to provide false or misleading information to the Minister to obtain an approval under the Act, although issues of Crown immunity and some evidentiary deficiencies arose in that regard.

The decision confirms the ability of conservationists to challenge false or misleading information contained in referrals using s475 of the EPBC Act, which is a remarkably powerful and novel avenue to attack deficiencies in environmental impact assessment procedures and in effect provides de-facto merits review for referrals under the Act. It highlights how the EPBC Act has dramatically improved the integrity of environmental impact assessment in Australia and provides a warning of the dangers of submitting false or misleading information under the Act. Justice Gray emphasised (at para 118):

> "the referral document must contain information that is truthful and complete, so as not to mislead. The purpose of the EPBC Act, to protect the environment, would be subverted if the Environment Minister were to be called upon to make determinations in relation to proposals without full information of the kinds required by the EPBC Act and the EPBC Regulations."

The essential lesson to be drawn from the decision for developers, environmental consultants and their legal advisors is that documents supplied to the Commonwealth in referrals under the EPBC Act should provide a full and frank description of the proposed action **and** associated actions while analysis of the likely impacts should be clear, accurate and supported by adequate sampling and investigation to justify any comments, conclusions or recommendations made.

The decision should also be seen in the context of a case that is pending in the Federal Court concerning the EPBC Act, *Queensland Conservation Council & Anor v Minister for the Environment and Heritage* (No Q203 of 2002), which challenges a decision of the Minister not to consider major associated downstream development in assessing the impacts of the Nathan Dam, which is proposed to be built on the Dawson River in central Queensland. If the conservationists succeed in the Nathan Dam Case then, together with the decision in *Mees v Roads Corporation*, environmental impact assessment under the EPBC Act will require a level of integrity and rigour that is unprecedented in Australia

1 The decision is available on the internet at www.austlii.edu.au

A system under strain: The Regulation of Gene Technology

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Introduction

The Gene Technology Act 2000 Cth (the Act) was intended to establish a nationally consistent scheme for enabling the use of gene technology[1]. However in its short life of approaching two years[2], five of the States have indicated they would not allow the commercial release of any new genetically modified (GM) food crops despite licences granted under the Act[3].

The Act establishes the independent position of Regulator[4]. It is the responsibility of the Regulator to determine applications for dealings with genetically modified organisms (GMOs)[5]. Dealings are defined widely under the Act to include:

(a) conduct experiments with the GMO;

(b) make, develop, produce or manufacture the GMO;

(c) breed the GMO;

(d) propagate the GMO;

(e) use the GMO in the course of manufacture of a thing that is not the GMO;

(f) grow, raise or culture the GMO;

(g) import the GMO;

and includes the possession, supply, use, transport or disposal of the GMO for the purposes of, or in the course of, a dealing mentioned in any of paragraphs (a) to (g)[6].

Thus the Regulator is responsible for the sanction or oversight of a large spectrum of dealings from experiments contained within a laboratory to the wholesale commercial release of GM crops. The final approval for the release of food, pharmaceutical drugs and agricultural and veterinary chemicals lies with other agencies after approval by the Regulator[7]. A hefty penalty applies to engaging in a dealing without an authorisation under the Act[8]. There are various authorisations available under the Act. These are:

- The dealing is included in the GMO Register[9];
- The dealing is an exempt dealing[10];
- The dealing is a notifiable low risk dealing[11];
- The dealing is licensed[12].

1 *Gene Technology Act 2000* s5.

2 The Act commenced on 22 June 2001.

3 Queensland is the only State which has not committed itself to a moratorium of any sort.

4 *Gene Technology Act 2000* s 26. The present incumbent is Dr Sue Meeks.

5 *Gene Technology Act 2000* s55.

6 *Gene Technology Act 2000* s10 "deal with".

7 Food Standards Australia and New Zealand, Therapeutic Goods Administration and Australian Pesticides and VeterinaryMedicines Authority.

8 *Gene Technology Act 2000* s 32 the penalty being 2,000 penalty units or five years imprisonment.

9 *Gene Technology Act 2000* s76 and following.

10 *Gene Technology Act 2000* s32(3).

11 *Gene Technology Act 2000* s74.

