NELA Essay Competition;
The Gerry Bates Essay Prize

The Gerry Bates Essay Prize is an award in honour of Dr Gerry Bates, a founding member of NELA. The award is made for the best environmental law essay written by a student enrolled in an undergraduate course at an Australian tertiary institution.

The Prize, subject to confirmation by the Executive Committee will be:

- Registration and airfare for the 2004 NELA Conference.
- Publication of the winning essay in the NELA Review.

Entries are now called for the 2003 Essay Competition. The criteria are as follows:

- The Prize is open to any undergraduate student who has during 2003, written an essay for an environmental law subject taught at an Australian tertiary institution.
- The length of the essay must be between 3,000-5,000 words.
- The student's lecturer/course coordinator must certify in writing that the essay meets the criteria above.
- The essay must be received at the NELA Secretariat office by end February 2004, preferably in electronic form (MS Word).

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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,

Environmental Laws Are Growing Claws

This final issue of the Review for 2003 features two papers presented at the 2003 NELA Annual Conference held in Broken Hill on 23-24 October 2003, in conjunction with the Annual Conference of the Environment Institute of Australia and New Zealand. The conference location at Broken Hill was most enjoyable and many stimulating papers were presented. For those who could not attend, a list of the NELA conference papers is set out at the end of this issue.

It is increasingly evident that environmental law relating to protection of ecosystems is evolving rapidly from an earlier phase. Australian environmental legislation has now entered a more mature phase where legislators are creating specific schemes to mandate how priorities like biodiversity conservation are to be achieved. The two papers featured in this issue are good examples of prescriptive new legislative schemes which seek to achieve for more sustainable land use in regional Australia. The paper by Ilona Millar examines the ambitious new Water Management Act 2000 (NSW), which endeavours to ensure environmental flows in rivers throughout New South Wales. This paper examines some of the preliminary legal issues that have arisen in implementation of this Act (through a number of pending legal challenges) and concludes that the NSW government's commitment to integrated catchment management is being eroded through political processes and apparent flaws in the legislated process for making of Water Sharing Plans. The paper by Tania Heber and Lucy Vaughan deals with recent enhancements to the scheme for protection of native vegetation under the Victorian Planning Provisions, through the incorporation of a 'net gain' framework. The authors conclude that whilst the objective of new framework promises a reversal of native vegetation clearance across the entire landscape, crucial operating guidelines have not yet been released, and thus it remains to be seen how effective the framework will be in practice.

This issue also features a case note by Chris McGrath on the landmark Nathan Dam case, in which WWF (Australia) and the Queensland Conservation Council have succeeded in securing a reassessment of the environmental consequences of the construction of a dam on the edge of the Great Barrier Reef. We have also included an interview with Mick Bourke, the new Chairman of EPA Victoria, in which he makes some interesting comments on his first 12 months in office.

Sub-editors Wanted: National, Tasmania, and ACT divisions.

Some of our State and Territory sub-editors have recently advised they are unable to continue their current roles. Accordingly there are opportunities for others to become involved in the National, Tasmania and ACT divisions. I would be very glad to hear from any environmental law enthusiasts who are interested in providing quarterly updates on behalf of these divisions.

Best wishes

Wayne Gumley

National Editor

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NELR editors

NATIONAL EDITOR: Wayne Gumley

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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

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

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

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

QUEENSLAND EDITOR: Leanne Bowie

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Leanne Bowie has been the Queensland editor for four years.

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

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

VICTORIAN EDITOR: Jennie Slatter

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).

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Will has been a member of NELA since 2000, and sits on the South Australian Branch Executive Committee, and the Natural Resources Sub-committee.

He has degrees in Arts and Law from the University of Adelaide.

Will practices at Adelaide firm Mellor Olsson, in the areas of Environmental and Planning Law, and Commercial dispute resolution.

TASMANIAN EDITOR: Vacant

WESTERN AUSTRALIAN EDITORS: Sally Marsh and Lewis McDonald

Sally Marsh sally.marsh@bdw.com.au

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 Lewis.mcdonald@mallesons.com

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

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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

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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.

As a general guide, articles should be between 3,000-5,000 words in length and should conform to standard conventions of legal writing. Please refer to the Australian Guide to Legal Citation (Melbourne University Law Review Association Inc 1998) as an illustrative style guide.

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

NATIONAL

Editor: John Ashe

Sixth Meeting of Environment Protection and Heritage Council (EPHC)—Initiatives on Water, Plastic Bags and Air Pollution

At the sixth meeting of the Environment Protection and Heritage Council (EPHC), held in Perth on 2 October 2003, Australia's Environment Ministers announced a number of measures to promote a more coordinated response to Australia's water shortage, plastic bag litter and air pollution problems.

Water

The Council agreed to support a national *Water Efficiency Labelling and Standards (WELS) Scheme* to ensure householders make better use of water. Under the scheme, manufacturers will be required to place water-efficiency labels on all showerheads, washing machines, dishwashers and toilets sold in Australia. Other products, including taps, urinals and flow regulators, will be covered on a voluntary basis. The list of products covered by the scheme is expected to expand over time.

The Council agreed to a collaborative approach to implement the scheme nationally. The Commonwealth will draft national legislation to underpin the scheme, in partnership with the States and Territories. This is expected to be in place by 2004, enabling the scheme to begin in 2005. The States and Territories will consider complementary legislation as part of a national partnership on water conservation.

It is estimated that the scheme will conserve around 87,200 litres of water annually—about 5 per cent of household use—and will save consumers about $620 million annually in water and electricity bills.

The Minister also agreed to work with the Natural Resource Management Ministerial Council to develop *National Guidelines on Water Recycling.* The guidelines will promote the safe reuse and recycling of wastewater for non-drinking purposes. These guidelines will enable large-scale treated sewage and grey-water to be used for:

- residential garden watering, car washing, toilet flushing and clothes washing
- irrigation for urban recreational and open space, agriculture and horticulture
- fire protection and fire fighting systems
- industrial uses, including cooling water.

Guidelines will also be developed for on-site treatment of grey-water treatment, including for high rise apartments and office blocks.

The guidelines will be developed in close cooperation with the National Health and Medical Research Council, the Australian Health Ministers Council and the Water Services Association of Australia. They will build on guidelines developed by individual States and Territories and based on Hazard Analysis and Critical Control Point Principles.

It is expected that the first stage of the new guidelines will be completed by December 2004.

Plastic Bags

(See also National Environmental Law Review No 3/2003, 8–9.)

In further development of the campaign to reduce plastic bag litter, the Council formally accepted the *Retailers Code of Practice for the Management of Plastic Bags.* The Ministers also called on all retailers, particularly smaller operators, to get behind the Code and to ensure that national bag reduction and recycling targets are met.

Under the Code, the Australian Retailers Association and major retailers such as Coles and Woolworths are committed to:

- reducing the use of single-use lightweight plastic bags by 50 per cent by the end of 2005
- increasing the recycling of these bags by between 15 and 30 per cent
- supporting a community target of reducing plastic bag litter by 75 per cent by the end of 2005.

Retailers have also agreed to introduce a transparent and independent auditing process to measure bag use, recycling and litter levels; to report to Ministers on their progress; and to undertake a vigorous recruitment program to encourage more retailers to join the scheme.

The Ministers also:

- commended retailers who have taken their own action to reduce plastic bag use
- asked officials to commence negotiations with retailers to phase out lightweight plastic bags within five years
- agreed to release a discussion paper, *Impacts of Degradable Plastic Bags,* for public comment, and to consider the report's findings and public comments at the next EPHC meeting in April 2004
- agreed that officials should convey the findings of the report to Standards Australia to help develop an Australian standard for degradable bags.

Air Quality
The Council initiated a review of the current air quality standard for sulphur dioxide. Minister also agreed to begin preliminary work for a review of ambient standards for, ozone (an indicator of photochemical smog) in the lead up to the statutory review due in 2005.

Waste Tyres
The Council welcomed moves by the tyre industry to promote greater recycling of used tyres. Tyre manufacturers and importers have formed a joint working group and are working with the Australian Tyre Recyclers Association to develop a framework for voluntary industry action on recycling of used tyres. The Ministers invited the tyre industry to submit a fully detailed proposal on tyre recycling for consideration at the next EPHC meeting in April 2004.

Fifth Meeting of Natural Resource Management Ministerial Council—Natural Resource Management Decisions Announced

The Natural Resource Management Ministerial Council (NEMMC) held its fifth meeting, in Perth, on 3 October 2003. The Council is made up of Federal, State and Territory Ministers with responsibility for the environment, natural resources, primary industries and water.

The Council:

- received an action plan from its Red Tape Reduction Taskforce, which was set up to consider ways to simplify the administration of the National Action Plan for Salinity and Water Quality (NAP) and the Natural Heritage Trust (NHT) in response to community concerns
- received a report on progress against a review of recommendations by the Natural Resource Management Community Forum at its meeting in April 2003

- discussed progress in implementing the NAP and the NHT, including the accreditation of regional natural resource management (NRM) plans in Victoria, New South Wales and South Australia and the agreement to the first comprehensive strategies for large-scale investment under the programs
- considered recommendations from the National Land and Water Resource Audit Australian Terrestrial Biodiversity Assessment 2002 report, which was released in April 2003
- endorsed a plan to implement *Australia's National Framework for Environmental Management Systems (EMS)* in Agriculture
- received a presentation from the New Zealand Minister for Conservation on current Climate Change and Greenhouse policy in New Zealand
- agreed to work with the Primary Industries Ministerial Council on a national policy framework for co-investment in afforestation and the environment
- reaffirmed its support for resolution of ongoing water reform issues, including water property rights, over-allocated systems in the Murray–Darling Basin, and trading and provision of environmental water
- noted progress with the development of a scheme for water labelling and regulation by the EPHC (see above)
- endorsed development of new benchmark *National Guidelines on Water Recycling,* to be developed in collaboration with the EPHC and other ministerial councils (see above)
- endorsed a joint statement on integrated oceans management, and reaffirmed a commitment to cooperate on the development of policy and management plans leading to more efficient regulation, and ecologically sustainable development (ESD), of Australia's marine resources
- endorsed a landmark paper, *A National Cooperative Approach to Integrated Coastal Zone Management*
- endorsed the recommendations of the High Level Officials Group, which set out the legislative, governance and funding arrangements and principles for a National System for the Prevention and Management of Marine Pest Incursions; and agreed to the development of an intergovernmental agreement as the formal means for establishing responsibilities and implementing the recommendations
- endorsed priorities and a timetable for negotiations between the Australian Government, States and Territories on fisheries arrangements during 2003–04 and 2004–05
- endorsed a model for introducing more flexibility into fisheries management arrangements under the Offshore Constitutional Settlement to enable a more harmonious management of fish stocks within a cross-jurisdictional area
- noted progress in the development of a framework for resource sharing and management in Australian Government-managed fisheries
- noted that crime in fisheries is growing, particularly in the abalone industry; agreed that this is a critical issue that needs dedicated action over the next two years; and agreed to develop a scoping paper on how to tackle the problem
- agreed to continue and extend the National Fisheries Ecologically Sustainable Development Reporting Framework, and noted that good progress had been made in incorporating the principles of ESD into the management of Australia's fisheries
- agreed to address the issue of Indigenous take of dugong and turtle
- agreed to release a paper, *Directions for the National Reserve System—A Partnership Approach,* on the future development of Australia's protected areas system
- noted progress of the current review of the Landcare system.

EPBC Act Developments

The Environment and Heritage Legislation Amendment Act (No 1) 2003 (the Amendment Act) received Assent on 23 September 2003. The Act made a number of amendments to the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act).*

Heritage Amendments
(See also National Environmental Law Review No 3/2003,10.)

