conference notice

National Environmental Law Association Conferences

NELA National Conference 2003

Thursday 23rd & Friday 24th October 2003

Broken Hill - NSW

This year, NELA will hold its 22nd Annual Conference within the Broken Hill Outback Summit being conducted by the Environment Institute of Australia and New Zealand and the newly formed Regional Cultural Alliance.

The NELA Conference will maintain its traditional two day format but it will be held within the larger Summit programme. NELA members may register for the NELA program only or they may register for additional program events by way of the 'add-on' provision included in the registration form.

A description of the conference events and venue details are available at the NELA website: http://www.nela.org.au/conference/

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

National Environmental Law Review

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

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.

The current National Executive includes:

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NATIONAL ENVIRONMENTAL LAW ASSOCIATION

membership information

In endeavouring to meet its objective of promoting understanding of the role of environmental law, NELA, provides many services to its members including:

> An annual conference

> Regular seminars and meetings on topical legal issues providing members with opportunities to listen to, meet and talk with experts from industry, business and academia

> The opportunity to become an active member of their state division and meet like minded people

> The opportunity to stay informed and up to date on recent legal developments and forthcoming events through our regular Bulletin, and state division networks

> Four issues per year of the new-look *National Environmental Law Review*, which contains recent developments on a state-by-state basis, case notes and articles

> Discounts on state division organised seminars and workshops as well as the NELA annual conference.

Membership is open to interested parties and costs $175.00 (incl GST) per financial year. Student memberships are available for $30.00 (incl GST) per financial year.

contact us

NELA is supported by a Secretariat located in Canberra. All enquiries of an administrative nature (eg memberships, subscriptions, etc) should be directed to:

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Editorial

Dear Readers,

I would like to start my first issue as editor of *National Environmental Law Review* by thanking my predecessor Rachel Baird for her fine work in upgrading the style and content of the journal, and her success in establishing a very efficient production team of publisher and sub-editors.

As for the future, you may be aware that there have been recent deliberations by the National Executive on the role of NELA and the future priorities of the journal. There is broad agreement that NELA should strive to be a leading provider of information and debate on environmental law, with an increasing focus on our website and electronic transmissions. The journal will not diminish in importance with these changes, as our website will carry full text of recent editions of the journal limited to members-only access. We are also negotiating with a leading provider of full text research databases to have earlier issues of the journal included in their database, which will enhance the accessibility of the journal to non-members.

In this edition there is the usual comprehensive update on developments from most Australian jurisdictions. Our articles offer a very wide spectrum of perspectives on current environmental law and practice. First we feature the text of a very informative speech on the development of environmental law in New South Wales by Justice Peter McClellan. There is a preview of the first three years of operation of the EPBC Act by a legal practitioner, Aletta Nugent, plus a commentary by Lyndall Kennedy from the EPBC Unit on the Heritage amendments recently passed by the Senate. Finally there is a personal perspective from a front-line environmental officer, Jennie Slatter on a day in the life of a (Victorian) EPA officer.

I have included one new section in the journal, which I hope you will find useful. At the back page of the journal under 'Literature Review - Recent Journal Articles' you will find the list of contents from several leading Australian environmental law journals to keep you appraised of the other recent publications in this area.

Positions vacant: South Australian and National sub-editors

We naturally have some turnover in our team of sub-editors from time to time and I would presently like to hear from any environmental law enthusiasts who are interested in providing contributions from the South Australian and National/Commonwealth jurisdictions.

Best wishes

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National Editor

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NELR Editors

NATIONAL EDITOR: Wayne Gumley

Senior Lecturer, Monash University wayne.gumley@buseco.monash.edu.au

Wayne has completed a BSc and LLM at Monash University and was first employed as a solicitor in the town of Mansfield close to the mountains of northeast Victoria. He later moved back to Melbourne to join the Australian Government Solicitor's Office, where he carried out a wide range of litigation and advising on behalf of the Commonwealth government and its various agencies, particularly on administrative law and revenue law. In 1992 Wayne joined the Faculty of Business and Economics at Monash as a lecturer in taxation law, and has recently extended his teaching to business law and environmental law. Wayne's research interests centre on emerging regulatory frameworks to assist sustainable development, particularly ecological tax reform and the role of market-based instruments. He is currently on the executive of the Victorian Division of NELA

NEW SOUTH WALES EDITOR: Dr Nicholas Brunton

Partner, Henry Davis York nicholas_brunton@hdy.com.au

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 blmb@minters.com.au

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 Jennifer.Slatter@epa.vic.gov.au

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

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

INTERNATIONAL, ACT EDITOR: David Jones

Associate, Baker & McKenzie Solicitors,
PhD Candidate, University of Wollongong
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David Jones has been involved with NELA since 1999 and took on these editorial roles at the beginning of 2003. David holds degrees in Law (Hons) and Environmental Science, a Graduate Certificate of Business and is currently completing his PhD with the University of Wollongong. His thesis examines developing systems for climate change regulation, with a particular focus on Australian opportunities for integrated environmental management.

David has worked in private practice for over 5 years, specialising in environmental, local government and planning law. He is a guest lecturer with the University of Wollongong, currently presenting the environmental and government tendering electives of the University's Practical Legal Training 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.

For those authors seeking more formal recognition for their work, NELR has decided to publish fully refereed articles in future issues. Full details of our refereeing policy can be obtained from the Editor, and will also be published in the next issue.

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

Continuing the previous edition's updates on climate change mitigation actions around the world, the following are some of the key developments of the last few months:

- The European Union has adopted emissions trading legislation that will operate throughout the EU from January 2005. The market-based system will also bind 10 new countries who are to join the 15 member EU in May 2004. The system will start with a 2 year pilot phase and is expected to apply to around 46% of all the source of carbon dioxide emissions in the region by 2010.

- Further to last edition's comments on the potential for climate change law suits over coming years, the Climate Change Justice Program (CJP) launched in July 2003, as an alliance of more than 70 environmental organisations, academics, lawyers and various individuals in 29 separate countries. The CJP aims to support and develop legal actions around the world, that enforce existing laws to prevent actions that contribute to or fail to appropriately mitigate the impacts of climate change.

- The Executive Board of the Clean Development Mechanism (CDM) of the Kyoto Protocol, issued its first approval for monitoring methodologies that can be used in CDM projects. CDM is essentially structured to give developed countries credit under their Kyoto Protocol obligations, for undertaking climate change mitigation activities in developing countries (who otherwise fall outside the binding provisions of the Protocol). The new methodologies provide standard ways of measuring the actual reduction in emissions that these projects result in

Tuvalu and Kiribati become parties to the Law of the Sea Convention

Two Pacific island states have recently become parties to the United Nations Law of the Sea Convention (LOSC). Tuvalu ratified LOSC on 9 December 2002, followed by the Republic of Kiribati's accession to it on 24 February 2003. The only remaining countries or territories in the region that are not formally bound by LOSC are now Niue (a non-UN member country in association with New Zealand) and, by virtue of the United States not having ratified or signed the Convention, the US territories of American Samoa, Guam, and the Northern Marianas. Although a number of countries such as the United States, Canada, Denmark, Peru and Thailand are not formally bound by LOSC, many of the Convention's fundamental provisions also exist as customary international law, including its extension of limited coastal state jurisdiction to a maximum of 200 nautical miles. These provisions confer sovereign rights over fisheries within the Exclusive Economic Zone (EEZ) and exclusive rights to explore and exploit mineral and other non-living sea-bed resources and sedentary species on the continental shelf beneath the EEZ.

Both Tuvalu and Kiribati formally declared their participation in the Agreement relating to the implementation of Part XI of LOSC at the time they joined the Convention, although neither country has signed or ratified the 1995 Straddling Stocks Agreement (an agreement for the implementation of the provisions of the Convention relating to the conservation and management of straddling fish stocks and highly migratory fish stocks).

Upon acceding to LOSC, Kiribati, which has an area of sea jurisdiction nearly 5000 times that of its land mass, made a declaration respecting the method utilised in Part IV of Article 47 to delimit baselines around archipelagos that determine the extent of archipelagic waters and thus the extent of the 12 nautical mile territorial sea and the EEZ. Kiribati is unique in that its area of ocean jurisdiction, which spans the

equivalent of the width of Australia, has no connections between the three island groups (Gilbert Islands, Phoenix Islands, and Line Islands). The method used for determining archipelagic baselines under LOSC effectively divides Kiribati into three non-conterminous sections. Kiribati would prefer a change in the formula used in calculating baselines, allowing the nation to draw a single international boundary around itself.

The ratification and accession to LOSC by Tuvalu and Kiribati places further pressure on Niue to accept the terms of the Convention. It also makes the position of the United States more incongruous, particularly in light of its active engagement in the region and its early ratification of the Fish Stocks Agreement. It may also indicate Kiribati's willingness to join Tuvalu and other countries that have signed the landmark Western and Central Pacific Tuna Convention, which is destined to alter significantly the conduct of distant water fishing by nations such as Taiwan, Korea and Japan.

(This item contributed by Warwick Gullet and Michael Pretes. Contact details as follows:)

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Michael Pretes
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COAG Agrees to a National Water Initiative

On 29 August 2003, at its meeting in Canberra, the Council of Australian Governments (COAG) announced its agreement to develop a National Water Initiative—a set of measures to reform the use of water in Australia.

COAG agreed that there is a pressing need to refresh its 1994 water reform agenda in order to increase the productivity and efficiency of water use, sustain rural and urban communities, and to ensure the health of river and groundwater systems.

The initiative aims to:

- establish a nationally-compatible framework of water access entitlements and improve the security of water access
- ensure ecosystem health by implementing regimes to protect environmental assets at a whole-of-basin, aquifer or catchment scale
- ensure water is put to best use by encouraging the expansion of water markets and trading
- encourage water conservation in the cities, including better use of stormwater and recycled water.

The details of the initiative are to be negotiated over the coming months and set down in an intergovernmental agreement, to be considered at the first COAG meeting in 2004.

In recognition of the particular pressures facing the Murray–Darling Basin, the member jurisdictions of the Basin also agreed to contribute $500 million over five years to address water over-allocation in the Basin. The contributions are: Commonwealth ($200 million); New South Wales ($115); Victoria ($115); South Australia ($65 million) and the Australian Capital Territory ($5 million).

Environment Ministers Agree to Industry Code of Practice for the Management of Plastic Bags

On 1 August 2003, Australia's Environment Ministers, meeting as the Environment Protection and Heritage Council (EPHC), agreed to accept a revised Code of Practice developed by the Australian Retailers Association (ARA) for the management of plastic bags.

The Code:

- supports an EPHC target of a 75 per cent reduction in bag litter by the end of 2005
- sets a target of 50 per cent reduction in plastic bags by December 2005. with a 25 per cent reduction achieved by the end of 2004
- sets a recycling target for lightweight high density polyethylene (HDPE) bags of 15 per cent (via in-store return) or 30 per cent of available bags through combined in-store and kerbside recycling by the end of 2005 (effectively a commitment to recycle all available bags)
- commits the retailers to work with the plastics and recycling industries to phase out HDPE bags that do not contain recycled content as soon as practicable
- commits to a national community behavioural change campaign
- will strive for a 90 per cent participation rate of the ARA supermarket and chain members in the Code and encourage smaller retailers to adopt the Code's initiatives.

The Ministers' agreement to the Code was on condition that it includes the following:

- baseline data on current levels of use and recycling will be provided by all signatories to the Code
- a transparent auditing standard and process will be put in place

- regular reports (e.g. six-monthly) on implementation of the Code will be made to EPHC Ministers and will be publicly available
- retailers would provide a transparent, fair market choice between lightweight single-use carry bags and multiple-use bags
- the ARA would enlist the signatures of as many small independent retailers as possible.

The Ministers also agreed:

- to support the phasing out of lightweight single-use carry bags containing HDPE within five years and to ask the ARA to enter into negotiations during the life of the Code to specify actions beyond 2005 to achieve this objective
- to seek legal advice on how retailers may provide information on the true costs of single- and multiple-use bags, to allow consumers to make an informed choice
- the ARA will be required to provide a revised version of the Code incorporating the matters specified by the Ministers prior to the EPHC meeting in October 2003
- if the Code as amended is not implemented and/or targets not reached, Ministers will again look at implementing mandatory measures, and work on the development of these measures will continue.

A National Approach to the Management of Chemicals in Australia

In May 2002 the EPHC established a high level National Chemicals Taskforce to scope issues with, and the need for, a national approach to ecologically sustainable chemical management and regulation in Australia. The taskforce had representation from the health, safety and primary industries ministerial councils and environment protection agencies (EPAs).

The taskforce report concluded that, while Australia has made significant progress towards ecologically sustainable chemicals management, more work is needed. The EPHC considered the taskforce report in May 2003 and established a Working Group, chaired by the NSW EPA, to develop a proposal for a national environmental risk management framework for chemicals. The Working Group will also investigate options to address other priority areas identified in the taskforce report. In doing so, the Working Group will consult with relevant ministerial councils, government agencies, industry and the community.

The taskforce report, *Scoping Paper—Towards Ecologically Sustainable Management of Chemicals in Australia,* is available from the National Environment Protection Council website at www.nepc.gov.au. Also available from the website is the supporting document, *Supporting Information—Towards Ecologically Sustainable Management of Chemicals in Australia.*

Action to Protect Australia's Biodiversity from Climate Change

On 26 August 2003 the Minister for the Environment and Heritage, Dr David Kemp, announced that the Commonwealth, State and Territory Governments are developing a National Biodiversity and Climate Change Action Plan. This will begin with an Australia-wide consultation process, beginning in September 2003, with an intention to submit the draft plan to the Natural Resource Management Ministerial Council in April 2004.