12 *Gene Technology Act 2000* Part 5.

GM Canola Applications

The authorisations which have attracted the most recent attention are licence applications for the commercial release of GM canola. The applications are by two global food science companies, Bayer CropScience Pty Ltd[13] and Monsanto Australia Ltd[14]. The Regulator, as she is required to do as part of the assessment process under the Act[15], has recently released the Risk Assessment and Risk Management Plan (RARMP) in connection with the Bayer application indicating an intention to issue a licence[16]. RARMPs are open to public submissions before the Regulator makes a final determination[17].

The use of GMOs generally, and these two canola applications in particular, have provoked much controversy. The Office of the Gene Technology Regulator lists the general arguments in relation to the use of GMOs. The arguments in favour for the rural sector being increased productivity and reduced use of chemicals, whereas arguments against include potential health risks, unknown long term consequences and risk to the integrity of non-genetically modified crops through the spread of GM crops[18]. It is this last aspect which has raised most concern amongst those opposed to the release of GM canola. There is the claim that because of the nature of the pollination of canola over a great distance, then non-GM crops will be contaminated and markets will be lost as a result of producers being unable to retain their non-GM status. There is judicial recognition of the unintentional spread of GM canola to non-GM crops in the Canadian case of *Monsanto Canada Inc v Schmeiser* 2001 FCT 258. Although Schmeiser grew non-GM canola, his crop was found to contain a proportion of Monsanto's patented Roundup Ready canola (a GM variety resistant to the Monasanto brand of glyphosate herbicide). Schmeiser was found liable for breaching Monsanto's patent although it was accepted that the plants had appeared on the Schmeiser farm through cross-pollination or spillage from passing trucks and not through deliberate planting. This decision was confirmed on appeal[19]. It is against this background that the Regulator has indicated that the Bayer licence is likely to be granted.

The object of the Act is:

> to protect the health and safety of people, and to protect the environment, by identifying risks posed by or as a result of gene technology, and by managing those risks through regulating certain dealings with GMOs[20].

It should be noted that implicit in this object is that the risks posed by gene technology can be managed rather than the technology be rejected. This is reinforced by the statement of the Minister at the time in the second reading speech that:

> This bill demonstrates that it is possible to effectively regulate risks associated with technology. For Australia to lose the benefits of this technology when we are able to manage those risks would be an irresponsible and insupportable step for government to take[21].

The conclusion has been drawn that this legislation favours the introduction of gene technology[22].

13 Office of Gene Technology Regulator, DIR021/2002 at http://ogtr.gov.au.ir/index.htm viewed 7 February 2003.

14 Office of Gene Technology Regulator, DIR020/2002 at http://ogtr.gov.au.ir/index.htm viewed 7 February 2003.

15 *Gene Technology Act 2000* s50.

16 Office of the Gene Technology Regulator, *Risk Assessment and Risk Management Plan, Commercial Release of Genetically Modified Canola (DIR 021/2002) Consultation Version*, (April 2003) p10.

17 *Gene Technology Act 2000* s52.

18 Office of the Gene Technology Regulator, *General Information*, at www.health.gov.au/ogtr/about/index.htm viewed 7 February 2003.

19 *Schmeiser v Monsanto Canada Inc* 2002 FCA 309 at http://decisions.fct-cf.gc.ca/fct/2002/2002fca309.html viewed 25 November 2002.

20 *Gene Technology Act 2000* s3.

21 Dr M Wooldridge, Minister for Health and Aged Care, *Hansard: House of Representatives*, 22 June 2000, p18105.

22 M Hain, C Cocklin & D Gibbs, "Regulating Biosciences: The Gene Technology Act 2000" (2002) 19 EPLJ 179.

Bearing in mind this background, it is necessary to look at the task of the Regulator when assessing such applications as the canola application. Her assessment is rightfully guided by the objects of the Act, thus she is assessing the canola applications against the risk to human health and safety and the risk to the environment[23]. In the Bayer application, the RARMP concludes that:

> the risks posed by the proposed commercial release of these GM canola lines to human health, safety and the environment are no greater than those posed by conventional (non-GM) canola[24].