Schedules 1 and 3 of the Amendment Act will come into effect on 1 January 2004. They incorporate a new heritage protection and management regime into the EPBC Act that provides for:

- inclusion of 'national heritage places' as a new matter of national environmental significance thereby making them subject to environmental assessment and approval processes under the Act
- establishment of a National Heritage List
- establishment of a Commonwealth Heritage List
- nomination, listing, management and protection arrangements for places on the two lists.

Nominations to the two lists will be called for in 2004 when the new laws commence.

Schedule 2 of the Amendment Act makes amendments to the EPBC Act that provide for certain consultation mechanisms with the Director of Indigenous Heritage Protection which come into effect at the same time as this position is established under section 9 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1989,* when enacted.

Other Amendments
Schedule 4 of the Amendment Act makes amendments to the EPBC Act that came into effect on 23 September 2003. They provide for:

- an ability to not accept a referral where it is a component of a larger action, and related notification requirements in these circumstances
- a civil penalty provision for actions not taken in the manner specified in a notice specified under section 77
- requirements in relation to various approval decisions on actions of relevance to World Heritage places
- requirements relating to Commonwealth compliance with plans for World Heritage places and Ramsar wetlands
- Ministerial delegations of powers and functions to the Director of National Parks
- additional Internet publication requirements.

Arising from these amendments the Department of the Environment and Heritage (DEH) has issued new Fact Sheets and a new Guideline:

- *Fact Sheet 2: Referral of proposed action* (updated September 2003) provides information about referring actions under the EPBC Act.
- *Fact Sheet 6: Staged Developments/Split Referrals* (September 2003) provides information about the new provisions in the EPBC Act that give the Minister the power not to accept a referral where the Minister is satisfied that the proposed action is a component of a larger action. DEH will check referrals to establish whether a proposed action is likely to be part of a larger action and the referral form has been amended to seek this information.

- *Fact Sheet 7: Particular Manner Decisions—Section 77A* (September 2003) provides information about the new provisions that provide a civil penalty for actions not taken in the manner specified in a notice specified under section 77. Section 77A(1) provides for the Minister to decide that a referred proposal is not a controlled action because it will be taken in a particular manner. Section 77A(2) provides for penalties of up to $110,000 for an individual and $1.1 million for a body corporate for a breach of a ' particular manner' decision. This is similar to a breach of condition of an EPBC Act approval.
- *Guideline on Application of 'Particular Manner' in Decision Making under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)* (October 2003) provides assistance to persons proposing to make referrals on the requirements to be addressed in 'particular manner' decisions and should be read in conjunction with *Fact Sheet 7: Particular Manner Decisions—Section 77A.*

EPBC Act Administrative Guidelines on Significance—Flying Fox Supplements

The Department of the Environment and Heritage has also issued amended supplements to the Administrative Guidelines on Significance relating the Grey-headed Flying Fox and the Spectacled Flying Fox. They take account of the decision by the Federal Court in *Humane Society International Inc v Minister for the Environment And Heritage* [2003] FCA 64 (see *National Environmental Law Review* No1 /2003,6).

Ozone Protection and Synthetic Greenhouse Gas Legislation Passed

The Ozone Protection and Synthetic Greenhouse Gas Legislation Bill 2003 has been passed by both houses. The bill builds on the *Ozone Protection Act 1989* and changes the title of that Act to the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*. It delivers three major changes:

- extends the import, export and manufacture licensing systems for ODS to also cover synthetic greenhouse gases where they are used as alternatives to ODS
- creates regulations for end-use controls on purchase, sale, handling and disposal of these gases
- implements the Beijing Amendment to the Montreal Protocol, banning the import and manufacture of bromochloromethane, and banning trade in certain ODS with non-Protocol countries.

It is expected that, as a consequence of the legislation, emissions will be reduced by the equivalent of nearly 6 million tonnes of carbon dioxide by 2010—a reduction in Australia's greenhouse gas emissions by up to 1 per cent of 1990 levels in 2010.

The complementary Ozone Protection (Licence Fees—Imports) Amendment Bill 2003 and the Ozone Protection (Licence Fees—Manufacture) Amendment Bill 2003 were also passed

Senate Committee Rejects Plastic Bag Legislation

The Senate Environment, Communications, Information Technology and the Arts Legislation Committee has rejected proposed legislation that would impose a levy on plastic bags. The two bills rejected by the committee in its report are the Plastic Bag Levy (Assessment and Collection) Bill 2002 and the Plastic Bag (Minimisation of Usage) Education Fund Bill 2002. Senator Brown (Australian Greens, Tasmania) introduced the bills in the Senate on 21 October 2002. Mr Peter Andren (Independent, NSW) introduced identical bills in the House of Representatives on the same day.

The legislative package includes a third bill, the Plastic Bag Imposition Bill 2002, which would enable the imposition of the proposed levy and would also declare the rate of that levy. As such, the bill is an essential element in the proposed legislative scheme. However, section 53 of the Constitution prevents a Senator from introducing such a levy, and Senator Brown tabled the bill in the Senate rather than introducing it as a bill. House of Representatives Standing Order No 293 prevents a private member from introducing a proposal for the imposition of a tax, so Mr Andren also tabled the bill.

These legislative constraints mean that the bill would need to be introduced by the Government if it were to have any prospect of enactment. The committee noted, however, that during the course of its inquiry the Environment Protection and Heritage Council (EPHC) had agreed to a non-legislative package of measures to reduce the use of plastic bags, and had formally agreed to the *Retailers Code of Practice for the Management of Plastic Bags* (see above). The committee concluded that the policy decision had already been made at the national governmental level not to follow the legislative option for minimising plastic bag use.

The Committee noted that plastic bags constitute only 2 per cent of Australia's litter stream and was persuaded of the need for a more holistic approach to reducing the litter stream. The Committee recognised that a levy on plastic shopping bags would reduce plastic bag use and litter in Australia but believed that regulation should only be used as an option of last resort. The Committee also saw merit in the national approach being pursued through the measures agreed by the EPHC. The Committee therefore recommended that the two bills not be agreed to.

Senator Brown provided a dissenting report supporting passage of the two bills. Labor Senators provided a supplementary report supporting mandatory legislative measures.

Senate Committee Endorses Fuel Quality Standards Legislation

The Senate Environment, Communications, Information Technology and the Arts Legislation Committee has recommended that the Fuel Quality Standards Amendment Bill 2002 be agreed to without amendment. The bill establishes a national labelling regime for fuels at point of sale and makes certain offences under the Act strict liability offences.

The background to the bill includes the controversy since late 2002 about the blending of ethanol with petrol. The Minister for the Environment and Heritage, Dr Kemp, announced on 11 April 2003 that the Government would set a 10 per cent limit on the volume of ethanol blended with petrol and would require the mandatory labelling of ethanol blended fuels. The Minister has already made a determination setting a 10 per cent cap on the volume of ethanol that may be blended with petrol, so the bill addresses the undertaking to introduce mandatory labelling. Specific fuel quality information standards will be introduced by the gazettal of a disallowable determination after the bill has been passed.

Labor Senators issued a dissenting report. They supported the introduction of a mandatory labelling scheme but considered that without draft regulations and labels the Committee had not been given enough in formation to fully understand the labelling regime the bill would put in place. The Australian Democrats issued a minority report raising objections to aspects of the proposed scheme.

Senate Committee Recommends Improvements to Environmental Regulation of Uranium Mining

The Senate Environment, Communications, Information Technology and the Arts References Committee report, *Regulating the Ranger, Jabiluka, Beverley and Honeymonn Uranium Mines* (October 2003), has found serious shortcomings in the environmental regulation of the four mines. The Committee's inquiry arose in response to spills and leaks at the mines, and the terms of reference required the Committee to assess the adequacy and effectiveness of the current system of environmental regulation.

A central issue was whether these spills and leaks have had an impact on the environment, and whether they are attributable to an over-reliance on self-regulation, unsatisfactory management practices and/or inadequate monitoring, oversight and enforcement by regulating authorities.

Mine operators and regulatory bodies acknowledged that there had been contamination from mining activity. They argued, however, that the number of incidents is not significant and environmental damage had not been proved.

The Committee found that a pattern of underperformance and non-compliance can be shown. It also found gaps in knowledge and an absence of reliable data on which to measure the extent of contamination or its impact on the environment.

The Committee also found that the Ranger and Jabiluka mines in the Northern Territory raise different sociological, geophysical and operational issues and environmental challenges from the Honeymoon and Beverley mines in South Australia. However, in the Committee's view, shortcomings in the operations of all four mines suggest that short-term considerations have been given greater weight than the potential for permanent damage to the environment.

The Committee made 25 recommendations for improved regulation of the four mines. They include recommendations for overhaul of legislation; involvement of the Traditional Owners, the Mirrar People, in the regulation of Ranger and Jabiluka; and better monitoring and reporting.

House of Representatives Report — Employment in the Environment Sector

The House of Representatives Standing Committee on Environment and Heritage has tabled the report of its inquiry into employment in the environment sector. The report, Employment in the *Environment Sector: Methods, Measurements and Messages* (November 2003), includes 16 recommendations under the headings:

- Understanding the Environment Industry
- Industry—Leading Ecologically Sustainable Development
- Government—Leading Ecologically Sustainable Development
- Marketing the Environment Industry
- Marketing Renewable Energy
- Editing and Accrediting the Workforce.

The recommendations support:

- provision of better statistical data on the industry
- initiatives to improve environmental performance assessment and reporting.
- provision of information and education on socially responsible investment
- reporting on ecologically sustainable development by all Australian Government departments and agencies by 2005
- mandatory use of Environmental Purchasing Guidelines by Australian Government departments and agencies
- development of an online database of Australian environmental goods and services
- the establishment of minimum benchmark standards across all areas of the ISO 14000 series
- development of a national policy for the environmental labelling of consumer goods
- retention of and a substantial increase in the Mandatory Renewable Energy Target
- initiatives to promote the use of renewable energy
- provision of environmental awareness training in business-related courses
- a review to assess current environmental skills and industry needs and workforce entry opportunities

- development by the Australian National Training Authority of a program of environmental apprenticeships or traineeships to provide follow-on opportunities for youth completing the Green Corps or similar programs
- the current initiative by the Environment Institute of Australia and New Zealand to establish a certification scheme for environmental professionals.

Report of House of Representatives Inquiry into the Recent Australian Bushfires

The House of Representatives Select Committee on the Recent Australian Bushfires report, *A Nation Charred: Inquiry into the Recent Australian Bushfires* (October 2003), has made wide-ranging recommendations in relation to bushfire prevention and management. They include an increased role and stronger accountability for the Commonwealth and the development of a national bushfire policy.

Productivity Commission Report on Australian Water Rights

The Productivity Commission has found significant differences in the way water rights are defined, allocated and administered in Australia and overseas. These findings are in the Commission's research paper, *Water Rights Arrangements in Australia and Overseas,* issued in October 2003.

The Commission found that there are two contrasting systems used to allocate water across competing users:

- In most Australian jurisdictions, and in South Africa, governments devise plans to share the volume available for consumption among right holders, Governments can modify these allocations for various reasons, including to increase the water available to the environment.
- In California, Colorado and Chile water rights are secured as legal property. Users can trade their rights in markets, provided doing so does not adversely affect the rights of others. Government agencies can only allocate additional water to the environment by purchasing water rights, harvesting additional water, or investing in water savings programs.

The Commission found that both systems have strengths and weaknesses, and quite different implications for the distribution of water between users and uses.

The Commission Chairman, Gary Banks, said that 'In all the jurisdictions studied, there is growing concern that water should go to its most valued uses—including for environmental purposes.' Mr Banks said: 'The study shows the importance of having sound governance arrangements for administering and enforcing water rights. It is also clear that adjusting any one component of such complex systems could have wider ramifications for their integrity.'

Increased Protection Announced for Great Barrier Reef

On 3 December 2003, the Minister for the Environment and Heritage, Dr David Kemp, tabled the new zoning plan for the Great Barrier Reef Marine Park. The plan involves a six-fold increase in protected zones and marine sanctuaries (from 4.5 to 33.3 per cent) within the park, and creates the largest network of marine protected areas in the world. Release of the plan follows an extensive community consultation program over two years, with over 31,000 submissions from individuals, community groups and industry bodies.