Dr Kemp also released *Climate Change Impacts on Biodiversity in Australia*—an assessment by the Biological Diversity Advisory Committee and the CSIRO of how Australia's changing climate is affecting Australian reefs, forests, grasslands, rivers and animals and plants. The report identified a range of adverse effects from climate change on Australia's biodiversity.

Heritage Legislation Passed by the Senate

(See also National Environmental Law Review No 3/2002, 6-7, and the article by Lyndall Kennedy, in this issue.)

The Government's heritage legislation package was passed, with amendments, by the Senate on 21 August 2003. The package is now expected to become law once the amended bills have been passed by the House of Representatives.

The bills are:

- Australian Heritage Council Bill 2002
- Australian Heritage Council (Consequential and Transitional Provisions) Bill 2002
- Environment and Heritage Legislation Bill (No 1) 2002.

The bills:

- establish the Australian Heritage Council, as the successor to the Australian Heritage Commission, to provide independent, expert advice to the Minister on the identification, conservation and protection of places on the proposed National Heritage List and Commonwealth Heritage List
- establish the National Heritage List, comprising places of national heritage significance, potentially including overseas sites such as Anzac Cove and the Kokoda Trail, but not including places of purely State or local significance
- establish the Commonwealth Heritage List, comprising sites of heritage significance on Commonwealth land
- retain the Register of the National Estate, in a modified form
- amend the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act) to identify places on the National Heritage List as matters of national environmental significance, thereby making them subject to the environmental assessment and approval processes under the Act
- impose requirements on Commonwealth agencies in relation to places on the Commonwealth Heritage List.

Passage of the bills means that funding will now flow under the *Distinctively Australian* program announced in the 2003–2004 Budget. This new program will provide $52.6 million (including $13.3 million of new funds) for the protection of places of national heritage significance.

The bills passed with the support of the Australian Democrats and independent Senators. Opposition by the Australian Labor Party and the Australian Greens centred on concerns about restricting the Commonwealth's heritage protection role to places on the National Heritage List and the Commonwealth Heritage List; perceived downgrading of the Australian Heritage Council to a body with advisory powers only; and protection for places on the Register of the National Estate.

Other EPBC Act Developments

Review of EPBC Act Administrative Guidelines on Significance

Environment Australia (EA) has begun a review of the *EPBC Act Administrative Guidelines on Significance* and supplementary guidelines and has sought public comment on the guidelines.

The guidelines were published in July 2000. Their purpose is to assist persons in determining whether an action should be referred to the Environment Minister for a decision on whether approval is required under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

The supplementary guidelines being reviewed are:

- *Supplement for the Nationally Endangered Bluegrass Ecological Community* (August 2001)
- *Guidelines on the Application of the EPBC Act to Interactions between Offshore Seismic Operations and Large Cetaceans* (October 2001)
- *Supplement for the Grey-headed Flying Fox* (October 2002)
- *Supplement for the Spectacled Flying Fox* (October 2002).

The guidelines are available via the EA web site at www.ea.gov.au. Comments are sought by 30 September 2003.

Declaration of Key Threatening Process—Action to Reduce Impact of Marine Debris

On 13 August 2003 the Federal Minister for the Environment and Heritage, Dr David Kemp, announced that he had taken action under the EPBC Act to boost protection for Australia's marine life and to combat the effects of harmful marine debris.

'Injury and fatality to vertebrate marine life caused by ingestion of, or entanglement in, harmful marine debris' has been listed as a key threatening process under the Act. This includes, for example, materials such as plastic bags, abandoned fishing gear and solid waste illegally dumped by ships at sea. The Threatened Species Scientific Committee recommended the listing.

The Minister has also commissioned a threat abatement plan for the process. This will be developed in consultation with stakeholders such as local councils, State Governments, industry and environmental groups and a threat abatement team will be formed. The plan will build on existing activities to mitigate the effects of marine debris and will:

- review existing policies, codes of practice, conventions and activities to determine their effectiveness
- coordinate abatement strategies identified in separate marine animal recovery plans such as the Marine Turtle Recovery Plan and the Grey Nurse Recovery Plan
- examine the effectiveness of joint agreements with other nations (and the need for new ones) to address the issues of marine debris and its impact on marine wildlife.

The Minister said that, while marine debris is a hazard for many sea creatures, it is a particular danger in Australian waters for at least twenty species already listed as threatened or endangered. They include Green Turtles, Loggerhead Turtles, Blue Whales, Humpback Whales, albatrosses and petrels.

Minister for Environment and Heritage v Greentree

See Case Notes below.

Murray–Darling Basin Amendment Legislation Enacted

The Murray–Darling Basin Amendment Bill 2002 has passed both houses and received Assent on 26 June 2003. The legislation amends the *Murray–Darling Basin Act 1993* so as to approve and give effect to the Murray–Darling Basin Amending Agreement between the Commonwealth, New South Wales, Victoria and South Australia. The Agreement makes new arrangements for the sharing of water in the River Murray catchment above Hume Dam arising from the corporatisation of the Snowy Mountains Hydro-Electric Authority. The legislation also provides for the management of environmental flows in the River Murray.

Maritime Pollution Legislation Enacted

The Maritime Legislation Amendment (Prevention of Pollution from Ships) Bill 2003 has passed both houses and received Assent on 26 June 2003. The legislation 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. The legislation ensures that the level of environmental protection from marine sewage in Australia is consistent with internationally adopted standards.

Product Stewardship (Oil) Legislation Amendments Enacted

The Product Stewardship (Oil) Legislation Amendment Bill (No 1) 2003 has passed both houses and received Assent on 14 August 2003. The legislation amends the *Product Stewardship (Oil) Act 2000* to exempt from the Product Stewardship (Oil) Levy certain oil products that cannot be recycled and pose only a low risk to the environment. The exemptions will take the form of a benefit payment which is equivalent to the Product Stewardship (Oil) Levy. The legislation also amends the *Product Grants and Administration Act 2000* to enable the new category claimants to register for benefits.

Senate Inquiry into Fuel Quality Standards Amendment Bill

The Senate has referred the Fuel Quality Standards Amendment Bill 2003 to the Senate Environment, Communications, Information Technology and the Arts legislation Committee for inquiry and report by 28 October 2003. The bill amends the *Fuel Quality Standards Act 2000* to establish a national labelling regime for fuels at point of sale, and make certain existing offences under the Act strict liability offences.

House of Representatives Inquiry into Sustainable Cities

At the request of the Minister for the Environment and Heritage, Dr David Kemp, the House of Representatives Committee on Environment and Heritage is to inquire into the development of sustainable cities.

Titled *Sustainable Cities 2025*, the inquiry will inquire into and report on issues and policies related to the development of sustainable cities to the year 2025, particularly:

- the environmental and social impacts of sprawling urban development
- the major determinants of urban settlement patterns and desirable patterns of development for the growth of Australian cities
- a 'blueprint' for ecologically sustainable patterns of settlement, with particular reference to eco-efficiency and equity in the provision of services and infrastructure
- measures to reduce the environment, social and economic costs of continuing urban expansion
- mechanisms for the Commonwealth to bring about urban development reform and promote ecologically sustainable patterns of settlement.

The committee has invited submissions by 31 October 2003 but will accept late submissions. It has prepared a short discussion paper that identifies some of the issues that the committee will be addressing during the inquiry. This is available via the committee website at www.aph.gov.au/house/committee/environ/cities/index.htm.

The committee discussion paper comments that the inquiry is timely given that 2004 is the Year of the Built Environment and there will be a national focus on the spaces we live in and how we improve the liveability of our cities and settlements.

Oceans Policy: Principles and Processes

The National Oceans Office has released *Oceans Policy: Principles and Processes*—a document which sets out the Australian Government's approach to making the policy framework in *Australia's Oceans Policy* more operational. Released in December 1998, *Australia's Oceans Policy* is the basis for the Australian Government's approach to achieving ecologically sustainable development in Australia's marine jurisdiction.

An independent review in 2002 of the implementation of *Australia's Oceans Policy* found that the policy goals and principles in the document continue to provide a benchmark, and outlined a number of ways to improve implementation. The major mechanisms for achieving operational improvement described in *Oceans Policy: Principles and Processes* are:

- Integrated Oceans Process
- Oceans Guidelines
- Regional Marine Planning
- Cross-sectoral Institutional Arrangements
- Assessing Managerial Performance.

Oceans Policy: Principles and Processes is available via the Oceans Office at www.oceans.gov.au. Public comments on the document are requested by 17 October 2003.

Draft South-east Region Marine Plan Released

On 18 July 2003 the Minister for the Environment and Heritage, Dr David Kemp, released the *Draft South-east Regional Marine Plan*, which sets out proposed management arrangements for the South-east marine region. This region encompasses some two million square kilometres Australia's ocean territory surrounding Victoria and Tasmania, the waters around Macquarie Island to the south, and the ocean off the New South Wales far south coast and eastern South Australia.

The draft plan is available via the Oceans Office website at www.oceans.gov.au. Public comments on the draft plan are requested by 17 October 2003.

Change of title for Environment Australia, and other departments

The Australian Government decided in June 2003 that common branding would apply to all Australian Government departments and agencies. As a consequence, the federal environment department will no longer be known as 'Environment Australia'. It will be known instead as 'the Australian Government Department of the Environment and Heritage' or 'the Department of the Environment and Heritage'. The policy also requires that references to 'Commonwealth' or 'Federal' should now be to 'Australian Government'.

Repeal of the Unhealthy Building Land Act 1990 (NSW)

The legislative regime for contaminated land in NSW has been simplified by the repeal of the *Unhealthy Building Land Act 1990* (UBL Act). This Act was the remnant of old public health legislation dating back to the turn of the century when disease was thought to be a result of poor location and sanitary conditions. The old legislation sought to protect public health by regulating "low-lying" land or land that could be contaminated by nightsoil. Similarly, the UBL Act prohibited building on "unhealthy building land" (ie. certain land identified as low-lying, flood-prone or potentially contaminated) and provided for the issuing of certificates as to whether land has been declared to be unhealthy building land.

As readers will know, the *Contaminated Land Management Act* 1997 and *State Environmental Planning Policy No. 55 Remediation of Land* ("SEPP 55") comprehensively regulate the management of contaminated land. Thus, sensibly, the Government repealed the UBL Act on 28 April 2003.

Regulation of low-lying land

Development on "low-lying" land is now controlled under the Environmental Planning and Assessment Act 1979 (EP&A Act). Pursuant to a policy developed by the NSW EPA, councils are now required to develop and implement "floodplain risk management plans" to manage development on low-lying land and record this information and provide it to the public.

We understand that a number of councils have adopted floodplain risk management plans, and development controls have been incorporated into either policy documents or environmental planning instruments. For those councils who have not developed such plans, councils are required to identify land as low-lying in any planning certificate issued under section 149 of the EP&A Act.

Contaminated land

Development on land that was formerly noted as being "contaminated" under the UBL Act is now managed under SEPP 55 and the EP&A Act. If land was listed under the UBL Act, it should be noted on section 149 certificates unless the local council has assessed the land under SEPP 55 and is satisfied that the land is suitable to be used for the purpose for which it is zoned.

Sale of "unhealthy" land

The Conveyancing (Sale of Land) Regulation 2000 has been amended so that vendors no longer have to provide a warranty that land is not subject a declaration under section5 of the Unhealthy Building Land Act 1990 in respect of the whole or part of the land. Accordingly, it is no longer necessary to search the Central Register of Restriction (the "CRR") in relation to the UBL Act. From 28 April 2003, local councils will provide information concerning low-lying, flood prone or potentially contaminated land under section 149(2) of the EP&A Act (see item 7).

Threatened Species Conservation Amendment Act 2002

Significant amendments to the Threatened Species Conservation Act will commence in the new year. The Amendment Act was assented to on 2 October 2002 but the bulk of the material changes have yet to commence operation. NPWS are drafting guidelines and other supporting documents to implement the changes and it is anticipated that the Act will commence in stages. One of the main reasons for the changes is the need to introduce consistency with the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.

Significant changes made by the Amendment Act

A new listing category is created, called vulnerable ecological communities. However, listing in this category will not trigger threatened species assessment or approval processes under the TSC Act or the EP&A Act. Vulnerable ecological communities:

- can be taken into consideration for the preparation of recovery plans;
- however, no licence is required to harm or pick and they cannot be the basis of stop work orders; and
- can be considered in making of environmental planning instruments, and can be taken into consideration in assessing DA's.

The Amendment Act also:

- clarifies certain listing criteria;
- enables the listing of semi-aquatic or semi-terrestrial species by joint order of the Minister for Parks and Wildlife and the Minister for Fisheries;
- provides for the joint preparation of recovery plan between Parks and Wildlife and Fisheries;
- changes to the procedure for listing of threatened species, populations or ecological communities;
- makes clear that property management plans authorise persons to harm or pick without a licence; and
- streamlines the licensing regime by allowing for the issuing of a single licence for scientific, educational and conservation activities, including flora and fauna surveys, affecting protected and threatened plants and fauna species, endangered populations and endangered ecological communities.

Another major change is a new eight part test (under s 94 of the TSC Act and s 5A EP&A Act and Fisheries Management Act) to assess the likelihood of significant effect on threatened species. This test is clearer than the existing test and should be less difficult to apply and guidelines are being prepared by NPWS to assist proponents and consent authorities.

Changes to the EP&A Act

Vulnerable ecological communities do not trigger EP&A Act processes for threatened species, populations and ecological communities but may be taken into account in the preparation of an environmental planning instrument. A new 'vulnerable species' listing does not affect:

- development application for twelve months after lodged;
- EP&A Act Part 5 assessments if listed after the EIS has been exhibited;
- EP&A Act Part 5 approval from the Minister if listed after approval requested.

EP&A Act Part 5 requirement to submit an EIS is no longer necessarily required if the only reason that the activity is considered likely to affect the environment is that it is likely to significantly affect threatened species, populations or ecological communities. In this case a species impact statement may be provided instead of the EIS.