Thus the assessment of risk is in comparison with the non-GM canola. There is consideration given in the RARMP of the likely effect of the spread of GM canola to non-GM varieties:

> the likelihood of some gene transfer from the GM canola to other cultivated canola is high, but the overall frequency of out-crossing will be very low. If gene transfer to other canola did occur, it would not pose any risks other than those posed by non-GM canola or require any additional management[25].

Thus there is recognition that there will be "some gene transfer" to non-GM canola. In the course of the risk assessment the Regulator acknowledges that current research indicates that there is the possibility of cross pollination of canola up to 2.6 kilometres[26] but citing other research, the independence of which has recently been called into question, the Regulator indicates that the rates are quite low, less that 0.2 per cent[27]. The Regulator gives no consideration to the economic or market impact of this risk. The reason for this is that the Regulator has interpreted the Act as excluding those considerations:

> Evaluation of trade, marketing and cost–benefit issues have been intentionally excluded from the *Gene Technology Act 2000* assessment process[28].

Despite this conclusion, the Regulator's own *Risk Analysis Framework for Licence Applications* defines 'Risk management" as incorporating "scientific, technological, social and economic information and community values"[29] (emphasis added). At least one Government draughtsperson believes that the issue of buffer zones is an appropriate matter for conditioning by the Regulator:

Conditions can be placed on the dealings where the Regulator believes these are necessary to protect the health and safety of people and the environment. For example, conditions may be placed on where and how GM crops can be grown, how close they can be grown to non GM crops…..[30]

23 *Gene Technology Act 2000* s3.

24 Office of the Gene Technology Regulator, *Risk Assessment and Risk Management Plan, Commercial Release of Genetically Modified Canola (DIR 021/2002) Consultation Version,* (April 2003) p9.

25 Office of the Gene Technology Regulator, n24, p9.

26 Office of the Gene Technology Regulator, n24, p101.

27 Office of the Gene Technology Regulator, n24, p100 citing: Rieger, M.A., Lamond, M., Preston, C., Powles, S.B., Roush, R. "Pollen-mediated movement of herbicide resistance between commercial canola fields" (2002) 296 *Science* 2386; SBS Television *Insight: Coming Ready or Not*, 15 May 2003, one of the authors, Dr C Preston admitted the research was funded by Monsanto and Bayer.

28 Office of the Gene Technology Regulator, n24, p8.

29 Office of the Gene Technology Regulator, *Risk Analysis Framework for Licence Applications to the Gene Technology Regulator,* (January 2002), Appendix 1, p70.

30 Therapeutic Goods Administration, *Draft Regulatory Impact Statement: Policy Principle to Recognise GM/Non-GM Designated Areas* (2 May 2003) at http://www.health.gov.au/tga/gene/gtrdap_a.htm viewed 19 May 2003.

Nevertheless, the conclusion in the RARMP is that the issue of the degree of cross-pollination between GM and non-GM canola does not pose a risk to human health or the environment and so the crucial issue of buffer zones between these crops is not a matter for a specific licence conditions. The Regulator leaves the matter of buffer zones to industry standard which is currently 5 metres between crops[31].

The Definition of environment under the Act

Thus the assessment by the Gene Technology Regulator is confined to those matters contained in the objects, being human health and safety and the environment, while the contamination of non-GM crops is classed as an economic or marketing consideration and beyond the scope of the *Gene Technology Act 2000* assessment. It is submitted that in not addressing this aspect more specifically in the proposed licence or conditions, the objects of the Act have not been fully complied with.

As previously indicated, the objects refer to protection of the environment. The environment is defined as including:

(a) ecosystems and their constituent parts; and

(b) natural and physical resources; and

(c) the qualities and characteristics of locations, places and areas[32].

There is no mention in this definition of social, economic and cultural matters as there is in the *Environment Protection and Biodiversity Conservation Act 1999*[33]. While this confirms the Regulator's assertion that economic factors are excluded from consideration, and that is overtly the case, the argument is that by failing to set any conditions in relation to buffer zones the RARMP fails to consider the effect on the environment.