Dr Kemp has also announced agreement in principle to a structural adjustment package for commercial fishers and others who may be adversely affected by the new plan.

The Government recently entered into a 3-year eco-efficiency agreement with the fertiliser industry and Queensland canegrowers, which aims to reduce impacts on water quality in the Great Barrier Reef Lagoon.

Protecting Marine Creatures from Marine Debris

Dr Kemp, has released a report which contains options to combat the problem of marine debris in northern Australian waters. Such debris, especially abandoned fishing nets and other gear, is a serious risk to protected creatures such as turtles, dugongs, whales and other marine life. The Key Centre for Tropical Wildlife Management at Charles Darwin University prepared the report, *Finding Solutions: Derelict Fishing Gear and other Marine Debris in Northern Australia.*

Marine debris was declared a key threatening process under the EPBC Act earlier this year.

Steps Taken to Restore the Health of the River Murray System

On 14 November 2003 the Murray–Darling Basin Ministerial Council announced a program to restore flows and upgrade local environments along the River Murray. The first step in the program will focus on achieving significant environmental benefits for six ecological assets:

- Barmah-Millewa Forest
- Gunbower and Perricoota-Forests
- The Hattah Lakes
- Chowilla Floodplain (including Lindsay-Wallpolla)
- The Murray Mouth, Coorong and Lower Lakes
- The River Murray channel.

This first step will require an average of up to 500 gigalitres of water each year, and will be developed through a community consultation process. A final recommendation will be put to the Ministerial Council around mid-2004. Funding for the program is to be agreed by the Council of Australian Governments (COAG), and will be additional to the $500 million agreed by COAG in August 2003 to address the Living Murray initiative and the over-allocation of water in the Murray–Darling Basin.

The water for the environmental flows in the first step is expected to come from a combination of engineering works, better management of river flows, on-farm water efficiency savings and some purchase of water from willing sellers. It is intended that the water will be acquired on a 'no regrets' basis, that is, without adverse social or economic impacts on river communities.

National Land and Water Audit Enters its Second Phase

Australian Government Ministers have announced a new phase for the Land and Water Audit, involving $3 million funding and a new strategic plan. The Audit was set up to assess the state of Australia's natural resources and is funded through the Natural Heritage Trust. Information collected by the Audit will enable the Government to evaluate outcomes from the National Action Plan for Salinity and Water Quality and the Natural Heritage Trust.

Legislation passed on Natural Resources Commission, Catchment Management Authorities, Native Vegetation and Contaminated Land

On 12 November 2003 three bills were introduced into the New South Wales Parliament. All have now been passed and are awaiting assent. These reforms establish a new independent Natural Resources Commission to make recommendations on natural resource management standards and targets, audit the performance of catchment management authorities, report on the achievements of targets and carry out enquiries. The bills also create 13 catchment management authorities to deliver natural resource management programs at the catchment level, and they introduce significant changes to native vegetation management.

The Natural Resources Commission Bill ("NRC")
This bill establishes the Commission as a statutory independent body along the lines of the Independent Pricing Irregulatory Tribunal. The Commission may conduct enquiries and provide advice on specific issues as directed by the Government. The NRC will also help the Government establish targets and standards for natural resource management based on scientific, economic and social information. The Premier will oversee the NRC but delegate its day to day operations to the Minister for Natural Resources.

The Catchment Management Authorities Bill ("CMAs")
This bill replaces the existing 72 natural resource management committees with 13 new regional authorities. These authorities will be formally constituted as statutory authorities with a responsible and accountable board. The role of the CMAs is to work with local communities to deliver natural resources improvements. The CMAs will have a Chair, a General Manager and the power to employ staff and is expected that they each will have a team of about 10 to 15 staff. They are to develop a catchment action plan and an annual implementation program. CMAs will be able to enter into contracts, distribute funds and charge a fee for services. CMAs will also provide a consent authority function for native vegetation clearing.

The Native Vegetation Bill
This bill repeals the existing Native Vegetation Conservation Act 1997. The objects of the bill are to provide for, encourage and promote that management and conservation of native vegetation on a regional basis in the social, economic and environmental interests of the state; to prevent the clearing of remanent native vegetation and protected regrowth; to protect native vegetation of high conservation value in regard to its contribution to water quality, biodiversity, salinity or land degradation; to improve the condition of existing native vegetation; and to encourage the revegetation of land with appropriate native vegetation. The bill embodies the concept of remnant native vegetation which is defined as "all native vegetation except regrowth", regrowth is defined as "native vegetation that is grown after 1 January 1983 in the case of the western division and 1 January 1990 in case of other land". Where regrowth has arisen as a part of a planned and legitimate cropping or grazing rotation, clearing of the regrowth ordinarily would not require consent. The bill also introduces the concept of property vegetation plans which may also provide for an earlier date for regrowth where it can be demonstrated by the land owner.

Under the new system, approval to clear remanent vegetation and protected regrowth will not be granted unless the Minister is convinced that the clearing will improve or maintain environmental outcomes. Flexibility will be built into the system by property vegetation plans that could include control programs involving the clearing of certain native vegetation for routine environmental agricultural management or activities authorised under other legislation such as the Rural Fires Act. Such activities could be undertaken without consent. The bill contemplates that ground cover that comprises less than 50% of indigenous species of vegetation can be cleared without consent. The new consent procedures will not apply to urban areas but will apply to rural residential areas. The bill does not repeal the Threatened Species Conservation Act 1995 and the 8 part test to assess whether there are likely to be impacts on threatened species will still be undertaken as part of the new consent process. The Threatened Species Conservation Act will be reviewed to identify whether any changes are necessary in light of the extensive changes to natural resource management arrangements embodied in these bills.

Contaminated Land Management Amendment Bill

This bill was introduced on 15 September 2003 and was passed on 3 December 2003 and is awaiting consent. The aim of the bill is to improve the ability of the Department of Environment & Conservation ("DEC") (formerly the EPA) to manage the performance of site auditors under the Contaminated Land Management Act 1997. The aim of the bill is to ensure that accredited site audits are of the highest calibre and that they maintain a high professional standard during the term of their appointment. The amendments provide the DEC with better means with which to enforce this standard. The bill will amend the act to give the Department power to issue binding directions to site auditors and the grounds on which the DEC can take action against the site auditor have been expanded. The bill also gives greater clarification in relation to the position of conflicts of interests for site auditors. An amendment to the bill also will allow land owners who are partially responsible for contamination to recover a proportion of their clean-up costs from any other party responsible for the contamination.

Environmental Planning & Assessment Amendments (Development Consents) Bill 2003

This act amends the Environmental Planning & Assessment Act 1979 ("EP&A Act") to extend the lapsing period for development consent for state significant development. The current provisions provide that development consent lapses 5 years after the date from which it operates.

The amendments allow the applicant or any other person entitled to act under consent to apply to the Consent Authority for 1 or more extensions of the lapsing period up to 3 years in total. The application must be made within 12 months before the lapsing period lapses. The consent authority (being the Minister for Infrastructure Planning and Natural Resources) may grant an extension if satisfied the applicant has shown that there may be a delay in physically commencing the relevant work arising from or related to 1 or more relevant legal proceedings and that there is otherwise good cause.

The amendments has arisen from situations where various development consents issued for state significant development have not been able to be acted upon because of other legal proceedings which have delayed the commencement of the relevant development. The amendments also provide for the voluntary surrender of development consents.

Changes to Class 1 Appeals in the Land & Environment Court

In a speech to the Environmental Planning Law Association Conference on 28 & 29 November 2003 the Chief Judge of the Land & Environment Court, Justice McClelland, delivered a paper entitled "Land Environment Court – Achieving the Best Outcome for the Community". In his paper the Chief Judge outlined a series of reforms to the procedure for class 1 appeals. These reforms are likely to have significant impact on the manner in which class 1 appeals are conducted. In the future the practice direction will be changed so that parties are required to inform the Registrar as soon as possible whether their case is suitable for case management. Case management would normally be carried out by a Judge or a Commissioner of the court. Case management will aim to identify the real issues in dispute and lay out a blue print for the hearing to ensure those issues are resolved as efficiently as possible. Court hearings are in the future likely to commence with a view on the site on the first day of the hearing unless otherwise directed. This is likely to apply for all 1 or 2 day cases but may not be applied for cases of 4 or more days.

His Honour outlined that the court will increasingly make use of court appointed experts. Beginning next year, the court will require the parties to consider whether or not there are issues in the case for which a court expert is appropriate. If the matter is appropriate, the parties will be invited to agree as to who should be appointed. The other significant change is a new rule to be made in the following terms:

> *"No order for the payment of costs will be made in proceedings to which this rule applies unless the court considers that the making of a costs order is, in the circumstances of that particular case, fair and reasonable".*

The new rule removes the former practice of making costs orders only where circumstances were exceptional. The new test will be "fair and reasonable". The decisions of the court will now determine the appropriate approach to the exercise of discretion in particular cases, see *Gee v Port Stephens Council [2003] NSW LEC 260*. Thus the court may, depending on the circumstances make an order for costs where it is fair and reasonable in class 1 appeals. The circumstances may include ambient claims or ill-considered development applications by applicants or where a consent authority fails to exercise its decision-making functions in a reasonable time or without appropriate regard to the needs of the whole community.

Victorian Greenhouse Regulations - A National First

Victoria has become the first state in Australia to adopt a statutory program for greenhouse gas reductions for industry, in a program run by EPA Victoria. The project, part of the $100 million Victorian Greenhouse Strategy, is established through the State environment protection policy (Air Quality Management) [SEPP (AQM)], which was gazetted on 21 December 2001.

The SEPP(AQM) prescribes statutory policy in Victoria for managing emissions of various air pollutants, including new criteria for air quality indicators and assessment and a range of new tools for environmental management. It also mandates, for the first time, provisions for EPA licencees and applicants for licences and Works Approvals to measure, report and - where appropriate - take cost effective action to reduce energy consumption and greenhouse gas emissions. The requirements are detailed in the Protocol for Environmental Management (Greenhouse Gas Emissions and Energy Efficiency in Industry) under the SEPP(AQM).

Companies take action commensurate with their total energy use and CO2equivalent emissions as follows:

Category (tCO2eq/yr)	**Energy Use (GJ/yr)**		**Emissions**
A	500	or	100
B	>500 but = or <7000	or	>100 but = or <1400
C	7000	and	1400

All licensees and applicants must estimate their emissions from electricity, gas, briquettes, fossil fuels and other energy sources, as well as any "process" emissions generated by processes such as fermentation, water treatment etc. Sites that fall into Category B or C must undertake an energy audit that meets the Australian Standard for energy audits and implement any actions identified through the audit that have a simple payback of 3 years or less (ie. return on investment of 33%). Category A companies, which use as much energy as 8 to 10 average homes or less, receive free advice and assistance to make voluntary reductions. All licensees will report annually on changes in energy use and on progress in implementing their energy efficiency actions.

Many Victorian companies are already saving money and reducing energy use through improving insulation on kilns, boilers and refrigeration units, reducing air and steam leaks in their factories, installing high efficiency motors when old motors wear out, reclaiming waste heat and installing energy efficient lighting with timers, dimmer switches and sensors.

All EPA-licensed sites must submit details of energy use and a three-year action plan for EPA approval by December 2003.

Companies applying for an EPA licence or Works Approval must also calculate energy use and select a category, with Category B & C sites required to implement energy efficiency best practice for all items that pay for themselves in three years or less.

EPA's Greenhouse Team has been working with industry since early 2002 to help them understand the requirements through a series of over 40 seminars and events, providing advice on energy efficiency and putting in place mechanisms for reporting and compliance. The Greenhouse Team's work also involves the dissemination of energy management information to EPA staff and clients.