Changes to the Land and Environment Court

Land and Environment Court Amendment Act 2002

Appeals to the Court involving relatively minor development should be quicker, cheaper and less legalistic following changes to the Court's legislation earlier this year. This Act amends the *Land and Environment Court Act* to implement reforms arising out of the report of the Land and Environment Court Working Party released in September last year and chaired by the Hon J S Cripps, QC.

The Act is amended to allow for "on-site hearing matters" being heard and disposed of by way of a conference held on-site of the proposed development and presided over by a commissioner. This will deal with appeals that are valued less than half the median sale price for dwellings in the local government area, where the development would have little or no impact beyond neighbouring properties and which do not involve any significant issue of public interest. It is anticipated that this will deal with the 63% of appeals to the Court (which involve projects valued between $50,000 and $500,000).

All other appeals will be "court hearing matters" which may be determined by a judge, a commissioner or a multi member panel. Panels can be convened where the matter is likely to involve a lengthy hearing, there are substantial issues in dispute or the development is particularly controversial. The Chief Judge will be required to have regard to the relevance of panel members' experience and expertise in relation to the subject matter at the appeal. The Court will be required to inspect the proposed development unless the parties agree otherwise.

Other minor changes enable experts in urban design and heritage to be qualified for appointment as a commissioner. Commissioners may also be appointed on a part time basis. The Court is also given the express power to impose easements over land in certain circumstances, similar to the power vested in the Supreme Court by section 88K of the *Conveyancing Act*. Easements can be sought where consent is granted on appeal and the Court is satisfied that the easement is reasonably necessary for the person's development to be carried out in accordance with the consent.

The Act also amends the *Environmental Planning and Assessment Act* to allow councils to review determinations under section 82A for up to one year after the original determination or, if the application is the subject of an appeal, up to the time when the Court hands down its decision. The amendments also clarify an applicant may make minor modifications to the application for the purposes of the review. Councils are also given the power to modify developments consents granted by the Court. This allows applicants who obtain consent on appeal to avoid having to go back to the Court to have the consent modified. The Act commenced operation on 10 February 2003.

Changes to Expert Witness Practice Direction 1996

Amendments to the Expert Witness Practice Direction have been made to ensure experts act impartially to assist the Court and to confirm their duty to the Court overrides any obligation to the engaging party and to ensure the expert witness is not an advocate for a party. Standard directions are now given by the Registrar requiring experts to confer and prepare joint reports on what is agreed or disagreed. Experts are bound by what is agreed.

Changes To Controls On Coastal Development

State Environment Planning Policy No. 71 – Coastal Protection and Amendment No 2

Development in the coastal zone is likely to become more difficult, take longer and cost more with the introduction of new planning restrictions through SEPP 71. The SEPP commenced on commenced last year but has been recently reviewed. While SEPP 71 does not prohibit any form of development outright, it gives the Minister significantly more power. The policy declares the following types of development in the coastal zone (up to 1km inland from the coast) as state significant development with the Minister for Infrastructure, Planning and Natural Resources as the consent authority:

- mining, extractive industry, industry, landfill, recreational establishments, marinas, tourist facilities (except bed and breakfast establishments, and farm stays);
- structures greater than 13 metres in height;
- subdivision of land within a residential zone into more than 25 lots;
- subdivision of land within a rural residential zone into more than 5 lots; and
- subdivision of land within any zone into any number of lots if the future development of any lot created by the subdivision will require effluent to be disposed of by means of a non-reticulated system.

Initially, these terms were not defined. However, on 1 August 2003, the SEPP was amended to include specific definitions. For a number of items, the definitions are quite narrow such that fewer matters will be determined by the Minister.

For development which is on, or partly on, land within "sensitive coastal locations", other controls apply. Sensitive coastal locations include, among others:

- land which is within 100 metres above or below the mean high water mark of the sea, bay or estuary;
- coastal lakes;
- certain protected wetlands, world heritage properties, aquatic reserves and marine parks; and
- land within 100 metres of a coastal lake, coastal wetlands, and other sensitive coastal environments.

For land within these locations, councils must send a copy of the DA to the Director General of Planning for consideration. The DA cannot be determined until 28 days after the DA is received by Planning NSW. Planning NSW may specify additional matters that the council must take into consideration in determining the development application. In effect, this means more detailed statements of environmental effects and longer approval times.

In addition, the Minister may "call in" a DA on land that is a sensitive coastal location and make it state significant development. When determining DA's for land within the coastal zone, both the Minister and the relevant council must consider all of the matters in clause 8, which includes the aims of SEPP 71 and 15 other separate matters. Consent authorities must not grant consent where they are of the view that:

- the development will diminish physical land based rights of access of the public to or along the coastal foreshore;
- the development involves a non-reticulated effluent disposal system which could have negative impacts on water quality; or
- the development treats discharges untreated stormwater into coastal waters.

Other specific controls also apply including a requirement for applicants to prepare master plans before approval can be granted for subdivisions of land in sensitive coastal locations. In addition, provisions of planning instruments which allow development with the zone to be consented to as if it were in a neighbouring zone have no effect.

State Environment Planning Policy No 74 – Newcastle Port and Employment Lands

SEPP 74 commenced on 22 August 2003. The aim of the Policy is to promote and coordinate the orderly and economic development of certain land within Newcastle and Port Stephens, to promote the economic development of the Port of Newcastle while preserving its heritage, and to make the Minister for Infrastructure, Planning and Natural Resources the consent authority for a steelworks on certain land at Tomago.

Premier's Business Sustainability Award

Entries are now open for the 2003 Victorian Premier's Business Sustainability Award.

The award is now in its second year and recognises companies that are adopting new, innovative practices to minimise their consumption of natural resources and impact on the environment.

Recycling materials, using less water and reducing greenhouse gas emissions are some examples of how businesses the world over are becoming more sustainable. These innovations are contributing to lower costs, better productivity and preferential entry to international markets.

Through the Premier's Business Sustainability Award, and in partnership with the Banksia Foundation, the Victorian State Government is searching for local leaders in this global challenge. More information on this award may be found at: www.dse.vic.gov.au/sustainability-award. Entries close on Wednesday, 10 September 2003.

Essential Services Commission Memorandum of Understanding

EPA Victoria and the Essential Services Commission (ESC) have entered into an Memorandum of Understanding (MOU), effective as of July 2003. The key objective of the MOU is to help to ensure that economic regulation of the prescribed essential utilities is applied within a framework that is fully cognisant of, and consistent with, statutory requirements administered by EPA.

The ESC is the independent economic regulator for Victoria's electricity, gas, ports, grain handling, freight rail, taxi, hire car, tow truck, statutory insurance and water industries.

The ESC was set up under the *Essential Services Commission Act* 2001 (Vic), which came into operation in January 2002. EPA is a prescribed agency and a prescribed body for certain purposes under the *Essential Services Commission Act.*

State Environment Protection Policy (Waters Of Victoria) updated

The *State Environment Protection Policy (Waters of Victoria)* was updated in June 2003 and now reflects current scientific approaches and Victoria's catchment management arrangements. The Waters of Victoria policy sets the framework for government agencies, businesses and the community to work together, to protect and rehabilitate Victoria's surface water environments. Special measures are provided by Schedules for sensitive areas such as Western Port, the Gippsland Lakes and Port Phillip Bay, amongst others.
The new SEPP is available at: http://www.craftpress.com.au/gazette/Gazettes2003/GG2003S107.pdf

NELA (WA) State Conference 2003

The NELA (WA) 2003 State Conference will be held on 25 September 2003 at the new Fremantle Maritime Museum. The theme of the conference is "From dreaming up to cleaning up: environmental aspects of projects". Speakers include Justice Barker QC, Wally Cox (EPA Chairman), Charlie Welker (Welker Consulting), Peter Eliot (URS) and many more. Tickets are available at $155 members and $185 non-members. Contact Lewis McDonald on (08) 9269 7147 for further details or email Samantha.ross@bdw.com for registration details.

Western Australian Government gives "in principle" support to Gorgon gas development on Barrow Island

On 8 September 2003, the Western Australian Government gave its "in principle" support to the Gorgon joint venturers to access Barrow Island for gas development purposes (**Gorgon Development**). The Gorgon gas reserve is Australia's largest gas reserve. Barrow Island has been a "class A nature reserve" since 1910 and has been home to an operating oil field for around 40 years. The Gorgon Development will see development on around 300 Ha (or 1.3 %) of Barrow Island.

Prior to giving its in principle approval, the Western Australian Government sought advice on the environmental issues associated with the Gorgon Development from the Conservation Commission and the Environmental Protection Authority (**EPA**). It also sought advice on the economic, strategic and social aspects of the Gorgon Development from the Department of Industry and Resources (**DoIR**) (through its consultant, the Allen Consulting Group).

The Conservation Commission and the EPA advised against the Gorgon Development on Barrow Island. DoIR supported the Gorgon Development.

In summary, the Conservation Commission's report states that *"Government should not approve the location, construction and operation of any gas processing plant on the Barrow Island Nature Reserve."* The principal reasons given by the Commission are:

- the Commission considers any industrial development within a nature reserve as inappropriate, and within a nature reserve as important as Barrow Island as particularly inappropriate;
- not insignificant environmental impacts and unacceptably high risk to Barrow Island's biodiversity conservation values (its unique ecosystems, species and populations);
- approval would be likely to prevent a return of Barrow Island to full nature reserve status;
- approval would set a precedent for other developments which would in the long-term substantially diminish Barrow Island's biodiversity conservation values; and
- alternative sites remain as options under appropriate economic conditions.

Similarly, the EPA's report states that *"[g]iven the high environmental and unique conservation values of Barrow Island, which are reflected in its status as a class A Nature Reserve, it is the view of the EPA that, as a matter of principle, industry should not be located on a nature reserve and specifically not on Barrow Island"*.

DoIR's advice suggests that the Gorgon Development has substantial social, economic and strategic benefits and concludes that *"Barrow Island represents the only commercial option for monetising the substantial national asset represented by the Gorgon resource"*.

This advice was taken into account by the Western Australian Government along with public submissions and the Gorgon Joint Venturers' responses to those submissions in making its decision to give in principle approval to the Gorgon Development.

As part of an agreement between the State of Western Australia and the Gorgon Joint Venturers, the Gorgon Joint Venturers must contribute up to $40 million over the life of the project to the Department of Conservation and Land Management (**DCLM**) to be used towards conservation projects to protect native

plants and animals in environments similar to Barrow Island. The Gorgon Joint Venturers must also fund DCLM officers who will monitor the construction and operation of the Gorgon Development.

Notwithstanding this "in principle" approval, the Gorgon Joint Venturers will still require formal environmental assessment and approval under Part IV of the *Environmental Protection Act 1986 (WA)* before any specific proposal may proceed on Barrow Island.

Information on the Gorgon project may be found at www.doir.wa.gov.au and at www.gorgon.com.au.

Environmental Protection Act 1986 to apply to all State Agreements

Section 5(2) of the *Environmental Protection Act 1986 (WA)* (**EP Act**) currently exempts State Agreements concluded before 1 January 1972 from Western Australia's environmental laws. This has meant that, in respect of certain projects, Alcoa, BHP Billiton and Rio Tinto (who are each parties to pre-1972 State Agreements) have not been legally obliged to comply with the EP Act.

On 13 June 2003, the State Development Minister, Clive Brown, announced that Alcoa, BHP Billiton and Rio Tinto have all agreed that operations governed by pre-1972 State Agreements will now be legally subject to the EP Act. This will be effected by amendments to nine individual State Agreements and to the EP Act itself.

Proposal to update memorandum of understanding between DoIR and EPA

Approval for mining activities on mining leases in Western Australia is generally governed by the Department of Industry and Resources (**DoIR**), through their assessment and approval of Notices of Intent submitted to DoIR by proponents of mining projects. Where these projects are likely to have a significant effect on the environment, these are referred to the Environmental Protection Authority (**EPA**) for assessment under Part IV of the *Environmental Protection Act 1986 (WA)* (**EP Act**).

The criteria by which DoIR identifies projects for referral to the EPA are set out in a Memorandum of Understanding (MOU) between the EPA and DoIR. This MOU was originally developed by the EPA and DoIR in 1995. Since 1995, there have been significant legislative changes both nationally and locally, and the actual practice of DoIR in referring proposals to the EPA has evolved from the process set out in the original MOU.

As a result, the EPA and DoIR are proposing to update the MOU to bring it into line with current practice and to take into account legislative changes since 1995. A draft version of this proposed MOU has recently been released for comment. Please contact Lewis McDonald on (08) 9269 7147 if you would like a copy.

The proposed MOU does not deal with proposed clearing controls which are likely to be introduced by the end of the year through amendments to the EP Act. The process for administering these clearing controls in respect of onshore mineral proposals will be dealt with by a separate MOU, which is currently in the early stages of its development.

Proposal to enshrine water restrictions in legislation

The Western Australian Government has introduced the *Water Conservation and Management Bill 2003 (WA)* to State Parliament. If passed, this Bill will have the effect of making the current water restrictions scheme permanent. The scheme put in place by this Bill will replace the *Water Agencies (Water Restrictions) By-laws 1998 (WA)* and restricts the use of water provided by the Water Corporation. The Bill provides for a degree of flexibility in the measures that may be taken to implement and effect water restriction in various areas in the State. Anyone in breach of the restrictions may face a fine of $500.

New Director of CALM Appointed

Environment Minister Judy Edwards announced on 21 August 2003 that Keiran McNamara has been appointed Executive Director of the Department of Conservation and Land Management (now known as DCLM, formerly CALM). Mr McNamara has been acting Executive Director since July 2001. Mr McNamara was formerly CALM's Director of Nature Conservation.