The argument is that the environment includes non-GM crops which might be grown in adjoining fields or kilometres away from a GM crop. These non-GM crops are part of the ecosystem which would be normally found in an agricultural area and such crops should be protected under a RARMP for GM canola. Thus a prescription of buffer should be made to protect this aspect of the environment. Furthermore, in considering the width of such a buffer zone, regard should be had to the industry accepted standards for non-GM and organic crops. Thus the Regulator's assessment of risk to non-GM crops should be based on accepted minimum levels of contamination to those crops, if any is allowed, not on an assessment of being "low to negligible"[34] without regard to any standards but simply a value judgement on the size of the predicted outcrossing.

A second reason why buffer zones should be specifically addressed relates to the reference in the definition of environment to "the qualities and characteristics of locations, places and areas."[35] The environment which the Regulator should consider protecting are the areas where non-GM crops may wish to be grown. The considerations relating to the issue of a licence and, if a licence is to be issued, the conditions of that licence, should be directed toward this aspect of the environment.

The failure of the RARMP to view the issue of non-GM crops and areas where they are grown as *part of the environment and take those into account* is a failure to carry out the object of the Act.

31 Gene Technology Grains Committee, *Canola Industry Stewardship Protocols*, (20 December 2002), p10.

32 *Gene Technology Act 2000* s10 "environment".

33 *Environment and Biodiversity Conservation Act 1999* s528 definition of "environment".

34 Office of the Gene Technology Regulator, n24, p24.

35 *Gene Technology Act 2000*, s10 "environment".

State Moratoriums and the Ministerial Council Policy Principle

As stated previously five of the six States have indicated that they will not allow the commercial release of canola. Only Tasmania has actually given statutory force to its moratorium through proclamation under the *Plant Quarantine Act 1997* (Tas) and there is a proposal to introduce further legislation on the issue. South Australia has a *Gene Technology (Temporary Prohibition) Bill 2002* which is in abeyance although the Government, with the acquiescence of the crops science companies, does not intend to sanction the commercial release of GMOs until a parliamentary select committee on the topic reports. The Western Australian government promised a five year moratorium and has a Bill before Parliament. The bill does not specify any time for a moratorium but gives the Minister responsible power to issue an order designating an area free of GM crops[36]. Victoria has just announced that with the agreement of the gene technology companies there would be no plantings of GM canola at least until the 2004 season[37]. New South Wales has introduced a *Gene Technology (GM Crop Moratorium) Bill 2003* into Parliament which allows the Minister to publish a moratorium order prohibiting the cultivation GM plants[38].

The constitutionality of any legislation purporting to implement these proposed moratoriums is the subject of some conjecture. The Gene Technology Act states as its sources of power the corporations power and the trade and commerce power[39]. Despite this quite broad basis for the legislative power of the Commonwealth, the Act is a co-operative arrangement as set out in the Commonwealth, State and Territory intergovernmental Gene Technology Agreement which commenced in September 2001. Under the Agreement each of the States and Territories were to pass co-operative legislation to implement the scheme[40]. Notwithstanding that some States have not yet passed this legislation, it would seem to be in only a narrow range of cases that the Commonwealth legislation would not be effective[41]. Thus because of the seemingly comprehensive nature of the Commonwealth legislation, any State or territory legislation purporting to impose a moratorium may be found to be invalid pursuant to section 109 of the Constitution.

The Gene Technology Act provides a mechanism whereby the Gene Technology Ministerial Council, established by the Gene Technology Agreement, may issue Policy Principles under the Act recognising areas designated under State law for marketing purposes as non-GM or GM[42]. Thus while that Act excludes economic or marketing issues from consideration by the Regulator, it countenances that those issues be dealt with by the States, if they see fit. The effect of such a policy principle is that the Regulator cannot issue a licence that is inconsistent with a Policy Principle[43].

The Ministerial Council has issued a draft Policy Principle, which at the time of writing was open for consultation. This proposed Principle recognises an area under a State law:

> ….. that is designated for the purpose of preserving the identity of GM crops, non-GM crops or both GM crops and non-GM crops, for marketing purposes….[44].

Although the Policy Principle talks of "areas" it should be noted that the various legislative instruments under consideration or enacted by the States envisage that the "areas" would be the whole of the State[45].

36 *Genetically Modified Crops Free Areas Bill 2003* s4.