As the end of the year approaches, EPA is engaged in reviewing audits and action plans, and chasing up those companies that are lagging behind and risk enforcement action under the *Environment Protection Act,* 1970 for failure to comply. EPA Victoria and the Sustainable Energy Authority Victoria (SEAV) have also co-published a workbook, the Greenhouse and Energy Management Toolkit to support industry to meet the requirements.

Copies of the SEPP, PEM and Toolkit can be downloaded from:
http://www.epa.vic.gov.au/Greenhouse/program.asp

(contributed by John Osborne & Georgi Stickels - John Osborne is an energy engineer with the Sustainable Energy Authority Victoria (SEAV) and is the technical advisor to EPA Victoria's Greenhouse Team. Georgi Stickels is a Greenhouse Project Officer with EPA Victoria's Greenhouse Team).

Draft Waste Management Policy (Siting, Design and Management of Landfills

EPA is revising the current policy framework for landfills to ensure that they are managed in a way that delivers a high level of protection for both the community and the environment. A draft *Waste management policy (Siting, Design and Management of Landfills)* has been prepared and once finalised, will replace the existing *State environment protection policy (Siting and Management of Landfills Receiving Municipal Wastes)* 1991.

The purpose of the proposed policy is to provide a clear and updated framework that encourages continuous improvement in the siting, design, and management of landfills. The policy will also encourage the minimisation of disposal of waste to landfill and the diversion of waste materials for re-use or recycling.

The proposed policy applies to all landfills in Victoria receiving solid, non- prescribed waste and/or Category C prescribed industrial waste (such as low level contaminated soil). This remains unchanged from the existing policy.

The draft policy is accompanied by a draft policy impact assessment (PIA), which provides an explanation of the proposed policy, the rationale for its provisions and the key impacts of adopting the policy.

EPA Victoria is seeking stakeholder views on the measures proposed and assistance in finalising the policy and PIA. Comment is sought from any person with an interest in the planning, siting, design, operation, rehabilitation and aftercare of landfills, to ensure that a wide range of views and experience are reflected in the final policy.

Any comments or submissions on this draft policy and PIA are welcome and should be submitted to EPA by 2 April 2004 and directed to:

> Project Manager - Landfill Waste Management Policy
>
> Waste Management Unit, EPA Victoria, GPO Box 4395QQ, Melbourne VIC 3001
>
> Or email: draftwmp.landfill@epa.vic.gov.au

Reforms to SA Planning System

On 4 December 2003 the Minister for Urban Development & Planning, Jay Weatherill, announced sweeping reforms to South Australia's Development Assessment Systems. Draft legislation is anticipated early in the New Year, aimed at streamlining Development Applications, being more responsive to community needs. The Minister has also foreshadowed an increased role for local Government in developing planning policy. Full details, including the Minister's News Release dated 4 December 2003 can be obtained at the Website of Planning SA, www.planning.sa.gov.au

Natural Resource Management Integration continues

The draft *Natural Resource Management Bill,* has continued to undergo considerable debate and consultation across South Australia. The new Bill, which establishes a new peak Advisory Natural Resource Management Council, with eight natural resource management regions throughout South Australia, is proposed to replace existing legislation relating to water, soil, and animal and plant control.

Funding for administration of the Act will continue to be provided by the Commonwealth and State Governments, and also an NRM levy on all property holders, which will replace existing catchment water management levies and contributions for animal and plant control included in local government rates.

New Act for the River Murray

The River Murray Act commenced operation on 24th November 2003. The Act contains a range of measures affecting the management and regulation of activities on and relating to the River Murray.

New Legislation

The Western Australian parliament has recently passed the *Contaminated Sites Act 2003, the Environmental Protection Amendment Act 2003,* the *Acts Amendment (Carbon Rights and Tree Plantations Agreements) Act* 2003 and the *Barrow Island Act* 2003. New bills have been introduced to Parliament to amalgamate the Waters and Rivers Commission with the Department of Environment and a discussion paper has been released which contemplates regulations requiring licence holders to prepare compliance statements.

Contaminated Sites Act 2003
The *Contaminated Sites Act* 2003 has passed both houses of parliament and is awaiting proclamation, which is expected to be received in mid 2004 once regulations are drafted.

Amendments to the Environmental Protection Act 1986
Most provisions of the *Environmental Protection Amendment Act* 2003 came into operation on 19 November 2003. The amendments which insert the new offences of causing serious and material environmental harm, requiring advertisement of works approval and licence applications and the new clearing provisions have not come into operation. They will not come into operation until the regulations are drafted (expected to be in mid 2004).

Registration of Carbon Rights
The *Acts Amendment (Carbon Rights and Tree Plantation Agreements) Act* 2003 received assent on 29 October 2003. This Act, along with the *Carbon Rights Act* 2003 and the *Tree Plantation Agreements Act* 2003 enable carbon rights to be registered on land titles and enable parties to enter into carbon covenants and tree plantation agreements. These mechanisms will enable Western Australia to participate in national or international carbon trading schemes. The value of a carbon right is presently speculative as it depends on the implementation of greenhouse gas emission restrictions and trading schemes.

Barrow Island Act 2003 Commences
Completing another step in the Gorgon economic, social and environmental assessment process, the *Barrow Island Act* 2003 has come into force. The Act ratifies the State Agreement between the State of Western Australia and the Gorgon Joint Venturers (consisting of Chevron Texaco, ExxonMobil and Shell) which enables the development of the Gorgon Gas Project on Barrow Island, an A class nature reserve. The Act enables the Minister to grant land tenure (leases, licences and easements) to the joint venturers over a maximum of 300 hectares and provides that a person may inject carbon dioxide gas underground with the Minister's approval.

Significantly, the agreement provides that the joint venturers will pay $40 million to the State for ongoing projects that will provide net conservation benefits. Net conservation benefits are defined as "demonstrable and sustainable additions to or improvements in biodiversity conservation values of Western Australia targeting, where possible, the biodiversity conservation values affected or occurring in similar bioregions to Barrow Island." Whilst the Act provides the joint venturers with access to Barrow Island, they must still obtain all necessary environmental, planning and other approvals before commencing construction.

Bill to transfer powers of Water and Rivers Commission to CEO of Dept of Environment and Minister for Environment

The *Machinery of Government (Water Resources) Amendment Bill* 2003 and the *Water Resources Management (Administration) Bill* 2003 were introduced to the Western Australian Parliament on 29 October 2003. The effect of these bills is that the Water and Rivers Commission will no longer exist and its powers will be transferred to the Minister for Environment and the Chief Executive Officer of the Department of Environment (CEO). The Bills also substantially amend legislation relating to the protection and management of waterways.

Discussion Paper on Regulations Concerning Annual Statements of Compliance

The Department of Environment has prepared a discussion paper concerning possible new regulations that will require those who hold a licence under Part V of the *Environmental Protection Act* 1986 to submit an annual statement of compliance with that licence.

The concept will require licensees to demonstrate compliance but the statements are not intended to replace the Department's inspection and audit functions. Instead, the statements will support those functions. The Department envisages that the compliance statements will be publicly available and integrated with existing reporting requirements

Human Cloning, Embryo Research and Gene Technology

On 27 November 2003, the ACT Minister for Health, Simon Corbell, introduced the *Human Cloning and Embryo Research Bill 2003* into parliament. The Bill is designed to implement bans on human cloning and impose strict regulatory requirements on research involving human embryos. When passed, the legislation will complement the Commonwealth *Prohibition of Cloning Act* and *Research Involving Human Embryos Act* which passed through at the National level in December 2002.

In addition, the Gene Technology Act 2003 has been notified, with commencement information still to be provided. As for the cloning legislation, this Act is aimed at implementing the Commonwealth plans for regulation of this industry, and follows from similar moves in Queensland, Victoria, Tasmania, South Australia and New South Wales.

Think Water, Act Water

The new draft strategy for sustainable water use management in the ACT was launched in November, with comments invited and public consultations set to take place in February 2004. Once formalised, it will become the Water Management Plan under the *Water Resources Act 1998,* with goals stretching out to 2050.

In its current form, the plan provides not only for efficiency programs but also for feasibility studies to be conducted by the Government-owned ACTEW Corporation, into alternative water supply options. The focus of the policy however is on sustainable water use and management, with a catchment-wide perspective and emphasis on the three key streams of stormwater, water supply and wastewater. The Government is also proposing rebates on a range of water efficiency initiatives, including showerheads, dual-flush toilets and a revised rainwater tank subsidy.

The strategy contemplates implementing new regulations to control domestic water use, such as sprinklers and watering systems. Many of these details are yet to be hammered out.

For more information, see http://www.thinkwater.act.gov.au/.

Improved Heritage Protections

Variation 173 to the Territory Plan was passed through in early December, with the intention of increasing the level of protection for 9 of the ACT's heritage precincts. This followed extensive criticism that the Territory Plan heritage protection provisions were inadequate, difficult to implement or enforce and failing at protecting important heritage.

The variations essentially simplify development controls applying to the precincts. Details of why particular areas or places were of heritage value have also been clarified, and conservation requirements more clearly expressed through a break down those that are mandatory, and those that "should" be pursued.

Bill of Rights Introduced

Following on from last edition's report, the *Human Rights Bill* has now been introduced into ACT parliament for debate. The Bill proposes to enshrine rights such as the protection of family and children, the right to equality before the law and a fair trial, the right to physical well-being and the right to privacy.

Interestingly, the Bill proposes to allow the Supreme Court to determine that legislation is incompatible with the Human Rights Act, but such a decision would not invalidate the legislation. Decision makers however, will be required to act in a way compatible with the Act, and government departments to measure their performance against its standards. A Human Rights Commissioner would be established, although it is anticipated that such a role would be fulfilled by the existing Discrimination Commissioner.

case notes

Qld Minister's dam decision overturned - Queensland Conservation Council Inc v Minister for the Environment & Heritage [2003] FCA 1463

Contributed by Chris McGrath, Barrister-at-Law

In *Queensland Conservation Council Inc v Minister for the Environment & Heritage* [2003] FCA 1463 ("the Nathan Dam Case", decided 19 December 2003), the Federal Court of Australia overturned decisions of the Australian Environment Minister for refusing to consider the impacts of major associated downstream agricultural development on the Great Barrier Reef World Heritage Area ("GBR") when assessing of the impacts of a major dam.[1] This decision has far-reaching implications for the operation of environmental law in Australia.

Justice Susan Kiefel found that when assessing the impacts of a proposal under the Australian Government's principal environmental legislation, the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) ("EPBC Act")[2], the enquiry of the Australian Environment Minister is a wide one and might extend properly to the whole, cumulated and continuing effect of the activity, including the impacts of activities of third parties.

In the Nathan Dam Case, two conservation groups, the Queensland Conservation Council and World Wide Fund for Nature (Australia), sought judicial review of decisions of the Australian Environment Minister under the EPBC Act in relation to a proposal to construct and operate the 880,000 megalitre Nathan Dam near Taroom on the Dawson River in central Queensland. The Dawson River joins the Mackenzie River to become the Fitzroy River flowing east to the coast and the GBR at Rockhampton.

The purpose of building the Nathan Dam is to supply water for irrigation of 30,000 hectares of farmland, mostly cotton growing, in the lower Dawson River Valley and other development in the region. Major concerns were raised regarding the likelihood of agricultural chemicals, particularly endosulfan, polluting water flowing to the GBR. The Fitzroy River catchment is recognised as a high-risk area for activities causing pollution of the GBR.

Despite concerns over the likelihood of the associated downstream agricultural development causing significant impacts to the GBR, the Australian Environment Minister, Dr David Kemp, refused to consider these impacts. He stated:

"I found that potential impacts of the irrigation of land by persons other than the proponents, using water from the dam, are not impacts of the … construction and operation of the dam."