Conservation bodies to be retained

Following an independent review of the Conservation Commission (established under s18 of the Conservation and Land Management Act 1984 (WA) (**CALM Act**)) and the Marine Parks and Reserves Authority of Western Australia (established under s 26A of the CALM Act), Environment Minister Judy Edwards has announced that the two bodies are to be retained as separate entities.

Implementation of IPA Operational Review

The 157-page *Integrated Planning and Other Legislation Amendment Bill* was introduced to Parliament on 4 June 2003. Essentially, the Bill replaces previous amendment legislation, which never commenced, and implements a wide range of changes derived from the "IPA Operational Review", outlined in earlier editions of this journal.

Development of heritage places

The *Queensland Heritage and Other Legislation Amendment Act 2003* "rolls in" to the *Integrated Planning Act 1997* the approval processes for demolition and other development of heritage places currently in the *Queensland Heritage Act 1992.* Normally, the local government will be the assessment manager for an application relating to private development, with the Queensland Heritage Council as concurrence agency (although the Queensland Heritage Council may be assessment manager if the local government is not involved in the application). A distinction is still maintained, exempting State developments from these processes. Since there are exemptions in both the *Integrated Planning Act* and the *Mineral Resources Act 1989* for mining activities, a consequential amendment maintains the existing level of protection for places entered on the heritage register which are located on mining tenements.

New policy on Flood, Bushfire and Landslide

A new *State Planning Policy on Mitigating Adverse Impacts of Flood, Bushfire and Landslide* will come into effect on 1 September 2003. A press release issued by the office of the Minister for Local Government and Planning says that Queensland will then become the first Australian State or Territory to introduce consistent statewide planning measures to reduce the impact of bushfires on the community.

New Plumbing and Drainage Act

Queensland has a new *Plumbing and Drainage Act 2002,* and the main provisions are expected to commence in mid or late 2003. Part of the purpose of the legislation is to improve the performance of the private certification system by increasing minimum competency standards and tightening the disciplinary and enforcement system. The Act also transfers control over stormwater to the *Local Government Act 1993.* The new legislation replaces the archaic *Sewerage and Water Supply Act 1949.*

New Planning Authorities Go Online

The ACT's overhaul of its planning system was reviewed briefly in the May edition of NELR. Since coming into operation on 1 July, a number of progressive initiatives have been announced in relation to this review.

The new ACT Planning & Land Authority is one of the first planning authorities in the country to make development plans / consents available on line. Following an earlier trial in which single residential development applications and consent were made available, larger and more complex DAs will now be made available for public viewing over the Internet (with the exception of some larger files such as expert reports, etc.) The Authority also intends to launch an "electronic lodgement" facility for lodging DAs on a 24 hour basis, within the coming months. For more details and to see these developments first hand, go to the Authority's website at http://www.actpla.gov.au

Providing advice to the Minister and the ACTPLA on significant policy, planning and community issues, is the Planning & Land Council. The government has decided to make all of the minutes and recommendations of the Council available online as well, for public comment and review. These can be viewed at http://www.planninglandcouncil.act.gov.au

Greenhouse Strategy Review

With the ambitious aims of capping ACT's greenhouse gas emissions at 1990 levels by 2008 and then reducing them by 20% before 2018, Environment ACT is considering a number of strategies for encouraging energy efficiency. Among its latest recommendations are legislative changes that would see commercial building tenants in paying their share of central services energy consumption. The theory is that building owners would attempt to increase building efficiency so that lower prices could be offered to tenants as inducements to enter into leases. Of course, it needs to be kept in mind that the ACT has barely 1% of the total greenhouse emissions around Australia, but these initiatives should still serve as useful models for other States.

A Bill of Rights for the ACT?

The report of the ACT Bill of Rights Consultative Committee was finalised towards the end of May 2003, with strong recommendations made for a *Human Rights Act* to be implemented in the Territory. Government feedback on the report is due out during the month of September.

NEPM Amendments on Air Quality in the ACT

With one of the higher wood fire smoke problems in the country, the ACT Government has indicated its willingness to implement the amendment to the *National Environment Protection (Ambient Air Quality) Measure,* which will focus on particle matter one quarter of the size of that previously covered under the 1998 Agreement terms. With most wood fire smoke particles falling within this smaller size range, the Government seems likely to impose harsher restrictions on air pollution in the future. The will be complemented by other environmental programs, including those that are seeing subsidies being provided to ACT residents for replacing their old wood fire heaters.

Three Year Ban on Genetically Modified Food

While continuing to provide support for further research on GM Crops under the auspices of the national Gene Technology Regulator, the ACT Government has committed to a 3 year ban on any commercial release of genetically modified organisms.

case notes

EPA (Qld) v Aargus Pty Ltd – environmental consultant fined

For the first time, the Queensland Environmental Protection Agency (EPA) has successfully prosecuted an environmental consultancy as a result of an incomplete contaminated land report under section 480(1) of the *Environmental Protection Act 1994* (Qld).

In the case of *Environmental Protection Agency v Aargus Pty Ltd* (Unreported, Magistrates' Court of Brisbane, Daley, M 30 July 2003), the consultancy, Aargus Pty Ltd, was convicted and fined $10,000 and ordered to pay a further $990.35 in costs. Aargus Pty Ltd lodged a contaminated land assessment report with the EPA stating that a site was suitable for unrestricted future use. The veracity of the report was checked by EPA officers, who discovered on inspection that the surface of the land was contaminated with abrasive blasting waste which contained lead and arsenic.

Aargus had engaged a contractor to prepare its report and the directors were not personally aware of the actual contamination of the land. However, the EPA considered this to be a very serious breach of the Environmental Protection Act, given the importance of such reports in the decision making process.

Kaylene Perissinotto, Senior Lawyer, Minter Ellison, Brisbane

Minister for the Environment & Heritage v Greentree [2003] FCA 857

The respondents in this case for a Federal Court interim injunction are the 3 proprietors of a property known as 'Windella', including Ronald Greentree, members of a partnership that apparently manages the property and the on-site manager of the property.

On 8 August 2003 Justice Stackville dismissed the respondent's application to dissolve the interim injunction granted on 31 July 2003. His Honour went on to restrain the respondents from any activities disturbing or otherwise affecting that portion of the Gwydir Wetlands on Windella, the flow regime of waters into and out of the Windella component of the Gwydir Wetlands.

The Gwydir Wetlands, located approximately 60 kilometres west of Moree in north-west NSW, is a declared Ramsar Wetland. As such, Gwydir is protected under s16 and 17A of the Environment Protection & Biodiversity Conservation Act (**the Act**), which prohibits action that has, will or is likely to have a significant impact on the ecological character of the wetlands.

Part of the Gwydir Wetlands falls on privately owned land, including 100 hectares on the respondent's 'Windella' property. At some time between October 2002 and the latest inspection, the respondents ploughed in and leveled 99 per cent of the Gwydir Wetlands on their land. Only the creek bed and a portion of the banks remain intact. However, even with this level of destruction there was evidence before the court that "with proper management it may be possible to remediate the site over a period of time".

Sackville J rejected an argument from counsel for the respondents, Mr Littlemore, that the injunction should be dissolved due to the fact that the damage had already been done and the cultivation of wheat would not itself have a significant impact on the wetlands. Indeed, the fact that the evidence suggested that there had been a deliberate contravention of the Act weighed against the respondents in His Honor's consideration of the balance of convenience.

In assessing whether to sustain or dissolve the injunction Sackville J is required to look whether there is a serious case to be tried (the respondents conceded this issue) and the balance of convenience. In looking at the balance of convenience in this case Sackville J took into account:

1. that the area has been deliberately ploughed under without reference to the authorities responsible for the Gwydir Wetlands and that such actions give rise to the distinct possibility that the respondents have contravened the Act.

2. the evidence supports that there is at least a possibility, and probably a reasonable possibility, of a substantial degree of remediation on the site.

3. the adverse economic impact upon the respondents in that the continuation of the injunction would prevent the respondents from making economic use, for their own purposes, of this area of wetlands.

After consideration of the balance of convenience Sackville J found that the balance of convenience lies "clearly in favour of continuing the injunction". His Honor said:

" It is, in my opinion, of some importance that there may be an opportunity to rehabilitate the wetlands that have been declared under the Act to be of international importance. Steps should not be permitted that would or could significantly prejudice that outcome. The evidence indicates to me that if the further action took place by way of cultivation of this land for the purposes of growing wheat, then the prospects of remediation of the land would be significantly impaired."

The Minister for the Environment and Heritage has since filed civil proceedings against the respondents.

What this means for conservation:

This case sets two precedents – firstly, a party can not cause damage in breach of the Act and then rely on the fact that the damage has already been done to avoid an injunction preventing them from using the damaged land and benefiting from the breach. Secondly, the real possibility of a deliberate breach of the Act will be weighed against the breaching party when weighing the balance of convenience.

Lyndall Kennedy, EPBC Unit Coordinator.

The Land and Environment Court of NSW - Swearing In Speech of Chief Judge, Justice Peter McClellan - Monday, 25 August 2003

Chief Justice, your Honours, Attorney, ladies and gentlemen:

I greatly appreciate the kind personal remarks of both the Attorney and Mr Benjamin. As this is a special occasion for the Land and Environment Court I would like to reflect briefly on the origins of environmental law and the role which the court plays in New South Wales.

At the end of the 19th century the industrial and agricultural development of modern Australia was just beginning. Our wealth was still derived from the land. The common law was the guiding force for the rule of law. However, change was coming. At the same time as Federation there was a concerted effort to provide legislation to control many aspects of our lives. In the abridged version of Manning Clark's History of Australia, the period 1851-1888 is given the title "The Earth Abideth Forever". 1888-1915 is titled "The People Make Laws". At the time of Federation New South Wales had no environmental law and there was no town planning law.

In 1906 the State Government passed the first comprehensive Local Government Act. Recognised quickly as inadequate it nevertheless provided control by local Councils over the subdivision of land and the opening of roads. An appeal against a Council's decision lay to the judges of the District Court. There were not many appeals. The 1906 Act was replaced by the Local Government Act of 1919. It continued to provide the legislative structure for local government until repealed in 1993.

Part XI of the 1919 Act was titled Building Regulation and Part XII carried the label Town Planning. However, the reality was, that apart from the introduction of Residential District Proclamations designed to stop industry, commerce and flats in areas given over to bungalows, "town planning" was confined to the control of subdivision and the opening of roads. Rights of appeal to the District Court continued.

In 1945, and only after considerable pressure was applied by the Commonwealth Government, (grant monies were threatened to be withdrawn) the Act was amended and Part XIIA titled Town and Country Planning Schemes was incorporated. It was the legislative foundation for the County of Cumberland Planning Scheme and other county schemes. They were followed by local planning schemes. The primary responsibility for development control remained with Councils, subject in many areas to a power of veto at State level.

The 1945 legislation did away with appeals to the District Court. That jurisdiction was given to the Land and Valuation Court.

With the commencement of Part XIIA the creation of the Land and Valuation Court and the introduction of development control the legal profession inevitably became involved in planning problems. Town planning, as a discipline, was in its infancy and for many years surveyors, engineers and architects did the work on the ground. But with development now regulated by written instruments questions of statutory construction emerged and complex concepts required explanation. The limits of the discretion available to the decision-maker, the permissible intensity of development, the compatibility of disparate forms of development, the need for an acceptable level of public facilities, such as roads, water and sewerage, public transport, schools and recreation facilities, and the problem of existing use rights were major issues, amongst many others, which the Land and Valuation Court had to resolve.

In 1958 the Parliament legislated to provide for Boards of Appeal in subdivision and building matters. Control of development appeals remained with the judges of the Land and Valuation Court until 1973, when the Local Government Appeals Tribunal was created. That Tribunal had responsibility for appeals in relation to all discretionary decisions made by Councils. The Supreme Court continued to have a role deciding questions of law which arose in appeals to the Tribunal, and, particularly following the decision in Sutherland Shire Council v Layendekkers, an increasing role in determining and enforcing the law.

The Local Government Reports, as they were known, reflect the extraordinary contribution which the judges of the Land and Valuation Court made to the development of principled decision making in town planning. I do not have time to dwell upon them today. Many of those decisions and the appeals determined from them, together with the decisions of the Supreme Court declaring the law, survive today. A quick glance at the early reports also reveals the extent to which the great names of the Bar of the day and those who were soon to be recognised appeared in planning cases. Volume 1 of the Local Government Reports records these appearances, as they then were: Stuckey QC, E H St John, R J Marr, J D Holmes, A B Kerrigan, Forbes Officer, J A Lee, J F Nagle, B T Thorley, Else Mitchell QC, A C Saunders, Woodward QC, R M Hope, J W Smyth QC, Wallace QC, A F Mason, K S Jacobs, Bowen QC, D L Mahoney, D B Milne, Pile QC, D A Staff, Sir Garfield Barwick QC, Hardie QC, Moffitt QC, Miller QC, L K Murphy, C R Evatt QC, P J Kenny and G J Samuels. Many of those counsel appear more than once in that volume of the reports.

It must have been a stimulating enterprise for all involved. To the extent that any legal text can capture the mood of the times. Murray Wilcox's classic "The Law of Land Development" managed to do so.

The contribution which the courts could make to the planning process was assisted by the form of the early planning instruments. With the County of Cumberland Planning Scheme as the model, local schemes, when made, followed a familiar pattern and adopted standard phraseology. In recent years this approach has been largely abandoned, making decisions in relation to the provisions of one plan of little if any, relevance to others. This has substantially increased the work of the Court and, I suspect, has contributed to the complexity, uncertainty and cost of the whole system.

Throughout the 1960s and 70s the population of Sydney continued to grow apace. Notwithstanding cyclical recessions the rate of urban, industrial and commercial development increased significantly. The so-called baby boomer generation educated with the assistance of Commonwealth scholarships was entering the work force.