37 Bob Cameron, Minister for Agriculture, *Media Release: No Commercial GM Canola This Year,* 8 May 2003.

38 *Gene Technology (GM Crop Moratorium) Bill* 2003 (NSW), s6.

39 *Gene Technology Act 2000* s13 and Commonwealth Constitution s51(i) & (xx).

40 Commonwealth, State and Territory intergovernmental Gene Technology Agreement, section 9.

41 Unincorporated entities not involved in interstate trade, for example.

42 *Gene Technology Act 2000* s21(1).

43 *Gene Technology Act 2000* s57(1).

44 Draft *Gene Technology (Recognition of Designated Areas) Principle 2003*, section 5, available at http://www.health.gov.au/tga/gene/gtrdap.htm.

While this Policy Principle will clarify the constitutional issue, it makes the assessment system of the Gene Technology Regulator established under the *Gene Technology Act 2000* irrelevant for the time being. The return of authority to the States and Territories to make a determination to allow the commercial release of GM crops seriously undermines the national system.

However, there are signs that the anti-GM stance of some of the States may only be a temporary measure. In New South Wales, the proposed three year ban has become a proposal for "moratorium orders" with no prescribed minimum or maximum time limit under the Bill which itself is stated to expire in 2006[46]. The Western Australian proposal of a five year moratorium has been dealt with in a similar fashion with a Ministerial designation also available under that State's proposed legislation[47]. The Proclamation under the Tasmania's *Plant Quarantine Act 1997* does not specify a time but a five year ban has been the stated intention. The public statements of the Victorian Government clearly indicate that its ban is only until the end of the year. The indications are that at least some States may be reserving their options as far as the commercial release of GM crops.

Conclusion

The area of assessment and licensing of gene technology under the *Gene Technology Act 2000* was intended to be efficient, effective, seamless and consistent[48]. However, the controversial issue of the licensing of GM canola for commercial release has highlighted shortcomings in the system and its implementation.

The omission of economic or marketing considerations from the legislation fails to take account of the highly contentious issue of segregation of GM and non-GM crops and the related issue of public acceptance of GM foods. This issue is a highly complex and uncertain matter. Excluding these matters from the Act may have simplified the task of the gene technology Regulator by confining the assessment of the effect of gene technology to purely the scientific issues of protection of human health and safety and the environment, but this has not enhanced the credibility of the assessment process in the eyes of a significant section of the community.

A wider reading of the term "environment" in the objects of the Act could have seen the Regulator address the issue of buffer zones in greater detail. An assessment of the width of the zones necessary to protect the integrity of non-GM crops as part of the environment should have been undertaken. This would be done, not on the basis of small percentages of outcrossing, but against the manner in which the non-GM market assesses contamination of non-GM crops.

The failure of the Act to assess these market issues has meant the disintegration for the time being of the nationally consistent scheme. The proposed Policy Principle will entrench the ability of the States and territories to maintain unilateral approaches to the utilisation of GM crops.

Besides the strains in the legislative scheme for gene technology which have exhibited themselves as a result of the canola applications, there are other inadequacies in the scheme which have not been canvassed here. Issues such as limited appeal rights for third parties, lack of emphasis on the precautionary principle in favour of management of risks and some issues about the administration of the Act also cause the system to be under strain. The canola applications have focussed attention on the Act. If the nationally consistent scheme enabling the use of gene technology is to regain some credibility a review of the Act should be commenced before the statutory date of June 2005[49].

45 *Gene Technology (GM Crop Moratorium) Bill 2003* (NSW), s6; *Genetically Modified Crops Free Areas Bill 2003* (WA) s4; Revocation and Declaration of Protected Area 2003, *Plant Quarantine Act 1997* (Tas), Schedule 1; *Gene Technology Temporary Prohibitation) Bill 2002* (SA) s4.

46 *Gene Technology (GM Crop Moratorium) Bill 2003* (NSW), s6 & s42.

47 *Genetically Modified Crops Free Areas Bill 2003 s4.*

48 Commonwealth, State and Territory intergovernmental Gene Technology Agreement, Recital B.

49 *Gene Technology Act 2000* s194

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