The statutory context of the Nathan Dam Case was that Part 3 (Chapter 2) and Parts 7-9 (Chapter 4) of the EPBC Act provide an offence, assessment and approval system for actions impacting upon matters of national environmental significance (as well as actions impacting on Australian Government (Commonwealth) land and actions undertaken by the Australian Government). As relevant to this case, "matters of national environmental significance" include the world heritage values of a declared World Heritage property and listed migratory species.

A person proposing to take an action that has, will have or is likely to have a significant impact on a matter of national environmental significance is required to refer the proposal to the Australian Environment Minister, who must then decide under section 75 whether it is a "controlled action" requiring assessment and approval under the Act. If the Minister decides a proposal is a controlled action, it must then be assessed under the EPBC Act and either approved or refused under section 133 of the Act. The Minister may also impose conditions on an approval.

The decision in the Nathan Dam Case concerned the extent of the enquiry necessary to be undertaken by the Australian Environment Minister under section 75 of the EPBC Act of the impacts which a proposed development or activity may have upon the matters protected by the Act.

1 The decision is available at http://www.austlii.edu.au/au/cases/cth/federal_ct/2003/1463.html.

2 In relation to the EPBC Act generally, see http://www.deh.gov.au/epbc/.

In summary, the decision establishes three legal principles of broad application for the future operation of the EPBC Act, namely:

- When assessing the impacts of a proposal under the section 75 of the EPBC Act, the enquiry of the Australian Environment Minister is a wide one and might extend properly to the whole, cumulated and continuing effect of the activity, including the impacts of activities of third parties.
- When assessing the impacts of a proposal under the section 75 of the EPBC Act, the Australian Environment Minister is first to consider 'all adverse impacts' the action is likely to have. The widest possible consideration is to be given in the first place, limited only by considerations of the likelihood of it happening. By that means the Australian Environment Minister should exclude from further consideration those possible impacts which lie in the realms of speculation.
- No narrow approach should be taken to the interpretation of the EPBC Act because of the high public policy apparent in the objects of the Act.

This decision has fundamental and far-reaching implications for development approval and the operation of environmental law in Australia by recognising the broad scope of relevant impacts that must be considered by the Australian Environment Minister under section 75 the EPBC Act.

The EPBC Act provides the overarching legal requirements for environmental impact assessment of development proposals in Australia and, by massively widening the scope of relevant impacts that must be considered for assessment under the Act, the decision dramatically strengthens the ability of the Act to protect the environment. The decision fundamentally improves the decision-making process for development approval under the Act by establishing that piecemeal decisions are unlawful. State and Territory governments performing environmental impact assessment under bilateral agreements on behalf of the Australian Government under the EPBC Act will also be required to comply with the same principles. The implications of this decision are therefore likely to reverberate for decades in the Australian environmental legal system.

Recent Cases in WA

(contributed by Sally Marsh and Clare Wood, Blake Dawson Waldron, Perth)

The Supreme Court of Western Australia has recently decided three cases concerning environmental issues in Western Australia:

Shire of Brookton v Water Corporation & Others [2003] WASCA 240 - Statutory Duty and the Environmental Protection Act 1986

In the *Shire of Brookton v Water Corporation & Others* [2003] WASCA 240, the Full Court of the Supreme Court of Western Australia considered whether the Shire of Brookton (the Shire) was negligent in failing to take action to prevent a fire, which damaged several properties. The court held that the Shire had a duty of care to take reasonable care to prevent damage to the respondents' property as a result of a fire at the landfill site. The Shire had breached this duty by failing to take action to address the risk of fire igniting in grain which had been dumped at the landfill, including by failing to instruct its employees to promptly extinguish fires at the landfill.

Whilst the case was decided on the negligence action, the court also considered the respondent's claim that the Shire had breached a statutory duty in failing to comply with a condition in its operating licence pursuant to the *Environmental Protection Act* 1986. The court held that the respondent's claim failed because the statutory purpose of the operating licence provisions is not the prevention of damage to property by fire. Rather, the court considered that the statutory purpose of the licence provisions is to minimise pollution connected with the activity conducted which gives rise to the requirement to be licensed, that is the discharge of waste or emission of noise, odour or electromagnetic radiation. Combined with the licence conditions imposed on the Shire, the court stated that the purpose of the licence provisions is to prevent the Shire from deliberately burning putrescible waste as a general disposal mechanism because of the associated discharge of smoke and odour. Accordingly, the court held that as the statutory purpose of the licensing provisions is not directed at damage by fire, it cannot be said that the legislature intended to create a cause of action at the suit of the respondents for property damage as a result of the escape of fire from the landfill site.

Greendene Development Corporation Pty Ltd and Environmental Protection Authority [2003] WASCA 242 - Referrals to the EPA under Part IV of the Environmental Protection Act 1986

The Full Court of the Supreme Court delivered its judgment in *Greendene Development Corporation Pty Ltd and Environmental Protection Authority* [2003] WASCA 242 on 10 October 2003. The case concerned an application for prerogative relief by a developer who proposed to subdivide land in the Margaret River area against a decision of the Environmental Protection Authority (EPA) to assess the subdivision proposal.

After several revisions of an "outline development plan" for the subdivision, in February 2000 the Shire of Augusta – Margaret River (Shire) forwarded to the Department of Environmental Protection (as it was then called) (DEP) a copy of "an application" received in relation to the "Proposed Riverslea Outline Development Plan" (as the Shire described it). The Shire's covering note requested that the DEP assess the application and provide any comments it wished to make within 30 days. The DEP's "EPA Service Unit" (a section of the DEP which provides advice and assistance to the EPA) considered the proposal for the purpose of providing advice to the Shire and did not pass the letter to the EPA. It did not treat it as a referral to the EPA under section 38 or 48A of the *Environmental Protection Act* 1986 (the EP Act) and made that explicit in its response to the Shire. The DEP also commented that it would not support the proposal due to the lack of information regarding a number of environmental issues.

Subsequently, the applicant revised the plan and modified it further and a final form was endorsed by the Western Australian Planning Commission (WAPC) on 11 December 2001. On 19 July 2002, the revised application for subdivision was approved, subject to conditions by the WAPC.

By letter dated 15 October 2002, the Leeuwin Conservation Group (Inc) referred the subdivision approval at Riverslea for environmental impact assessment under section 38 of the EP Act. On 23 December 2002, the Chairman of the EPA determined that the subdivision should be assessed under the EP Act by way of a public environmental review, one of the most comprehensive levels of assessment. The EPA notified the applicant and the Shire of this decision and the Shire then notified the applicant that it was precluded from any further decision making in relation to the matter pursuant to section 41(2) of the EP Act.

The applicant then sought that the Supreme Court quash the decision of the EPA that the approved subdivision of the land be assessed. The three grounds were (1) that when the WAPC conditionally approved the application to subdivide, it ceased to be a "proposal" for the purposes of the EP Act, (2) that the application was essentially the same as the proposal that had already been referred to the EPA in around March 2000 and could not be referred again under section 38(5), and (3) that contrary to section 40(1)(b), the EPA failed to inform the applicant in writing within 28 days after the referral that the EPA considered the that the proposal should be assessed.

The Court dismissed the application and held that:

1. An application for subdivision is a proposal, whether or not the application has been approved. "Proposal" is not limited to proposals which cannot be implemented without further approval from some decision making authority. Rather, the EP Act continues to operate until such time as a proposal has been fully implemented. Further, the application in this case required further approvals by the Shire, which is a "decision making authority" and the application was therefore a proposal under the EP Act.

2. The application had not been previously referred to the EPA and section 38(5) of the EP Act did not apply to prevent the application being referred to the EPA in 2002. The letter from the Shire in 1999 was not a referral to the EPA because it was not expressed to be so and did not contain the detailed subdivision plan.

3. Although the EPA had clearly breached the 28 day time limit, the court held that the legislature intended that time limit in the EP Act was set to ensure that the proponent and others were not left in limbo for an undue period of time. The legislature did not intend that if the time limit was not complied with, the proposal could no longer be assessed. Accordingly, the failure of the EPA to notify the applicant within 28 days did not prevent the EPA from considering the application.

The decision demonstrates the importance of ensuring referrals to the EPA are made unambiguously and of ensuring the EPA acknowledges the referral.

Re Environmental Protection Authority; Ex Parte Environmental Protection Authority [2003] WASCA 248 - "State Instrumentalities" and "Decision Making Authorities" under the Environmental Protection Act 1986

In *Re Environmental Protection Authority; Ex Parte Environmental Protection Authority* [2003] WASCA 248, a recent decision of 14 October 2003, the Full Court of the Supreme Court of Western Australia considered whether the Western Australian Town Planning Appeal Tribunal, an independent statutory body, was a "State instrumentality" and therefore a "decision-making authority" for the purposes of the Environmental *Protection Act 1986* (WA) (EP Act).

The Shire of Northam had refused to grant planning approval to BGC for a proposal to extend the boundaries of its quarry. BGC appealed to the Tribunal, which purported to make a decision allowing the proposal to go ahead.

BGC's proposal had been referred to the Environmental Protection Authority **(EPA)** under the EP Act. The EPA had decided to assess the proposal, thereby precluding any decision-making authority from making any decision which would have the effect of causing or allowing the proposal to be implemented until the Minister for Environment had served an authority to do so on the decision-making authority.

The Full Court held that the Tribunal was a State instrumentality and therefore a decision-making authority within the meaning of the EP Act. The Tribunal was therefore bound not to make any decision which would cause or allow the BGC proposal to be implemented, until the Tribunal was served with an authority to do so by the Minister.

The Court considered that to find otherwise would defeat the purpose of the EP Act, by preventing a local council from causing or allowing a decision to be implemented, but not imposing a similar constraint on any appellate tribunal standing in the shoes of the local authority. The Court considered this restraint to be the only safeguard in the EP Act against a proposal being implemented before the environmental impact assessment process had been completed. Given the importance of the section's function as a safeguard, it would frustrate the objects of the EP Act is the term "decision-making authority" were construed narrowly to exclude such appellate bodies.

The Court also raised, but did not answer, the question whether a court is likely to be considered a "State instrumentality" for the purpose of the EP Act, and therefore bound in the same manner as the Tribunal.

"From 'No Net Loss' to 'Net Gain'; Victoria's Native Vegetation Management – A Framework for Action"

by Tania Heber and Lucy Vaughan, Maddocks Lawyers - a paper presented to the 2003 NELA Annual Conference, Broken Hill, 23-25 October 2003

Introduction

Since European settlement began in Victoria in the 1830's about 65% of our native vegetation has been cleared. Victoria's forests and woodlands were estimated to cover nearly 20 million hectares (or about 88% of the State) in 1869. By 1967 this cover has been reduced to 8 million hectares, or about 35% of the State. Of the remaining forests and woodlands 70% is modified to some degree. Most remnant native forest is on public land whilst only 5% of privately owned land is now covered by native forest. About 35% of the State is public land[3].

No Net Loss Policy

In 1992, the conservation of native vegetation was recognised by all Australian governments as a matter of national environmental significance in the Council of Australian Governments (COAG) Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment.

The governments agreed on national policy to:

reverse the long-term decline in the quality and extent of Australia's native vegetation cover by June 2001.

Since 1992 a series of national policies have been formulated to develop a national co-ordinated approach to the conservation of native vegetation. In particular:

- *Native Vegetation National Overview, States/Territories/Commonwealth Stocktake of Native Vegetation Management – August 1999,* Department of Environment and Heritage, 2000
- *National Framework for the Management and Monitoring of Australia's Native Vegetation,* ANZECC 1999.[4]

In Victoria the policy found expression in Victoria's Biodiversity: Directions in Management, Department of Natural Resources and Environment 1997.

Essentially the goal of the policy was to achieve 'no net loss' of native vegetation across the Victorian landscape by the year 2001.

The goal of 'no net loss' has not yet been achieved.

'Net Gain' Policy

In late 2002 the Victorian government, through the Department of Sustainability and Environment, released its policy Victoria's Native Vegetation Management – A Framework for Action.