It was in the early 1970s that young graduates began to emerge from the universities with an increased understanding of science and the interaction of development with the natural environment. Town planning became an academic discipline and University courses in environmental science began to emerge. At the same time very significant changes were coming as community values with respect to the value of natural areas, the acceptability of industrial pollution, the impact of noise, the quality of the natural and built landscape and many other environmental considerations were articulated. The environment became a political issue at the local and national level. It was not the only change occurring. As Bascow and Wheeler have observed "the wave of environmentalism which developed in the industrialised world grew in the turbulent period of political ferment and change which occurred in the 1960s and 1970s."

In 1976 the State Liberal government of the day introduced legislation to reform Part XIIA of the Act just prior to the elections of that year.

I remember the announcement well, for I had laboured for months at night to prepare a draft of an updating supplement for Murray Wilcox's book – a task which I completed just days before the announcement. It rendered my efforts redundant before they arrived at the publisher.

The Coalition lost the election and the Labor Party, led by Neville Wran, who is here today, came to power. In 1979, the Wran government introduced far-reaching changes repealing Part XIIA and enacting the Environmental Planning and Assessment Act. The inclusion of the word "environment" was not just incidental. It reflected the fact that all aspects of the built and natural environment including projects undertaken by government were now controlled by an Act of Parliament. It was a major step.

As part of the legislative package, the Land and Environment Court was created. For the first time merit appeals and enforcement of environmental law were provided for in the one location. The structure was then unique, although the change did not occur without controversy. I myself joined in that controversy. But the Court has proved to be an enduring institution and has become a model for many similar courts in the developed world.

The Land & Environment Court has been led during the last twenty years by three people whose contribution to the development of the Court and environmental jurisprudence it is appropriate to acknowledge today. The late Jim McClelland was given the task of creating the court, defining its hearing processes and commencing the task of laying out the legal principles which would guide environmental law

under the new legislation. I appeared before him many times and came to know him well as counsel to the Maralinga Royal Commission. Jim was a man of insight and courage with an enviable mastery of the English language. I am immensely pleased that his widow Gillian Appleton is here today to join in this occasion.

Jerrold Cripps followed Jim and was Chief Judge until appointed to the Court of Appeal. Jerrold came with a knowledge of planning, having formed a close working relationship with the late Justice Hope one of the leaders in the field, before he was appointed to the Supreme Court. The Local Government and Environment Reports bear testament to the capacity which Jerrold demonstrated to not only master planning problems, but to give them a context within established legal principles. He contributed to the resolution of many of the most significant issues of the last twenty years, including the problems with the application of environmental legislation to government activities. Jerrold has given to the community in many ways. Through his work with the Legal Aid Commission he was also able to ensure that the Environmental Defenders Office was provided with a stable foundation.

Jerrold was followed by Mahla Pearlman who came to the Court with a great knowledge of property law and with the experience of leadership with the Law Society and the Law Council of Australia. Her judgments are models of clear expression and reflect the intensity of her endeavour to define the problem and reason to the correct answer. During Mahla's time the Court came under significant pressures leading to an inquiry which I am sure added to her burdens as Chief Judge. Although the criticism was, at times, strident, Mahla led the Court with dignity engaging with its critics and responding to the issues.

The brief outline I have sketched this morning is sufficient to demonstrate that environmental law has a recent history. Its present form is a direct response to changing community structures, understanding, needs, and expectations.

No doubt there are some in the community who believe that the role of the court should be limited to declaring and enforcing the law and that there is no place for appeals from merit decisions made by councils or others. However, as I have indicated the Parliament has given a merit review role to courts or expert tribunals since the early days of planning control.

There are many reasons why such a merit review process is appropriate. However, its continuing legitimacy rests on consistency of decision-making in accordance with identified principles. Merit appeals provide the opportunity for the Court to address contemporary environmental problems and responses and, through the reasons for decision, articulate principles which can guide and inform decision-making at all levels of the process. As Sir Gerard Brennan said in Drake "Inconsistency (of decision making) is not merely inelegant, it brings the process of deciding into disrepute." He was, of course, speaking in relation to immigration matters but his remarks hold true for decisions with respect to environmental problems. Those early and exciting days of the Land and Valuation Court reflect the intensity with which that Court approached the task of defining the principles which would enable the rational resolution of environmental disputes, both large and small.

Of course, the volume of merit appeals today is vastly greater than it was in 1950. One thousand one hundred and twenty four development appeals were lodged with the Court in 2002. Most of those matters are decided by the Commissioners of the Court who, in many respects, carry out its most important work.

It cannot be assumed that environmental law and the role of the Land and Environment Court will be free of controversy in the future. Some of the issues which the Court must deal with raise questions of fundamental human rights. All of them affect the lives of some or a group of people in our community. Many will involve very substantial money profits or losses to individuals or corporations. The court must contribute to the task of balancing the immediate needs of the present generation with the trust we hold for those who will come after us.

The work of the judges of the Court is varied but has two significant elements. In recent years, criminal prosecutions have increased in both number and complexity. There remains a constant flow of judicial review matters. Because of the significance which environmental issues have in our community the judges have the task of ensuring that environmental jurisprudence both acknowledges and contributes to the development of administrative law. Insofar as the common law is able to respond to contemporary problems the environment, above almost any other area, will continue to bring forward issues against which the relevance and effectiveness of existing administrative law principles can be assessed.

I am honoured to have been asked to be Chief Judge of the Land and Environment Court. I consider it a privilege to be given the task of leading the dedicated men and women who comprise its members. In leaving the Supreme Court to take up my new role I thank my colleagues on the court for their friendship and support since I was appointed. The Supreme Court is a stimulating environment in which to work comprised as it is of judges dedicated to the resolution of complex disputes. Above all I thank the Chief Justice for the opportunities he has provided for me to engage in interesting and challenging tasks.

This is not an occasion to dwell upon personal matters. That occurred when I became a judge of the Supreme Court. However, I would like to acknowledge the fact that both my parents are here today and I express my continuing gratitude to my wife and children for their support. I am also grateful for the extraordinary efforts of my associate Angela Flockhart, my research assistant Elisabeth Passmore and others who have worked to assist my leaving the Supreme Court on time.

I express my personal thanks to you all for coming. Your presence honours me but, more importantly, it honours the Land and Environment Court.

A Revolutionary Three Years in Environment Management? The Implementation of the Environment Protection and Biodiversity Conservation Act

By Aletta Nugent, Lawyer, Deacons (Melbourne)

Introduction

In its first three years of operation, the *Environment Protection and Biodiversity Conservation Act 1999* (the Act) has made some progress towards achieving what was thought to be the impossible by establishing a functional, if not entirely efficient, national environmental management system.

The implementation of the Act has not been without incident and controversy, and there is no doubt that the full potential of the Act has yet to be explored. Although much of the initial criticism levelled at the Act when it first came into force has subsided, the operation of the assessment and approvals process under the Act and the perceived lack of enforcement of the Act by the Commonwealth Department of Environment and Heritage (Environment Australia) has continued to come under fire. Perhaps in response to this criticism, the Australian National Audit Office (the ANAO) recently completed an audit into Environment Australia's handling of referrals, assessment, approvals and enforcement of the Act.[1]

This article gives a practical guide to the operation of the Act up to its third birthday. The focus of this article is on the referral, assessment, approval and enforcement aspects of the Act, and an assessment of how effective these aspects have been. The comments and findings of the ANAO audit are also discussed. Trends in the assessment and approvals process, enforcement of the Act and the Commonwealth government's attitude to the Act will be analysed to provide an indication of the future of the Act.

Overall, the past three years have shown that the Act has the potential to effectively provide for a national environmental management scheme and is increasingly making progress towards this goal.

Overview of the Act

The following actions trigger the operation of the Act:

(1) Any action that has, will or is likely to have a significant impact on a matter of national environmental significance. Matters of environmental significance under the Act are:

   a) World Heritage properties;

   b) Ramsar wetlands;

   c) Listed threatened species or ecological communities;

   d) Listed migratory species;

   e) Nuclear actions;

   f) Commonwealth marine areas;

   g) Any matter prescribed in the regulations as being a matter of national environmental significance.

(2) Any action on Commonwealth land that has, will or is likely to have a significant impact on the environment;

(3) Any action outside Commonwealth Land that has, will or is likely to have a significant impact on the environment on Commonwealth Land;

(4) Any action of the Commonwealth, a Commonwealth agency or Commonwealth corporation that has, will or is likely to have a significant impact on the environment anywhere, whether inside or outside Australia.

The Act prohibits the taking of any of the above actions (referred to as controlled actions) without approval under the Act, except where the action does not require approval on the basis that it is:

[1] Ashe, J (ed), "EPBC Act Developments", *National Environmental Law Review*, No. 3, September 2002: 9.

(1) covered by a bilateral agreement;

(2) covered by a Ministerial declaration;

(3) taken in accordance with a Regional Forestry Agreement;

(4) authorised under the *Great Barrier Reef Marine Park Act 1975.*

Actions with the potential to trigger the Act must be referred to the Commonwealth Environment Minister (the Minister). The Minister will decide whether the action is a controlled action and accordingly whether it requires approval under the Act.

If the Minister decides approval is required, the Minister will then decide on the method of environmental assessment the proposed action must undergo, from the following:

(1) Accredited assessment process;

(2) Assessment on preliminary documentation;

(3) Assessment by Public Environment Report (PER);

(4) Assessment by Environmental Impact Statement (EIS); or

(5) Assessment by Commission of Inquiry.

A controlled action can also be assessed in accordance with a bilateral agreement. The Act provides for two types of bilateral agreements, those allowing the proposed action to be assessed in accordance with the environmental assessment processes of the State or Territory where the action is to occur (assessment bilaterials) and those allowing the State or Territory to give or withhold approval of the action (approval bilaterals).

If an approval bilateral is in place, an action will not need to go through the approval process in the Act. Approval can only be given by a State or Territory government under an approval bilateral in accordance with the Commonwealth accredited management plan for that State or Territory ensuring the impacts of an action are adequately assessed.

When a proposed action is assessed under an assessment bilateral, it will be assessed in accordance with the environmental assessment process/processes accredited in the relevant bilateral agreement. The results of this assessment are then provided to the Minister to decide whether to approve the action.

Where there has been a contravention of the Act there are a range of compliance and enforcement mechanisms available. These include injunctions, environmental audits, civil and criminal penalties, conservation orders, infringement notices, the power to ensure environmental damage is remedied and the power to publicise contraventions.

Operation of the Act

Referrals, Assessment and Approvals

When the Act came into force, many were sceptical of the ability for its assessment and approval mechanisms to work effectively in practice. Much of the initial criticism appears to have subsided since the Act has become operational. The objective of the ANAO audit was to examine and report on the quality and timeliness of assessments and approvals under the Act, and also on the activities of Environment Australia in enforcing and ensuring compliance with the Act.[2]

An analysis of the referrals received and the assessment and approval of controlled actions under the Act, plus a discussion of the results of the ANAO audit follows.

[2] The Auditor-General, *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999,* Audit Report No. 38 2002-2003, Performance Audit at para 7.

Referrals - General

More than half of the referrals received by the end of June 2003 were found not to require approval under the Act.[3] Whether this shows that proponents are erring on the side of caution in deciding whether an action has the potential to trigger the Act, or indicates that the Minister is tending to read down the scope of the Act's triggers, is uncertain. In Victoria, relevant authorities have followed a "if in doubt, refer" line in advising enquirers. The very heavy penalties for breach of the Act may also be a factor influencing the "cautious" approach.

There were more referrals received for proposals in New South Wales than from any other jurisdiction.[4] However, more referrals from Queensland were deemed to be controlled actions requiring assessment and approval under the Act.[5]

As at the end of June 2003, new urban and commercial development proposals gave rise to more referrals than any other type of activity.[6] The referral of mining activities gave rise to the largest number of controlled actions than any other type of activity.[7]

The most common triggers for controlled actions have been the listed threatened species and ecological communities trigger and the listed migratory species trigger. In many cases, more than one trigger resulted in a proposal's classification as a controlled action.

Referrals - Issues

Environment Australia has stated that the reason a large number of referred actions have not been found to be controlled actions is a result of proponents being over cautious.[8] However, the ANAO found that it is due to confusion over the concept of significance and that stakeholders were having difficulty in determining when an activity may have a 'significant impact' on a matter of national environmental significance.[9]

When the Act first came into force, Environment Australia released "The EPBC Act Administrative Guidelines on Significance".[10] The ANAO found that these guidelines were not specific enough to particular industries or activities to allow for an assessment to be made whether an activity may have a significant impact on a matter of national environmental significance.[11] Environment Australia is in the process of reviewing the guidelines and is also considering providing industry specific guidelines.[12]

The ANAO noted that there have been relatively few referrals arising from forestry and agricultural activities.[13] Referrals from these sectors should be higher given the potential for these activities to impact on listed threatened species and communities.[14] Stakeholder groups from within the agricultural industry in particular have criticised the Act, arguing that it imposes onerous obligations on farmers and is flawed due to uncertainty associated with the Act's triggers.[15] The ANAO considers that industry specific guidance on what constitutes a 'significant impact' would assist in encouraging referrals from these groups.[16]

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[3] Environment Australia, *Monthly Statistics – Referrals, Assessments and Approvals: June 2003 – Overview since Commencement of EPBC Act on 16 July 2000,* Environment Australia Website: www.ea.gov.au/epbc/statistics/statistics.html.

[4] Ibid.

[5] Ibid.

[6] Ibid.

[7] Ibid.

[8] The Auditor-General, *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999,* Audit Report No. 38 2002-2003, Performance Audit at para 2.10.

[9] Ibid.

[10] Environment Australia, *The EPBC Act Administrative Guidelines on Significance,* July 2000.