The primary goal identified for native vegetation management is:

> *a reversal, across the entire landscape, of the long-term decline in the extent and quality of native vegetation, leading to a Net Gain.*

3 Dore, Griffing & Hayes, *Native Vegetation National Overview: States/Territories/Commonwealth Stocktake of Native Vegetation management* – August 1999, DEH 2000.

4 Other contributing national policies include:
National Strategy for Ecologically Sustainable Development
National Strategy for the Conservation of Australia's Biological Diversity
National Forest Policy Statement
National Greenhouse Strategy

The *Framework* introduces some new policy statements of interest to practitioners:

- measuring quality - habitat hectares
- off-site offsets – local gains
- investment in natural heritage (missing markets, bushtender and bush broker)

What Is 'Net Gain'?

The Framework describes Net Gain as:

> *.... the outcome for native vegetation and habitat where overall gains are greater than overall losses and where individual losses are avoided where possible. Losses and gains are determined by a combined quality-quantity measure and over a specified area and period of time. Gains may be either required offsets for permitted clearing actions or as a result of landholder and Government assisted efforts that are not associated with clearing.*

Net Gain comprises three essential components:

1. A reduction in losses in the extent of existing native vegetation,
2. A reduction in losses in the quality of existing native vegetation due to threatening processes, and
3. The achievement of gains in extent and quality of native vegetation through its rehabilitation and revegetation with indigenous species for biodiversity conservation and land and water outcomes.

In relation to protection and clearance decisions at the on-ground level, the Framework has adopted a three step approach to applying Net Gain:

1. To avoid adverse impacts, particularly through vegetation clearance.
2. If impacts cannot be avoided, to minimise impacts through appropriate consideration in planning processes and expert input to project design or management.
3. Identify appropriate offset options.

We will consider the notion of "off-set" adopted by the *Framework* in a moment, but suffice to say, the *Framework* requires that these three steps be taken before off-sets should be considered. In order to ensure that the 'commensurate' requirement of Net Gain is met in terms of any off-sets, Net Gain requires that a clear link between gains and losses must (at a minimum) be established.

In summary, the concept of Net Gain adopted by the *Framework* is as much about achieving gains in quality of native vegetation as it is about increasing the quantity of native vegetation. In this way, the net gain approach is linked to the conservation significance of the native vegetation in question. The *Framework* provides a strong focus on the protection and net improvement of higher conservation significance vegetation and allows for a more flexible (but still accountable) approach for vegetation of lower conservation significance. How the conservation significance of native vegetation is measured is by use of what the Framework calls a habitat hectare assessment. We consider the habitat hectare measure in more detail shortly.

How Is 'Net Gain' Policy Implemented In Victoria?

Notably, there has been no change in the means by which native vegetation retention policy is implemented in Victoria. Such policy is implemented by the operation of the *Planning and Environment Act* 1987 and the planning schemes approved under that Act.

Section 47 of the *Planning and Environment Act* 1987 provides that if a planning scheme requires a permit to be obtained for the use or development of land then an application must be made to the relevant responsible authority (usually a municipal council) in the prescribed form.

Clause 52.17 of the Victorian planning schemes impose the requirement to apply for a permit to remove, destroy or lop native vegetation. Native vegetation is defined in the planning schemes as 'plants that are indigenous to Victoria, including trees, shrubs, herbs and grasses.

The native vegetation retention controls, now manifested in clause 52.17 of the Victorian planning schemes, apply Statewide. The native vegetation retention controls were first introduced as State provisions into Victorian planning Schemes in 1989. The controls were introduced overnight to avoid any pre-emptive clearing that may have occurred if notice was given of a start date for the commencement of operation of the controls. In 1999 standard planning controls were introduced in Victoria, known as the *Victoria Planning Provisions* (VPPs). The VPPs are standard planning controls that apply Statewide. The native vegetation controls were carried over from the old format planning schemes unamended.

With the introduction of the *Framework* the VPPs and the native vegetation controls have been amended to make the *Framework* an incorporated document within the VPPs and a relevant consideration when considering whether or not to grant a permit for the clearing of native vegetation.[5]

Clause 15 of the VPPs provides for State planning policy in relation to the environment. Clause 15.09 relates specifically to the conservation of native flora and fauna. The objective of the policy is:

> *To assist the protection and conservation of biodiversity, including native vegetation retention and provision of habitats for native plants and animals and control of pest plants and animals.*

Before the introduction of the 'net gain' policy it was State planning policy that:

> *If native vegetation must be removed as part of a land use or development proposal, planning and responsible authorities should require the proponent, where prudent and feasible in the context of land use, to replace lost native vegetation by regenerating or replanting at least an equivalent area of vegetation of similar composition of locally indigenous species, either on the subject land or nearby land.*

The State planning policy in the VPPs now provides that:

> *Planning and responsible authorities should have regard to Victoria's Native Vegetation Management – A Framework for Action (Department of Natural Resources and Environment 2002). If native vegetation is proposed to be removed as part of a land use or development proposal, planning and responsible authorities should achieve a Net Gain outcome, as defined in the Framework. This is achieved firstly, as a priority, by avoiding adverse impacts, particularly native vegetation clearance; secondly, if impacts cannot be avoided, by minimising impacts though appropriate consideration in planning processes and expert input into project design or management; and thirdly, by identifying appropriate offset actions. The criteria for determining the appropriate response and offsets are contained within the Framework.*

The change in State policy in the VPPs clearly demonstrates the shift from the 'no net loss' to the 'net gain' policy.

The native vegetation retention controls (which establish the need to apply for a planning permit for native vegetation clearance) found in clause 52.17 of the VPPs have as their purpose:

> *To protect and conserve native vegetation to reduce the impact of land and water degradation and provide habitat for plants and animals.*

The controls provide decision guidelines that must be considered, as appropriate, before the responsible authority decides on an application to clear native vegetation. Before the introduction of the *Framework* the relevant decision guideline required the responsible authority to consider:

> *The policy on retention and re-establishment of native vegetation.*

The native vegetation retention controls in the VPPs now provide that the responsible authority must consider:

> *The goal of Net Gain expressed in Victoria's Native Vegetation Management – A Framework for Action (Department of Natural Resources and Environment 2002) and relevant operation guidelines.*

5 Amendment VC19 to the Victorian Planning Provisions commenced operation on 24 July 2003

The previous decision guidelines were vague and non-specific. The current decision guideline specifically requires the responsible authority to consider the Framework when deciding whether or not to permit native vegetation clearance.

Key Aspects Of The Framework

Measuring quality – habitat hectares
A habitat hectare is defined in the *Framework* as:

> *.... a site-based measure of quality and quantity of native vegetation that is assessed in the context of the relevant native vegetation type.*

At its most simplest, if it is assumed that an unaltered area of natural habitat is at 100% of its natural quality, then one hectare of such habitat will be equivalent to one habitat hectare. That is, the quality multiplied by the quantity. Ten hectares of this high quality habitat would be equivalent to ten habitat hectares and so on. If an area of habitat had lost 50% of its quality (say by way of weed invasion and loss of understorey), then one hectare would be equivalent to 0.5 habitat hectares, ten hectares would be equivalent to five habitat hectares, and so on.

How is the habitat hectare measured?

The *Framework* acknowledges that there is no one absolute measure of general vegetation/habitat quality, but there are a range of well-accepted indicators. It has developed a simple equation that combines a number of these indicators to calculate a practical relative measure.

The two primary determinants of the general vegetation/habitat quality of an area are:

- inherent site condition – i.e. how altered is the site from a notionally optimal state; and
- viability in the landscape context – i.e. does the patch of vegetation that the site is within retain its broader ecological functions and linkages, in a manner that enables it to respond successfully to natural fluctuations and other disturbance events?

Native vegetation at a site is assessed by comparing it to a benchmark which represents the average characteristics of a mature and apparently long-undisturbed stand of the same type of vegetation. General vegetation/habitat quality is scored from one (complete retention of natural quality as described by benchmark characteristics) to zero (complete loss)[6].

The combination of this quality measure and the area of native vegetation that it refers to is the habitat hectare (i.e. habitat score x area = habitat hectare).

The intention is that, generally speaking, a consultant will be engaged by the proponent (at the proponent's cost) to undertake the habitat hectare assessment, although we understand from DSE that in the case of very small scale clearing by farmers, there may be provision made for an assessment by the local council (acting as the responsible authority) without the need for incurring the cost of engaging a consultant.

One final point to note in relation to the habitat hectare measure, is that use of this measure provides an accounting system to enable the progress of achieving the net gain goal to be measured, not only in relation to individual parcels of land but for regional catchments and for the State as a whole.

Offsets – long term protection
The *Framework* recognises that where native vegetation is permitted to be removed, the total loss (that is, quality and quantity) must be offset. Ideally, the offset should occur on the parcel of land from which the native vegetation has been removed. The *Framework* however, does provide for off-site offsets, in recognition that it will not always be possible or feasible to replant or regenerate native vegetation on the affected land.

One matter that the *Framework* is silent about, is how offsets will be protected in the long term. Clearly, an offset is an essential element of achieving a net gain of native vegetation across the landscape. However, the net gain will only be achieved if the offset planting or regeneration is protected. Take the example of a

6 Parkes, D., Newell, G., and Cheal, D. (2001) 'Assessing the Quality of Native Vegetation – the Habitat Hectares approach'. *Journal of Ecological Management and Restoration* (in press).

farming property, where an area of native vegetation is permitted to be cleared for cropping purposes on the condition that an offset is achieved by carrying out regeneration and management works in remnant vegetation on another part of the farm. In ten years time, the landowner wants to extend the cropping area and makes a new application to clear the area that was previously required as an offset for the earlier clearing approval. It seems that the net gain goal would be defeated, if approval to allow clearance of this offset vegetation was granted.

The possible means to achieve long term protection include:

1. an agreement under section 173 of the *Planning and Environment Act* 1987
2. trust for nature covenants
3. planning permit conditions
4. public land tenure

Section 173 of the *Planning and Environment Act* 1987 provides that a responsible authority may enter into an agreement with an owner of land in the area covered by a planning scheme for which it is a responsible authority. The responsible authority can enter into the agreement on its own behalf or jointly with any other person or body. In this case, that other body may be the Department of Sustainability and Environment. (DSE's flora and fauna unit is the statutory referral authority under the planning scheme for any application to clear an area of land greater than 10 hectares.)

Section 174 of the *Planning and Environment Act* 1987 provides that an agreement may provide for the prohibition, restriction or regulation of the use or development of land; the conditions subject to which the land may be used or developed for specified purposes; any matter intended to achieve or advance the objectives of planning in Victoria and the objectives of the planning scheme. There is little doubt that the protection of native vegetation and in particular, offset vegetation, could rightly be the subject of a section 173 agreement.

With respect to this mechanism's ability to ensure long term protection of the native vegetation, firstly, section 173 agreement are registrable on the title to the land and run with the land. Secondly, section 175 of the Act provides that a term of the agreement may include the requirement for a bond or guarantee to be lodged with the responsible authority, which is forfeited if the agreement is not complied with. This is useful if the agreement also contains ongoing maintenance obligations.

The obvious disadvantage of this mechanism is that many landowners do not want terms and conditions regarding ongoing obligations with respect to native vegetation protection registered on the title to their land.

Trust for Nature covenants are a further mechanism that may ensure the long term protection of offsets. The *Victorian Conservation Trust Act* 1972 establishes the Victorian Conservation Trust, now known as Trust for Nature. The legislation gives the Trust the power to enter into binding covenants with landowners to achieve identified environmental objectives. The covenants can be registered on title and run with the land. The Trust also has the power to hold, buy or sell land. In this way the Trust could become the owner of the land on which the offset vegetation occurs.

One disadvantage of relying on this mechanism is the amount of public funding that may be required to achieve net gain.