[11] The Auditor-General, *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999,* Audit Report No. 38 2002-2003, Performance Audit at para 2.10.

[12] Ibid at para 2.11.

[13] Ibid at para 6.8.

[14] Ibid.

[15] Macintosh, A. *Environment Protection and Biodiversity Conservation Act 1999: An Overview of the First Two Year,* World Wildlife Fund Website: www.wwf.org.au/downloads/EPBC_2nd_anniversary_overview.pdf at 2.

[16] The Auditor-General, *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999,* Audit Report No. 38 2002-2003, Performance Audit at para 11.

The ANAO was also concerned by the low number of referrals from the Commonwealth and Commonwealth agencies in light of their obligation to make a referral if they undertake an action with the potential to significantly impact on the environment anywhere.[17] It seems that some Commonwealth agencies are experiencing difficulty in deciding whether an action may have a significant impact.[18] Environment Australia has produced draft guidelines to assist Commonwealth departments and agencies, but these have yet to be finalised and have not been widely circulated.[19] Environment Australia intends to formalise these guidelines as part of its review of the administrative guidelines on significance.[20]

Regarding the content of referrals received, the ANAO found that a relatively high number of referrals contained inadequate information.[21] Reasons given for this inadequacy ranged from proponents' having a lack of resources to proponents deliberately limiting the amount of information provided in order to escape the application of the Act.[22] Although the ANAO recognised that any inadequacies in referral information are generally addressed in Environment Australia's screening of referrals or through the public consultation process, it found that the Authority could do more to encourage better quality information in referrals.[23]

The problem of staged referrals was another issue uncovered by the ANAO audit. A staged referral is where a large project is referred on a stage by stage basis. Under the Act, Environment Australia can only assess a referral to the extent of the action proposed.[24] Also, by referring a project in stages it is less likely that any one stage will be found to require assessment and approval.[25] Schedule 2 of the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) (the Regulations) provides that, in describing the proposed action, a proponent must state whether the action is related to other actions or proposals in that region. Although Environment Australia has in place an informal consultative approach to dealing with staged referrals, the ANAO found that a more formal approach to deal with the issue is required.[26]

Assessment and Approval

General

Where an action was found to be a controlled action, and accordingly required assessment under the Act, the Environment Minister's preferred assessment mechanism has been by way of preliminary documentation. This means that the environmental impacts of the majority of proposals assessed under the Act are not being subjected to as high a level of investigation as would be afforded by an EIS or PER.

As at the end of April 2003, only one action failed to gain approval. However, the majority of approvals given were subject to conditions.[27]

Assessment and Approval - Issues

Concern has been raised in some quarters about the high use of assessment by preliminary documentation and whether this method of assessment ensures all relevant matters are considered.[28] However, the ANAO

[17] Ibid at para 34.

[18] Ibid para 34 - 36.

[19] Ibid at para 5.31.

[20] Ibid.

[21] Ibid at para 2.33.

[22] Ibid at para 2.28.

[23] Ibid at para 2.31 – 2.33.

[24] Ibid at para 2.40

[25] Ibid at para 2.38.

[26] Ibid at para 2.41.

[27] Environment Australia, *Monthly Statistics – Referrals, Assessments and Approvals: April 2003 – Overview since Commencement of EPBC Act on 16 July 2000,* Environment Australia Website: www.ea.gov.au/epbc/statistics/statistics.html.

[28] The Auditor-General, *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999*, Audit Report No. 38 2002-2003, Performance Audit at para 3.19.

found that the assessment process employed for actions in the cases it examined were thorough and comprehensive and found no evidence of relevant matters being overlooked.[29]

That said, should an EIS or PER have been required, a more thorough assessment may have brought to light information on impacts and matters not apparent on the basis of the preliminary documentation. Although assessment by preliminary documentation may be attractive from a cost perspective, the tendency for actions to be assessed in this way raises concern over the adequacy of information being provided for decision-making under the Act.

In relation to approvals, the ANAO found that decision-making was rigorous and of a sufficiently high standard.[30] However, it does seem unusual that only one proposed action failed to gain approval in the three years since the Act commenced. It might be argued by purists that limiting the assessment of actions to preliminary documentation may not cover all relevant issues such as collateral or flow-on effects and maintenance of homeostasis, with the result that there is a reduction in the information upon which a decision can be made, and that this may be a factor in the high approval rate.

The point has been made, however, that the majority of approvals were given with conditions. Further, the ANAO found that where conditions were not imposed it was often because the relevant State or Territory had already attached suitable conditions in accordance with its assessment processes.[31] Overall, the ANAO found that the conditions being attached to approvals adequately meet the Act's requirements.[32]

Compliance with Time Frames for Decision Making

Compliance by Environment Australia with the statutory time frames for decision-making set out in the Act appears to be improving.[33] However, there have still been criticisms of delays in decision-making and the resulting impact these delays have on projects waiting on a decision.[34] The ANAO found that there was general stakeholder satisfaction with the timeframes for assessment and approvals under the Act[35] and that decision-making mostly accords with the timeframes specified in the Act.[36] The ANAO found that the implementation of more bilateral agreements is likely to improve the efficiency of the assessment process under the Act.[37] However, the implementation of assessment bilaterals has proved to be one of the more problematic aspects of the Act's implementation in the time since its enactment.

Bilateral Agreements

Bilateral agreements are viewed by Environment Australia as being a key feature of the Act and their establishment continues to be one of its high priorities.[38] As already noted, there are two types of bilateral agreements under the Act, assessment and approval bilaterals. The statement by Environment Australia regarding the importance of bilateral agreements seems to refer to assessment bilaterals, as there does not appear to have been any moves to implement approval bilaterals at this stage.

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[29] Ibid.

[30] Ibid at 3.23.

[31] Ibid at 3.15.

[32] Ibid at 3.17.

[33] For example, 6% of the total decisions on whether an action requires approval in the year July 2001 – June 2002 were late compared with 17% prior to June 2001. See Department of Environment and Heritage, *Department of Environment and Heritage Annual Report 2001-02: Operation of the Environment Protection and Biodiversity Conservation Act 1999* at 181-182.

[34] Ashe, J (ed), "EPBC Act Developments", *National Environmental Law Review*, No. 3, September 2002: 9.

[35] The Auditor-General, *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999,* Audit Report No. 38 2002-2003, Performance Audit at para 4.13.

[36] Ibid at para 4.26.

[37] Ibid at para 30.

[38] Department of Environment and Heritage, *Department of Environment and Heritage Annual Report 2001-02: Operation of the Environment Protection and Biodiversity Conservation Act 1999* at 178.

There are many practical reasons why the implementation of assessment bilaterals is desirable. If effectively implemented, they have the potential to result in increased efficiency and decreased duplication and cost associated with actions which trigger the Act.[39] Nevertheless, attempts by Environment Australia to implement assessment bilaterals have proven to be a challenge.

The implementation of assessment bilaterals was prejudiced when the Minister released draft agreements for each of the States and Territories, within a few days of the Act coming into force and without first consulting or even notifying the State and Territory governments.[40] This brought an angry response from the State governments.[41]

After this initial controversy, Tasmania entered into a bilateral agreement fairly quickly, doing so on the 15 December 2000. Other States were slower to follow, with the Northern Territory signing a bilateral agreement on 31 May 2002 and Western Australia entering into an agreement on 16 August 2002.[42]

A revised draft bilateral agreement for Queensland was released for public comment in September 2002, has yet to be signed.[43] Environment Australia has stated that the development of an agreement with New South Wales is well advanced,[44] while agreements with Victoria and the Australian Capital Territory are waiting on the outcome of reviews being conducted by these jurisdictions of their environmental legislation.[45]

The South Australian government refused outright to enter into a bilateral agreement when the Act came into force.[46] There having been a change in government in South Australia since that time, Environment Australia is seeking the views of the new South Australian government in relation to developing an agreement.[47]

Environment Australia's experience with the Tasmanian bilateral has shown that assessment bilaterals provide adequate information for a decision to be made whether to approve an action.[48] The use of this bilateral has also shown that assessment bilaterals can save time, effort and cost to proponents, the relevant State Government and the Commonwealth Government.[49]

While the ANAO found no evidence to suggest that assessment in accordance with bilateral agreements results in increased timeliness, this was attributed to the limited number of bilaterials in place.[50]

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[39] These were stated goals of the bilateral agreement mechanism in Hill, R. "Reform of Commonwealth Environmental Legislation: Consultation Paper" at 5.

[40] Environment Institute of Australia, *EIA Newsletter* June 2000 at 1.

[41] Ibid.

[42] Environment Australia, *List of Assessment Bilateral Agreements between the Commonwealth and the State and Territories,* Environment Australia Website: www.ea.gov.au/epbc/assessmentsapprovals/bilateral/list.html.

[43] Environment Australia, *List of Assessment Bilateral Agreements between the Commonwealth and the State and Territories,* Environment Australia Website: www.ea.gov.au/epbc/publicnotices/bilateral/archive/index.html.

[44] Department of Environment and Heritage, *Department of Environment and Heritage Annual Report 2001-02: Operation of the Environment Protection and Biodiversity Conservation Act 1999* at 178.

[45] Department of Environment and Heritage, *Department of Environment and Heritage Annual Report 2001-02: Operation of the Environment Protection and Biodiversity Conservation Act 1999* at 179.

[46] Shaw, C. "Impact of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) on the State Approval Process", *AMPLA Yearbook 2001* at 84.

[47] Department of Environment and Heritage, *Department of Environment and Heritage Annual Report 2001-02: Operation of the Environment Protection and Biodiversity Conservation Act 1999* at 179.

[48] Department of Environment and Heritage, *Department of Environment and Heritage Annual Report 2001-02: Operation of the Environment Protection and Biodiversity Conservation Act 1999* at 178.

[49] Ibid.

[50] The Auditor-General, *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999,* Audit Report No. 38 2002-2003, Performance Audit at para 30.

It is considered inevitable that agreements will eventually be finalised between the Commonwealth government and each of the States due to the prominent and central role the Act has assumed in the Australian environmental legal system.[51] This seems to be a fair assumption to make, particularly given that the scope of the Act is likely to grow as new threatened species and communities are listed and triggers are likely to be added. Accordingly, the number of proposals coming within the assessment processes of the Act will continue to grow, and this is likely to bring pressure on State governments not party to an assessment bilateral to enter into one to minimise cost and duplication of processes faced by proponents.

Enforcement

Environment Australia is coming under increasing criticism for not enforcing alleged instances of non-compliance with the Act.[52] The Act contains a broad range of enforcement mechanisms and serious penalties for non-compliance, but Environment Australia has declined to utilise these mechanisms in favour of a cooperative approach to enforcement.[53] There have not been any prosecutions brought under the Act,[54] while education and awareness raising have taken a priority.[55]

The audit by the ANAO noted a degree of stakeholder concern over the level of Environment Australia's enforcement of the Act, with one stakeholder identifying a growing awareness of the Authority's unwillingness to take enforcement action.[56] The ANAO found that Environment Australia relies heavily on third parties to identify instances of non-compliance with the Act.[57]

Environment Australia has followed up on a number of reported incidents and estimates that five percent of all referrals have been submitted following compliance effort.[58] The ANAO also found there to be inadequate monitoring of compliance with approval conditions by Environment Australia and that there was no formal monitoring of actions that are not controlled actions if carried out in a particular way.[59] Further, information is not being kept on the number of approved actions that have commenced or been completed.[60] Environment Australia is planning a system for monitoring actions but the implementation of such a system is still in its initial stages.[61]

On 10 April 2003 Environment Australia released its Compliance and Enforcement Policy. The policy confirms the intention of the Authority to rely on a cooperative approach to compliance and indicates a reliance on compliance measures such as education activities, the provision of information and advice, persuasion, cooperative assistance and collaboration; only where these measures fail will enforcement mechanisms be used.[62]

In the case of contraventions, the policy states that education and/or warnings will be used for first and less serious contraventions to ensure that offenders are aware of legislative requirements.[63] Deterrent sanctions such as suspension or cancellation of permits or approvals, injunctions, remediation orders, pecuniary penalties and prosecution will be used where there has been a serious or continuing contravention.[64]

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[51] Shaw, C. "Impact of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) on the State Approval Process", *AMPLA Yearbook 2001 at 84.*

[52] Ashe, J (ed), "EPBC Act Developments", *National Environmental Law Review,* No. 3, September 2002: 9.

[53] Macintosh, A. *Environment Protection and Biodiversity Conservation Act 1999: An Overview of the First Two Year,* World Wildlife Fund Website: www.wwf.org.au/downloads/EPBC_2nd_anniversary_overview.pdf at 13.

[54] The Auditor-General, *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999,* Audit Report No. 38 2002-2003, Performance Audit at para 37.

[55] Ibid at para 39.

[56] Ibid at para 6.41.

[57] Ibid at para 6.11.

[58] Department of Environment and Heritage, *Department of Environment and Heritage Annual Report 2001-02: Operation of the Environment Protection and Biodiversity Conservation Act 1999* at 195.

[59] Ibid at para 40.

[60] Ibid.

[61] Ibid.

[62] Ibid.

[63] Ibid at 6.

[64] Ibid.

Overall, the policy does not appear to alter the position Environment Australia has implicitly taken in relation to compliance and enforcement since the Act's commencement. The policy states that Environment Australia will use a range of flexible and targeted measures to promote self-regulation and to achieve its compliance and enforcement objectives.[65] This indicates that prosecutions and other punitive measures in the Act will rarely be utilised, in favour of cautions and cooperative assistance offered to prevent or halt contraventions of the Act.