Planning permit conditions may also be considered to achieve long term protection of offsets. Any planning permit granted to remove native vegetation is subject to conditions imposed at the discretion of the responsible authority. Such a condition could provide for the ongoing protection and maintenance of offset vegetation.

The disadvantage with adopting this mechanism is that the case law regarding the enforceability of planning permit conditions once the permit is spent is not yet settled in Victoria. Some Tribunal case provide that once the permit has been acted upon and the vegetation cleared in accordance with the permit, any conditions of the permit are spent. More recent cases hold that the permit only expires once all conditions are complied with. The question is yet to be tested in a higher court.

Public land tenure could assist in the protection of offsets. Any offset planting, regeneration or maintenance that occurred on public land is more likely to be retained particularly if the land is within land zoned for a public use.

Having said that the *Framework* does not encourage this means of protecting offsets into the future. In fact, the *Framework* encourages private land offsets to be on private land. This is because of the potential for an actual or perceived conflict of interest between the responsible authority's role of deciding the appropriate offset and being the ultimate beneficiary of any offset. (Note this conflict does not occur in relation to requirements for public open space. Another disadvantage is cost shifting from the private to the public sector

Operational guidelines
The Framework will be supported by further details to be provided by a set of Operational Guidelines, which are yet to be released. As with most broad policy documents, it is very difficult to anticipate how the Framework will operate and be implemented in practice in the absence of these Guidelines. The devil is always in the detail.

We anticipate, however, that the Guidelines will provide guidance to both proponents and responsible authorities in the preparation and assessment of applications for planning permits to clear native vegetation under the *Planning and Environment Act* 1987 and the VPPs and in particular in relation to matters such as:

- estimating the amount of land to be cleared;
- calculating habitat hectares (including guidance on exactly when an independent consultant will be required for this purpose);
- preparing appropriate offset plans and land management programs;
- imposing appropriate permit conditions; and
- using section 173 agreements and conservation covenants.

Given the silence of the *Framework* on how offsets will be protected in the long term, we assume that this issue will be addressed by the Guidelines. Clearly, the ability of responsible authorities to impose appropriate mechanisms on landholders for the ongoing protection of native vegetation is crucial for ensuring a net gain result. We believe that it is this aspect of the *Framework* that has the potential to generate considerable controversy amongst farmers and developers. It will be interesting to see how the *Framework* ultimately negotiates this issue, if indeed, it does.

Investment in natural heritage (missing markets, bush tender and bush broker)
Another key aspect to the *Framework* is its recognition of the opportunities for Net Gain that can be achieved through the capture and development of what can be described as 'missing markets'. That is, opportunities to engage private landholders in management of their native vegetation in a cost effective way.

The *Framework* describes two initiatives designed to capitalise on these missing markets, being Bush Tender and Bush Broker.

Bush Tender
Bush Tender offers landholders the opportunity to receive payment for entering agreements with the governments for the provision of management services that improve the quality or extent of native vegetation on their land.

The program is based on a competitive tender process whereby landholders establish their own price for the management services they are prepared to offer to improve their native vegetation. This price forms the basis for their bid, which is compared with the bids from all other landholders participating in the process. The successful bids are those that are considered to offer the best value for money. Those landholders will receive periodic payments for their services under a three year management agreement.

A trial of Bush Tender was undertaken during 2001 in two areas within North Central and North East Catchment Management Authority regions. The results of that trial were positive and the Trial was extended to Gippsland in 2002. The *Framework* acknowledges that the full impact of the Bush Tender approach can really only be properly assessed after several consecutive years.

Bush Broker

The Framework recognises that there are circumstances where clearing of native vegetation is required to facilitate development but mitigation for that vegetation loss (by way of offset gains) is not possible or preferable on the same property. Bush Broker is an attempt to ensure that Net Gain is still achieved by providing a means whereby the offset gains required can be generated elsewhere by third parties for a price.

The *Framework* makes clear that the preference is for offset gains to be generated on the same property. Therefore, Bush Broker is really directed at institutional developers such as VicRoads and mining ventures. It is an attempt to ensure that their clearing activities do not slip through the net.

The *Framework* acknowledges that a broker is required to facilitate and oversee this exchange where third parties are involved. It is anticipated that Bush Broker will piggy back on the Bush Tender program in the following way:

Under the Bush Broker proposal the price for offsite gains would be established through the operation of Bush Tender where the competitive auction process would provide a fair market price for proponents seeking to purchase offsets generated under management agreements. The site information required for matching appropriate gains to losses is also collected during the Bush Tender process. Proceeds from the sale of offsets would be recycled back into future Bush Tender rounds.

At this stage, Bush Broker appears to be little more than an idea very much in its infancy. It is an ambitious program that is yet to be fully developed and (we understand) yet to be formally put to the Government. Accordingly, it may or may not ultimately be realised.

Conclusion

There are many questions still to be answered in relation to how the Framework will operate in practice, on the ground. In our view, the content of the Operational Guidelines will be a crucial determinant of the ability of the Framework to succeed in its objective of achieving net gain in the long term.

Legal Aspects of Environmental Allocations in Water Management Planning

by Ilona Miller, Principal Solicitor, EDO - a paper presented to the 2003 NELA Annual Conference, Broken Hill, 23-25 October 2003.

Introduction

River flows have been drastically affected by irrigation and consumptive uses over the past 5 decades. In attempts to control water flows to deliver water for agricultural purposes, natural flow patterns have been altered to the extent of reversing seasonal patterns of water delivery to floodplains and wetlands. This has led to significant environmental problems where ecological values of riverine systems, such as riparian and floodplain vegetation and aquatic species are being drastically affected. One example of this is the iconic River Red Gums in the Murray darling basin, populations of which have been declining due to the absence of flood flows. Another example is the decline in species such as the Murray Cod and Silver Perch, which have been identified as threatened species under federal environmental law.

In this paper, I would like to take the opportunity to discuss some of the legal and practical issues arising from the first stage of implementing the Water Management Act 2000 **(WM Act)** in NSW. Chapter 2, Part 3 of the WM Act deals with water management planning and in particular the preparation and making of water management plans **(WMPs)**. The processes that have been undertaken in relation to WMPs have been fraught with contention and are now the subject of a number of legal challenges in the NSW Land and Environment Court **(L&E Court)**. This paper will canvas some of the reasons why the planning process has resulted in such controversy and the background to some of the legal challenges decided, and currently before the Court. My particular interest is in the way in which the WM Act is intended to protect environmental flows and the environmental values of this States' water resources. Accordingly, the focus of this paper is on environmental allocations. However, I will also try to highlight some of the social and economic issues that result from the changes to water management planning.

I will be looking firstly at the framework within which the WM Act provides for environmental allocations through its objectives and principles. Secondly, I will consider the way in which water management committees and the Minister have given effect to those objectives and principles through Water Sharing Plans **(WSPs)**. I will then review some of the legal issues arising from the environmental provisions of the WSPs having regard to the recent *Murrumbidgee Horticulture Council v Minister for Land and Water* case decided on 26 September 2003 and other challenges yet to be heard by the L&E Court. Finally, I will briefly review some of the recent developments in relation to a National Water Action Plan and the suggestions raised by the Wentworth Group of Concerned Scientists (Wentworth Group) to better manage and share water resources.

Impetus for water management reform

In order to place the environmental provisions of the WM Act in context, it is important to remember that the impetus for reform of water management came from the Commonwealth government through the National Competition Council **(NCC)** and the Council of Australian Governments **(CoAG)** reform agenda.

The CoAG Agreement states that governments are to:

> *establish a sustainable balance between the environment and other uses, including formal provisions for the environment for surface and groundwater consistent with the ARMCANZ/ANZECC national principles. Best available scientific evidence should be used and regard should be had to the inter-temporal and inter-spatial needs of river systems and groundwater systems.*[7]

The ARMCANZ National Principles for the Provision of Water for Ecosystems include the following relevant principles:

> Principle 1 – river regulation and/or consumptive use should be recognised as potentially impacting upon ecological values
>
> Principle 3 – environmental water provisions should be legally recognised.

7 clauses 4b – 4f CoAG Agreement

> Principle 4 – in systems where there are existing users, provision of water for ecosystems should go as far as possible to meet the water regime necessary to sustain the ecological values of aquatic ecosystems while recognising the existing rights of other water users.
>
> Principle 9 – all water uses should be managed in a manner which recognises ecological values.
>
> Principle 12 –all relevant environmental, social and economic stakeholders will be involved in water allocation planning and decision making on environmental water provisions.

In addition to allocating water to the environment, the CoAG Water Reform Framework also sought to ensure States implemented legislative changes and institutional reform to deal with issues including:

- establishing certainty of entitlements for water users ('property' rights);
- integrated planning for ecologically sustainable new developments;
- facilitating adaptive management of water resources;
- incorporating environmental costs in water pricing;
- facilitating ecologically sustainable water trading; and
- implementing a National Water Quality Management Strategy.

In order to meet the objectives of the CoAG Water Reform Framework, States have been allocated funding contingent upon meeting targets for implementing institutional and legislative reform.

One of the matters I will be addressing in this paper is the New South Wales Government's performance in establishing a sustainable balance between the environment and other uses of water.

Implementation of the Water Management Act

The WM Act sets out a number of mechanisms relating to water sharing, water use, drainage management, floodplain management and controlled activities[8].

At the outset, it is important to note that, to date, critical aspects of the WM Act have not yet become operative, in particular those parts dealing with access licenses and approvals.[9] Accordingly, water licenses, works approvals and floodplain works approval are still being dealt with under the *Water Act 1912* and permits to develop near water sources are still granted pursuant to Part 3A of the *Rivers and Foreshore Improvement Act 1948.* The parts of the WM Act dealing with access licences and approvals are intended to commence on 1 January 2004 and 1 July 2004 respectively.

There are a number of reasons for the delay in the operation of the WM Act. Firstly, following the NSW State election in March 2003 there were a number of institutional changes within the Departments responsible for the implementation of the WM Act. The Hon Craig Knowles MP was appointed as the Minister for Natural Resources and the Departments of Land and Water Conservation and PlanningNSW were integrated into a new department known as the Department of Infrastructure, Planning and Natural Resources **(DIPNR)**. Upon his appointment, Minister Knowles stated that implementation of the Act would be deferred as he wanted to consider the National Water Plan being developed by the Commonwealth government. The Minister pointed to the need to for *"tight cohesion and co-operation between the States and the Commonwealth"*[10]. As will be seen below, the National Water Plan is intended to be agreed upon by State Governments in November 2003 and the provisions of the plan may lead to further amendments to the WM Act with a view to defining water access licenses in perpetuity[11].

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8 Chapter 3 WM Act

9 Chapter 2 of the WM Act

10 Media Release – Department of Land and Water Conservation 17/06/03 http://www.dlwc.nsw.gov.au/mediarel/mo20030617_2024.html

11 "CoAG deal on $500m national water initiative" *Land and Water News* (September 2003) p.2

Additionally, as will be discussed in more detail below, many of the issues surrounding the preparation of WMPs and the matters dealt with in them, have been highly contentious, leading to prolonged debate and legal challenges. Until the validity of some of the provisions of WMPs are settled by the Court, those provisions, which facilitate the operation of licences and approvals, may not be able to commence.

Environmental Objectives

Turning now to the environmental considerations in the WM Act. Under the Act, water for the fundamental health of the environment is be protected as a priority in the sharing of water resources.

The objectives of the WM Act provide the basis for sustainable water management and water for the environment – these include:

(a) to apply the principles of ecologically sustainable development;

(b) to protect, enhance and restore water sources, and their associated ecosystems, ecological processes and biological diversity and their water quality.

Similarly, the water management principles outlined in section 5 of the WM Act state that:

- water sources, floodplains and dependent ecosystems (including groundwater and wetlands) should be protected and restored and, where possible, land should not be degraded;
- habitats, animals and plants that benefit from water or are potentially affected by managed activities should be protected and (in the case of habitats) restored;
- the water quality of all water sources should be protected and, wherever possible, enhanced;
- the cumulative impacts of water management licenses and approvals and other activities on water sources and their dependent ecosystems should be considered and minimised; and
- sharing of water from a water source must protect the water source and its dependent ecosystems.