The policy does not give clear guidance in relation to how compliance monitoring is to occur. The policy lists a number of ways Environment Australia might monitor compliance, such as patrols, audits, targeted investigations, inspections and analysis of information reported as required by conditions attaching to permits, approvals, etc.[66] Rather than giving a clear indication of the way compliance with the Act will be monitored, the policy shows that Environment Australia has yet to implement formal procedures for detecting contraventions of the Act. It should be noted that the three assessment bilaterals currently in force provide for State assistance in the monitoring of approval conditions.[67]

The lack of formal compliance monitoring and the heavy reliance by Environment Australia on non-punitive measures in response to contraventions could be attributed to a lack of resources (not an uncommon problem for environmental agencies throughout the country). The ability for the Commonwealth government to cope with the extent of its powers and responsibilities under the Act has been questioned.[68] The audit by the ANAO found there was a risk that Environment Australia would provide ineffective responses to potential breaches under the Act because of a lack of resources.[69] Although Environment Australia is in the process of preparing audit plans for all actions approved subject to conditions, the ANAO found that the staffing levels allocated to doing this was limited.[70] Although Environment Australia has said that funding levels for this

aspect of operations will increase,[71] one would expect some system for the monitoring of approval conditions to be actively in place within three years of the Act's operation.

While, Environment Australia has not brought any prosecutions under the Act, a few actions have commenced by individuals seeking injunctions under the Act. These cases are discussed below.

Case Law under the Act

To date, there have been three cases involving applications by third parties for injunctions under s475 of the Act. Much has been written on the first two cases, Booth v Bosworth (2001) 114 FCR 39 (the Flying Fox case) and Schneiders v The State of Queensland; Jones v The State of Queensland [2001] FCA 553 (the Fraser Island Dingo case). These cases involved alleged significant impacts on World Heritage areas and will only be dealt with briefly. The third case, Mees v Roads Corporation [2003] FCA 306, involved the alleged use of false or misleading information in referral documentation and will be discussed in more detail.

There is presently an application before the Federal Court in Queensland in relation to the assessment of the proposed Nathan Dam in Queensland and this is discussed also.

Booth v Bosworth (2001) 114 FCR 39

In this case, Booth sought and obtained an injunction under s475 of the Act to halt the electrocution of large numbers of Spectacled Flying Foxes on electrical grids set up to protect the crop on a lychee farm in north

[65] Ibid at 4.

[66] Ibid at 5.

[67] Ibid at 6.25.

[68] Scanlon, J and Dyson, M. "Will Practice Hinder Principle? – Implementing the EPBC Act", *Environmental and Planning Law Journal,* Volume 18, No. 1, February 2001: 19.

[69] The Auditor-General, *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999,* Audit Report No. 38 2002-2003, Performance Audit at para 6.3.

[70] Ibid at 6.22 - 6.23.

[71] Ibid at 6.33.

Queensland. Booth argued that the electrocution of the Spectacled Flying Foxes had a significant impact on the world heritage values of a declared World Heritage Property, namely the Wet Tropics World Heritage area.

This case was responsible for identifying the potential scope of the Act, in that the killing of a species from a World Heritage area outside of that World Heritage was found to have a significant impact for the purposes of the Act. Also, consideration of the meaning of "significant impact" was given in this case, with Branson J accepting that a "significant impact" is an "impact that is important, notable or of consequence having regard to its context or intensity".[72]

Schneiders v The State of Qld; Jones v The State of Qld [2001] FCA 553

The applicants in this case argued that the culling of dingos by the Queensland government on Fraser Island was likely to have a significant impact on the world heritage values of the Fraser Island World Heritage Area.

Dowsett J accepted that dingoes were part of the world heritage values of the Fraser Island World Heritage area[73] and that there was a serious question to be tried,[74] but rejected the applications on the balance of convenience as the cull would only continue for a finite period of time, involve a small number of dingoes and was in the public safety, and the evidence presented by the applicants as to the impact of the culling was weak.[75]

Although unsuccessful, this case is important in that it further illustrates the ability for third parties to bring enforcement action under the Act.

Mees v Roads Corporation [2003] FCA 306

Dr Paul Mees sought an injunction in relation to alleged misleading information contained in a referral by VicRoads under the Act for a section of the proposed Scoresby Freeway.

When making a referral, all related actions or proposals to the action referred must be disclosed. In response to this aspect of the referral, VicRoads stated that there is no proposal for a new freeway linking the Scoresby Freeway with the Metropolitan Ring Road. Mees argued that this was misleading, in that it failed to reveal the full situation. He argued that there was a secret plan within VicRoads and the Victorian Government to construct the link and/or that the construction of the Scoresby Freeway would make the construction of the link inevitable.

Gray J did not accept that there was a secret plan,[76] however, he did find that the construction of the Scoresby Freeway would create a strong chance and make it highly likely that the link would be built in the future.[77] Therefore, the question to be considered was whether the failure to identify this strong chance the future link would be constructed was misleading.

In the context of the referral and its identification of transport projects not yet fully defined and possible future transport services, Gray J found that the firm statement that there was no proposal to construct a future link to be misleading.[78] He found the notion of projects as described in the referral to be very wide and that it was necessary, in order to provide the complete picture, for VicRoads to refer to the strong chance of the link proceeding as a result of the construction of the Scoresby Freeway.[79]

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[72] *Booth v Bosworth* (2001) 114 FCR 39 at 65 and 66.

[73] *Schneiders v The State of Queensland; Jones v The State of Queensland* [2001] FCA 553 at para 4.

[74] Ibid at para 7.

[75] Ibid at paras 8 – 12.

[76] *Mees v Roads Corporation* [2003] FCA 306 at para 101.

[77] Ibid at para 114.

[78] Ibid at para 116.

[79] Ibid.

Further, Gray J found that although it may not have been necessary for VicRoads to go into the detail it did in relation to other possible future developments, in doing so it took the risk that a failure to reveal the full picture would make the referral misleading.[80]

However, Gray J had difficulty in deciding what outcome should follow from his decision. Gray J ordered that the parties file the orders they propose to be made. Being unable to decide upon such orders, the matter further came before Gray J on 23 April 2003.[81] The respondents proposed that the application be dismissed. Mees proposed that the court make a Declaration that the referral was misleading and that the Minister be served with a copy of the Declaration and reasons for judgement. Gray J declined to grant the orders sought by Mees and therefore, although Mees succeeded on the substantial "misleading" issue, the application was dismissed.

This case shows that it is possible for a third party to take legal action to ensure that information contained in referral documentation is accurate. Notwithstanding the difficulties identified by Gray J in relation to applying an injunction to such a breach, it is possible that inaccuracies in referral documentation may be forcibly rectified in this way.

Since the conclusion of this case, Mees has lodged a further application challenging the Minister's decision that the construction of the relevant section of the Scoresby Freeway is not a controlled action. The basis for the further application is the correctness of the Minister's refusal to consider possible indirect effects of the proposal (ie. the impacts should the link proceed) and not merely the direct effects.[82] The further application is likely to be heard in November or December of this year.[83]

Nathan Dam Application

The Queensland Conservation Council (QCC) and the World Wide Fund for Nature (WWF) have lodged an application with the Federal Court in relation to the proposed Nathan Dam in Queensland.

The Minister has decided that the proposal is a controlled action due to its likely impacts on listed threatened species and ecological communities.[84] However, the Minister was not convinced, despite submissions from the Great Barrier Marine Park Authority, QCC and WFF, that the proposal is likely to have a significant impact on the Great Barrier Reef Marine Park World Heritage Area.[85] QCC and WWF are seeking a review of this aspect of the Minister's decision.[86]

The major issue to be determined in the case is expected to be the Minister's obligation to consider "all adverse impacts" of the proposal on matters of national environmental significance and if, when making the decision about whether approval was required, the Minister considered all adverse impacts in light of his alleged failure to consider the downstream impacts of the Dam on the Great Barrier Reef Marine Park World Heritage Area.[87]

Future of the Act

The first three years of the Act's operation indicates that it will continue to gain prominence in the Australian environmental legal system. The scope of the Act has been found to be extensive and Environment Australia has quite evidently been investing considerable time and effort into getting the legislation to function effectively.

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[80] Ibid at para 117.

[81] *Mees v Roads Corporation* [2003] FCA 410.

[82] Dr Paul Mees, personal communication, 7 August 2003.

[83] Ibid.

[84] Environment Defenders Office (Qld) Inc, "Nathan Dam Case – Qld Conservation Council (QCC) and World Wide Fund for Nature (WWF) Challenge the Proposed Nathan Dam", *Bulletin,* February 2003: www.edo.org.au/edoqld/edopld/new/Feb03.htm.

[85] Ibid.

[86] Ibid.

[87] Environment Defenders Office (Qld) Inc, "Update on Nathan Dam Case – QCC and WWF v Minister for the Environment and Heritage", *Bulletin,* April 2003: www.edo.org.au/edoqld/edopld/new/April03.htm.

With the true extent of the scope of the Act becoming apparent, there was some concern that the Commonwealth government might shy away from its responsibilities under the Act. These fears appear largely unfounded, with new threatened species and communities being listed continuously. Parts of the Act relating to biodiversity conservation have been actively utilised, such as the creation of recovery plans and threat abatement plans.

The Commonwealth government has also shown itself willing to make politically unpopular decisions, such as including land clearing to the list of key threatening processes under the Act, despite intense pressure from the farming lobby.

Although enforcement appears to be an area that has been neglected by Environment Australia, this has been offset somewhat due to the amount of educational activity the Authority has been engaged in. As a result of Environment Australia's active promotion of the Act, there are many members of the community who have a basic awareness of the Act's requirements[88] and this is reflected in the active reporting of possible contraventions by third parties.[89] Although not providing the same deterrent effect that an active utilisation of punitive measures would have, the availability of the third party injunction provisions in the Act have been shown to be of assistance where the Act is contravened.

It seems inevitable that new actions that will trigger the Act will be added. As part of the Commonwealth government's proposed heritage protection regime, amendments to the Act are currently before the Senate which if passed would make places on the proposed National Heritage Places list matters of national environmental significance for the purposes of the Act.[90]

The Commonwealth government has also expressed an intention to include a greenhouse trigger in the Act. A draft regulation for the trigger was released in November 2000 and State and Territory governments consulted on the proposed regulation, however the process appears to have stalled since then.[91]

Therefore, all indications are that the scope of the Act will continue to grow, and that Environment Australia will make every attempt within its resource capabilities to ensure the legislation operates effectively.

Conclusion

In the first three years the Act has exceeded expectations in its capacity to function as intended. Much of this can be attributed to the efforts of Environment Australia within its limited resource capabilities. However, it seems that the full potential of the Act was not anticipated when it first came into force, and it is only now that its true extent is being realised.

This is not to say that the Act is operating entirely efficiently and without issue. The referral process is experiencing problems in relation to inadequacies in referral documentation, staged referrals, the large number of unnecessary referrals received and a lack of referrals from key industry groups. There are issues with the assessment process in relation to the heavy reliance on assessment by preliminary documentation, which in turn may be the cause of almost all proposed actions gaining approval.

Also, there are the assessment bilateral agreements which should result in increased efficiency in the assessment process once in place but which are yet to be implemented in all States. The absence of assessment bilaterals in New South Wales and Queensland in particular is unsatisfactory in light of the fact that the largest number of controlled actions arise within these States.

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[88] The Auditor-General, *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999,* Audit Report No. 38 2002-2003, Performance Audit at para 6.11.

[89] Department of Environment and Heritage, *Department of Environment and Heritage Annual Report 2001-02: Operation of the Environment Protection and Biodiversity Conservation Act 1999* at 195.

[90] Ashe, J (ed), "EPBC Act Developments", *National Environmental Law Review,* No. 4, December 2002: 6.

[91] Macintosh, A. *Environment Protection and Biodiversity Conservation Act 1999: An Overview of the First Two Year,* World Wildlife Fund Website: www.wwf.org.au/downloads/EPBC_2nd_anniversary_overview.pdf at 19.

One major deficiency that has arisen under the Act has been the lack of enforcement and compliance monitoring by Environment Australia. The Authority has admitted that it has been reactive rather than proactive in this respect, and that this function has been under funded.[92] The Department has stated that it is intended that funding will be increased towards enforcement and compliance monitoring.[93] Although, Environment Australia's Enforcement and Compliance Policy has just recently been released, the generality of its contents and the uncertainties associated with the funding means that the operation of this vital aspect of the Act remains uncertain.

Overall, all indications are that the implementation of the Act has progressed well and in certain respects has exceeded expectations. If this is not the case already, it is only a matter of time before the vast majority of development projects will have to be assessed for possible implications and requirements under the Act.

[92] The Auditor-General, *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999,* Audit Report No. 38 2002-2003, Performance Audit at para 6.45.

[93] Ibid at para 6.46.

The Heritage Amendments

By Lyndall Kennedy, EPBC Unit Coordinator. The EPBC Unit is a joint project of WWF Australia and the Tasmanian Conservation Trust

The *Environment and Heritage Legislation Amendment Act 2003, Australian Heritage Council Act 2003* and the *Australian Heritage Council (Consequential and Transitional Provisions) Act 2003* (collectively known as 'the Heritage Amendments') have been passed through parliament. Coming into force in February next year, the Heritage Amendments will introduce sweeping changes to the current Commonwealth heritage regime.

The Heritage Amendments:

- introduce two new lists to which the EPBC Act assessment procedures will apply: the National Heritage List and the Commonwealth Heritage List;
- introduce a transparent approval and assessment process for Heritage properties that allows for the public to participate;
- impose civil and criminal penalties for breaches; introduces a regime whereby the Australian Government is required to proactively protect Australia's national heritage places;
- repeal the *Australian Heritage Commission Act 1975* ('the AHC Act');
- replace the Australian Heritage Commission with the Australian Heritage Council; and
- retain the Register of the National Estate,

1. What are we gaining under the new approvals process?

(a) The heritage values of properties on the National Heritage List become the 7th matter of National Environmental Significance under the Environmental *Protection & Biodiversity Conservation Act 1999* ('the EPBC Act'), triggering the approvals process under that Act.

(b) The new regime creates an approval process that will apply to all actions that are likely to have a significant impact on:

- the National Heritage values of a place on the National Heritage List; or
- the Commonwealth Heritage values of a place on the Commonwealth Heritage List.

[There was more of a consultative process rather than an approval process under the AHC Act]

(c) The approval requirements will apply to all persons and actions that fall within the Constitutional powers of the Australian Government.

[The AHC Act only applied to the actions of Australian Government Ministers and authorities of the Australian Government]

(d) The Australian Government Minister for the Environment and Heritage (the "Minister") will make the decisions on whether an action requires approval and whether actions should be approved (unless a bilateral agreement is made that transfers the power to approve actions to a State or Territory).

[This means the Minister will have wider powers to protect Australia's heritage]

(e) Before the Minister decides whether an action requires approval or whether an action should be approved, members of the public will be given an opportunity to make submissions and these submissions must be taken into account when the relevant decisions are made.

[The AHC Act did not provide members of the public with an opportunity to comment on decisions to take an action that may damage a place on the Register]

(f) Substantial penalties can be imposed where there is a failure to obtain proper approval to take an action. Maximum penalties for taking an action without a required approval include 7 years imprisonment and/or a fine of up to $550,000 for an individual and a fine of up to $5.5 million for a corporation. The offender may also be required to pay to reduce or repair any environmental damage caused by the unauthorised action. If the approval was conditional, there are also penalties for contravening a condition of an approval including 2 years imprisonment and/or a fine of up to $110,000 for an individual and $1.1 million for a corporation.

[There were no penalties for non-compliance with the requirements of the AHC Act]

(g) Documents concerning decisions under the new regime will be publicly available (including on Department of the Environment & Heritage's website).

[Documents relating to actions that trigger the AHC Act were not required to be made publicly available under the AHC Act.]

2. What are we gaining under the new assessment process?

(a) All actions that require approval under the new regime will also be required to be assessed under the EPBC Act.

Note: There are three exemptions from this rule. Assessment under a bilateral agreement; assessment under another Commonwealth assessment; the Minister can exempt actions from the assessment process if the Minister considers it is in the "national interest" that the action be exempt from this process.

[There was no formal assessment process under the AHC Act and the Commission's assessments were carried out in a manner determined appropriate by the Commission.]

(b) Members of the public will be provided with an opportunity to comment on assessment documentation prepared under the new regime.

[The AHC Act did not allow members of the public to comment on "assessments" being carried out by the Commission.]

(c) Documents concerning assessments will be publicly available (including on the Department of the Environment & Heritage's website).

[Documents concerning "assessments" under the AHC Act were not publicly available.]

3. What are we gaining in reference to actions of the Australian Government?

(a) The Australian Government, its agencies and other ministers are now required to obtain approval from the Minister if they intend to take an action that is likely to have a significant impact on the Commonwealth Heritage values of a place on the Commonwealth Heritage List.

[There were no approval requirements for Australian Government actions under the AHC Act]

(b) Australian Government agencies will also be required to:

- "take into account" Commonwealth Heritage values and to "minimise impacts" on these values when taking actions that relate to places on the Commonwealth Heritage List; and
- seek the advice of the Minister prior to taking an action that is likely to have a significant impact on a Commonwealth Heritage place.

[This has significantly increased the obligations of Australian Government agencies not to adversely impact the heritage values of Commonwealth Heritage Listed properties]

4. What are we gaining in expanded public rights to protect Heritage?

(a) The new regime broadens the rules of standing for persons involved in the protection and conservation of the "environment" (which now includes cultural and indigenous heritage groups) to enforce public rights, obtain injunctions to stop damage and to appeal against decisions made under the Act.

[The public had no rights under the AHC Act to take action to ensure that heritage properties were protected from destruction]

5. What are we gaining in terms of management planning?

(a) The new regime includes a process for the preparation and implementation of management plans for places on the National and Commonwealth Heritage Lists.

(b) All Australian Government agencies are now required to prepare heritage strategies and to maintain heritage registers for the places they own or control.

(c) Where management plans are prepared for places on these lists, the Australian Government is expected to provide resources for the implementation of the plan and to ensure the values of the place are maintained.

6. What are we gaining for Heritage places outside Australia?

The Heritage Amendments enable places outside Australia to be included on the National and Commonwealth Heritage Lists. This listing will effect actions by Australians at those sites.

[The AHC Act only allows places within Australia to be included on the Register.]

7. What are we gaining in terms of Conservation Agreements?

The Heritage Amendments will enable the Minister to enter into "conservation agreements" with the owner of any place that has heritage significance. Conservation agreements are like covenants, they are legally binding on the Australian Government, the owner and any person who subsequently acquires an interest in the place.

[The AHC Act had no equivalent provision]

8. Where do we go from here?

In the past couple of years many have argued against the amendments because they felt that the amendments do not go far enough. However, the amendments will offer real and tangible protection to properties and places on the lists, they introduce an approval process with penalties for breach, and they allow the Australian community to have a say in the protection of Australia's heritage. These are significant gains. The amendments offer substantial protection above and beyond the notional consultative process that AHC Act could provide.

A Day in the Life of an Environment Protection Officer

By Jennie Slatter, Environment Protection Officer, EPA Victoria

Firstly, to understand the role of an Environment Protection Officer, it is important to understand the legislative framework that applies to EPA Victoria. The *Environment Protection Act 1970* (Victoria) (EP Act) is central to the work of an EPA Officer. The EP Act establishes the EPA as an independent government authority, provides a system for administration and enforcement and sets out a policy framework. Sections 55, 55C, 57 and 62B of the EP Act set out the powers of Authorised Officers of the EPA. Section 55(1) of the EP Act allows Authorised Officers access to industrial or commercial premises at any time for investigation purposes, including the collection of samples for analysis. In the event of imminent danger to life or limb or to the environment, Section 62B of the EP Act allows Authorised Officers to give directions to remove, neutralise or treat (as appropriate) the source of the threat.

State Environment Protection Policies (SEPPs) and Waste Management Policies (WMPs) are subordinate legislation and are declared by the Governor in Council on the recommendation of the Authority. SEPPs establish environmental objectives to protect relevant beneficial uses of the various segments of the environment (ie. air, water and land). While WMPs (formerly Industrial Waste Management Policies – IWMPs) cover the management of wastes, including storage, handling and treatment of wastes. These policies provide the framework for the application of the EP Act, guiding the Authority's decisions in regards to works approval applications and licences.

The EP Act also contains wide regulation making powers, with regulations under the Act covering: fees, prescribed waste, notifiable chemicals, waste transport, noise and emission standards for motor vehicles, the construction and operation of plant and equipment, measurement of discharges and prohibition or regulation of waste.

Accordingly, the EP Act, SEPPs, WMPs and Regulations are central tools in the daily work of an Environment Protection Officer. As suggested by the above description of the EP Act and associated policies and regulations, the work of EPA Officers involves working on a broad range of environmental issues, including: water pollution, air quality, contaminated land, groundwater, noise, waste management, landfills, cleaner production, energy and greenhouse in a range of contexts.

A significant portion of an EPA Officer's time involves working with licensed site operators to ensure that these operations are managed in accordance with the conditions of the EPA licence for the premises. Each EPA Officer is allocated a Client Manager role for several licensed premises within their region, dealing with all environmental issues that relate to these premises. EPA licences are the principle mechanism for site-specific regulatory control. The types of operations that require an EPA licence and works approval are set out in the *Environment Protection (Scheduled Premises and Exemptions) Regulations 1996.*

A works approval is essentially a prerequisite for an EPA licence. Through the works approval process (s19B of the EP Act), proponents for the development of new operations, or significant changes to existing operations, are required to submit applications for the proposed works to EPA Officers for assessment prior to the commencement of works. If EPA approves the application, a works approval will be issued setting out conditions for the pre-operational phase of a scheduled activity. When the pre-operational works are completed and the associated conditions of the works approval are appropriately satisfied, EPA will then issue a licence. A licence supercedes a works approval and sets out conditions for the operational phase of works. Licences are reviewed and amended on a regular basis by EPA Officers to ensure that appropriate controls are in place.

Increasingly, EPA are trying to work in co-operative partnerships with industry to ensure that good environmental outcomes are achieved, rather than adopting a more traditional command and control approach. Still, at times, EPA Officers have take on an enforcement role requiring either: issue of warning letters or fines, or for more serious incidents, collecting evidence for prosecution. EPA's approach to undertaking enforcement action is outlined in EPA Publication 384 *Enforcement Policy.*

The work of an EPA Officer also involves regular contact with the community through responding to pollution reports from the public that are received through EPA's Pollution Watch Line or direct to Officers. Pollution reports can range from machine noises from industrial premises that interrupt people's sleep, to illegal waste dumping, to oil slicks in Port Phillip Bay. Pollution reports can be received from the public anytime between 8:30am to 10:00pm, seven days a week and therefore, Officers are required to work on call after-hours on a regular basis to respond to these reports. Some pollution reports can be resolved within hours, whilst others may take several months to address.

EPA Officers often take on a mediation role, attending regular meetings with a particular industry and their residential neighbours. Representatives from local councils and other government agencies may also attend. These forums provide an opportunity for residents to express any concerns they have in relation to the operation as well as providing industry with the opportunity to explain to their neighbours what goes in within the walls of their premises. Through gaining a better understanding of the neighbouring industrial operation and the controls in place, residents often gain assurance that the actual risks posed by the industry are much less than those that were originally perceived. In several cases, industry and the local community have worked together to identify a positive way in which industry can contribute to the local area (eg. through local beautification works). In other cases, industry and their residential neighbours have been able to agree on suitable times for particular aspects of an industrial operation to occur. Ideally, these forums provide an opportunity for greater understanding between industry and the community, enabling both parties to work together more effectively to resolve issues.

EPA Officers also work regularly with other government agencies, including: local Councils, Department of Sustainability and Environment (DSE), Ecorecycle Victoria, Regional Waste Management Groups (RWMGs), Department of Infrastructure (DOI), Department of Human Services (DHS), WorkCover, Metropolitan Fire Brigade (MFB), Victoria Police, Sustainable Energy Authority of Victoria (SEAV) and water authorities. Typical inter-agency work includes: responding to a major pollution incident such as an oil spill, working collaboratively to address diffuse source pollution in a catchment and exchange of advice between agencies in relation to particular applications for proposed works, site specific and other environmental issues.

Environment Protection Officers work in EPA's Operations regions, based in: Melbourne, Dandenong, Geelong, Traralgon, Wangaratta and Bendigo. Other areas of work within EPA include: Policy (Air, Water, Waste, Land and Groundwater), Executive, Solicitors, Sustainable Development, Community Relations, Environmental Chemistry (EPA's analytical laboratory) and Organisational Support (including Human Resources, Information Technology, Media, Knowledge, Corporate Communications and Finance).

I have found my work as an Environment Protection Officer at EPA to be incredibly diverse and always interesting. A 'typical day' can involve: investigating chemical odours in a residential area allegedly arising from nearby industrial operations, reviewing an application for a works approval, conducting an unannounced inspection of a scheduled premises to check licence compliance, collecting samples from a polluted waterway that may be used as evidence in a prosecution, discussing a noise issue with an Environmental Health Officer at a local Council and attending a community/industry consultation meeting in the evening. There's never a dull moment!

For further information about EPA, please refer to EPA's website: www.epa.vic.gov.au or email me: jennifer.slatter@epa.vic.gov.au.

Literature review - recent journal articles

Australasian Journal of Natural Resources Law & Policy

(Centre for Natural Resources Law and Policy, Faculty of Law University of Wollongong)

Volume 8 2003 Number 1

- Voluntary and Negotiated Agreements in Agriculture: Towards a Partnership Approach to Resource Management, By Neil Gunningham
- Preserving Opportunities or Taking Unjustified Risks? Reflections on the Report of the New Zealand Royal Commission of Genetic Modification, By Janet Hope
- Comparison of Two Commonwealth/State Environmental Management Programmes in an Evaluation Framework, By Bryan Jenkins
- Out Damned Weeds! Weed Management in Australia - Keeping them at Bay, By Elisa Arcioni

Abstracts of these papers are available at http://www.uow.edu.au/law/nrl/vol820031.htm

Environmental and Planning Law Journal

(Thomson Lawbook Co)

Volume 20 Number 4 (August 2003)

- A Question of Confidence: An Appraisal of the Gene Technology Act 2000, by Mark Tranter
- Self-regulation of environmental and social performance in the Australian mining industry, by David Brereton
- From red-neck to green-black: mineral exploration and native title in the Northern Territory, by Matthew Storey
- Voluntary environmental agreements in Australia: an analysis of the statutory and non-statutory frameworks for the implementation of voluntary environmental agreements in Australia, by Alexander P Danne

Journal of Environmental Management

(Environment Institute of Australia and New Zealand)

Volume 10, Number 9 - March 2003

- Ecological Sustainability of Military Areas in Australia's Tropical Savannas, by Andrew Ash, John McIvor, Christian Roth and Philip Price.
- Potential Environmental Impacts from Farming Rainbow Trout Using Inland Saline Water in Western Australia – by Mark Starcevich, Alan Lymbery and Robert Doupe.
- Watering Down Property Rights for the Sake of the Environment: Consideration of the Environmental Benefits of Attenuated Water Rights in NSW – by Lin Crase, Brian Dollery and Michael Lockwood.
- Solid Waste-level Rise on Atoll Nation States: A Less Publicised Environmental Issue in the Republic of Kiribati – by Yale Carden.
- Going for Zero: A Comparitive Critical Analysis of Zero Waste Events in Southern New South Wales – by Robin Tennant-Wood.