It is clear from the objectives and water management principles that the WM Act is concerned with the environmental health of water sources and their dependent ecosystems. However, it is arguable that the implementation of the Act has failed to give effect to many of these objectives.

Water Management Planning

The initial intent of the WM Act was for WMPs to be prepared to deal with a range of issues including (but not limited to) water sharing, water source protection, drainage management and floodplain management.[12] For the purposes of giving effect to the objects of the WM Act,[13] WMPs were intended to be inclusive documents setting the framework for all aspects of water catchment planning. However, this intention has not been effectively implemented, with only discrete water sharing issues being addressed by the preparation of Water Sharing Plans (WSPs) over the past two years. WSPs operate as 10 year statutory plans which define water sharing arrangements between defined categories of water users; including the environment, basic landholders (domestic, stock and native title entitlements), high security, general security and supplementary water users. The DIPNR has expressed the view that the plans have been *'designed to provide for healthier rivers and aquifers and dependent ecosystems and to provide clarity and certainty about water rights'*[14]. However, many stakeholders have questioned the achievement of this goal.

12 s.13(1) WM Act

13 including integrated management of water sources (s.3(f) WM Act)

14 Hampsted, M *NSW Legislation and Policy Overview* paper presented at the A-Z of Australian Water Trading Conference September 2003

WSPs were intended to be gazetted by mid 2002 to enable the commencement of the provisions of the WM Act in relation to access and entitlements. This process has been seriously delayed due to the inability of regional water management committees to work effectively to balance environmental, social and economic needs. In the NSW 2001 National Competition Policy Assessment, the National Competition Council stated that:

> *The prime concern the Council has with the New South Wales System, is to ensure that while it is important for bulk access regimes to be established quickly, they must also be done properly including the basis for determination of environmental flows to reflect the 10 year timeframe under the Act. Otherwise, if the bulk access regimes and environmental flow requirements are poorly addressed, the issues for the environment will not be addressed for another 10 years.*[15]

Notwithstanding the CoAG caution about taking time to prepare the plans properly, the 35 plans that have recently been gazetted suffer a number of common deficiencies and arguably contradict many of the environmental objectives of the WM Act[16].

Environmental Water

Section 8 of the WM Act states that a WSP must identify three classes of environmental water. These are:

- environmental health water – *being water committed for fundamental ecosystem health at all times;*
- supplementary environmental water – *being water committed for specified environmental purposes at specified times or in specified circumstances; and*
- *adaptive environmental water* – water that, pursuant to an access licence is committed for specified environmental purposes, either generally or at specified times.

Section 20 of the WM Act further requires a WSP for a water management area to establish environmental water rules, identify the requirements for water use in a water management area, identify requirements for water access licenses and provide for the establishment for the creation of a bulk access regime and access dealing principles and access dealing rules. Access dealings principles are made by order published in the Gazette - known as "the principles order". Access dealing rules must comply with the principles. In addition, WSPs must be consistent with the State Water Management Outcomes Plan **(SWMOP)** and relevant legal policies. Herein lies the crux of the legal challenges before the L&E Court.

Section 20 of the WM Act states:

20 **Core provisions**

(1) The water sharing provisions of a management plan for a water management area or water source must deal with the following matters:

(a) the establishment of environmental water rules for the area or water source in relation to each of the classes of environmental water referred to in section 8 (1),

(b) the identification of requirements for water within the area, or from the water source, to satisfy basic landholder rights,

(c) the identification of requirements for water for extraction under access licences,

(d) the establishment of access licence dealing rules for the area or water source,

(e) the establishment of a bulk access regime for the extraction of water under access licences, having regard to the rules referred to in paragraphs (a) and (d) and the requirements referred to in paragraphs (b) and (c).

15 NSW 2001 NCP Assessment p.94

16 The WSPS are intended to commence operation on 1 January 2004 and apply to over 80% of water extraction in NSW.

(2) The bulk access regime referred to in subsection (1) (e):

(a) must recognise and be consistent with any limits to the availability of water that are set (whether by the relevant management plan or otherwise) in relation to the water sources to which the regime relates, and

(b) must establish rules according to which access licences are to be granted and managed and available water determinations to be made, and

(c) must recognise the effect of climatic variability on the availability of water, and

(d) may establish rules with respect to the priorities according to which water allocations are to be adjusted as a consequence of any reduction in the availability of water, and

(e) may contain provisions with respect to the conditions that must (as mandatory conditions) be imposed on access licences under section 66 (1), including conditions providing for the variation, from time to time, of the share and extraction components of access licences, and

(f) must be consistent with the water management principles.

(3) The rules referred to in subsection (2) (d) must comply with the priorities established under section 58.

(4) The access licence dealing rules established under subsection (1) (d):

(a) must comply with the access licence dealing principles, and

(b) subject to those principles, may regulate or prohibit any dealing under Division 4 of Part 2 of Chapter 3.

The requirement to establish environmental rules and a bulk access regime are mandatory obligations, which leads to the next part of this paper.

Legal Issues with Environmental Water in Water Sharing Plans

To date, the NSW L&E Court has determined one challenge to the validity of a WSP and has made interim rulings on another WSP challenge. There are a further 12 plans progressing through the Court system. All of these challenges have been brought in the Court's Class 4 jurisdiction, which enables the Court to review, on administrative law grounds, the legality of the provisions of the plan and the validity of the Minister for Natural Resources' decision to make the plans. There is no avenue for challenges to be brought against the merits of the plans – hence, for the most part, the proceedings are extremely legalistic. Section 336(1) of the WM Act enables "any person" to bring proceedings to remedy or restrain a breach of the Act. This provides the standing of third parties to challenge the validity of the plans within 3 months of their gazettal[17].

1. Compliance with Legislation

It is submitted that the purported rules for environmental water do not, in the majority of WSPs, provide environmental flow rules for each class of environmental water in accordance with section 20(1)(a) and section 8 of the WM Act. This is one of the matters being raised on behalf of conservation interests in the only environmental challenge to a water sharing plan[18].

It is important to recall that environmental health water is required to be committed for fundamental ecosystem health at all times. However, many WSPs do not provide environmental health water 'at all times' or where it is provided for, it is linked to flows for consumptive uses.

Additionally, in a number of the plans the dependent ecosystems of the water source or area are not identified, nor are their needs (specific or even general) set out. Nor are terms such as "fundamental ecosystem health" defined. The basis for providing environmental flows is to protect, enhance and restore water sources, their associated ecosystems, ecological processes and biodiversity and their water quality.[19]

17 S.47 WMA

18 Nature Conservation Council Inc v Minister administering the Water Management Act 2000 LEC 40573/03

19 s.3(b) WM Act

Many of the ARMCANZ Principles adopted by CoAG have been developed with this general objective in mind. However, these issues have not taken prominence in the consideration of environmental requirements. For example, whilst a number of the draft WSPs contained provisions which identified local threatened species or key environmental concerns, such provisions are absent from the final plans.

In the majority of WSPs the approach of water management committees has consistently been to determine what the existing consumptive requirements of a water source are (i.e. current licence allocations) and set a long term annual extraction limit and then work backwards from that amount of water to provide for environmental flows. This is fundamentally contrary to the objects of the WM Act and also the CoAG principles.

The same criticism is applicable to many of the rules for supplementary environmental water where events that require supplementary health water, such a bird breeding events, are not expressly identified. Additionally, crediting water to supplementary environmental purposes is often contingent upon the Minister making an available water determination for general security access licences. This has the effect, similarly to the provision of environmental health water, of linking environmental flows to consumptive purposes, rather than giving it the priority it requires under the Act.

It would appear that the conservationists are not the only ones concerned about the failure to comply with the requirements of section 20 of the WM Act to establish bulk access dealing rules. The converse argument to the failure to adequately provide for environmental flows is that too much water is being set aside for environmental purposes and that this is contrary to the requirement that the rules identify the requirements for water for extraction under access licences and be consistent with priorities set out in section 58 of the WM Act between high, general and supplementary entitlements.

2. Performance Indicators

Another example of a possible failure to comply with the terms of the WM Act relates to performance indicators. Section 35(1) of the WM Act requires a water management plan to include the following components:

(a) a vision statement;

(b) objectives consistent with the vision statement;

(c) strategies for reaching those objectives; and

(d) performance indicators to measure the success of those strategies.

Section 35(1)(d) imposes an obligation to measure the success of strategies to achieve the objectives consistent with the vision statement. The use of the word 'measure' requires the performance indicator to be capable of some form of objective assessment.

Many of the WSPs that I have reviewed contain 'performance indicators' which are incapable of any form of measurement. Concepts such as 'change' are frequently referred to without specification of the magnitude or nature of the change which could then be used to indicate a measurement of success or otherwise.[20] The failure to set out performance indicators in WSPs is arguably a breach of section 35 of the WM Act and could potentially lead to the invalidity of that plan.

3. Priority for the Environment and Consistency with the State Water Management Outcomes Plan

Section 9 of the WM Act provides that:

(1) It is the duty of all persons exercising functions under this Act:

  (a) to take all reasonable steps to do so in accordance with, and so as to promote, the water management principles of this Act, and

  (b) as between the principles for water sharing set out in section 5 (3), to give priority to those principles in the order in which they are set out in that subsection.

20 See for example Clause 13 Water Sharing Plan for the Gwydir Regulated River Source 2002

(2) It is the duty of all persons involved in the administration of this Act to exercise their functions under this Act in a manner that gives effect to the State Water Management Outcomes Plan.

The WM Act establishes a system of priorities between environmental and consumptive water uses. Environmental water is intended to have priority over all other types of water except in times of drought, when landholders basic rights take priority.[21] In order to reflect these priorities, it is submitted that in determining the structure of bulk access regimes, the first step should be to determine the environmental water needs of the water source and its dependent ecosystems, having regard to the stresses and constraints of the water source. To this end, classes of environmental water are required to be identified and provided for.

One of the main criticisms conservationists have made in respect of WSPs is that they do not provide priority for the environment. For almost all water management committees, there was significant tension between conflicting interests of consumptive water users and conservation groups during the WSP drafting process. Where there was disagreement amongst committee members as to the environmental water needs of a water source (which has been the case in all water management areas) there was no opportunity for disputes to be resolved through independent processes by a suitably qualified person. Rather, there was a bargaining process in an attempt to achieve an acceptable allocation by consensus which often resulted in 'the absolute minimum' amount of environmental water to be allocated to the environment.

Other Priorities

Further issues relating to priorities between categories of consumptive water users were raised in the recent case of *Murrumbidgee Horticulture Council v Minister for Land and Water* (2003 NSWLEC 213). The WM Act identifies categories of licences in section 57 and then allocates priorities between them in section 58. This case is discussed below in detail for a number of reasons. Firstly, it is the first case to interpret the WM Act. Secondly, it highlights the contentious nature of the debate between water users. Thirdly, it illustrates the complexity of the provisions of the Act and subordinate instruments and their interaction. Fourthly, it canvasses important issues that will shape the future of other challenges before the Court.

In the Murrumbidgee case, the Council represented approximately 1000 'high security' water users (irrigators with permanent plantings) along the Murrumbidgee River in a challenge to the validity of the *Water Sharing Plan for the Murrumbidgee Regulated River Water Source* **(MWSP)**. In relation to the issue of priority between water users, the following grounds of review were raised:

1. That cl 49 of the MWSP, which provides for priority of access during periods of supply constraints was inconsistent with s58 of the Act which sets the water access priorities of different licences[22]. This was predicated on the basis that only persons who had ordered water would receive it.

2. That cl 53(8) of the WM Act, which prohibits a dealing in water allocations from a high security access licence water allocation account if the application is received after 1 September in any water year, is invalid and beyond the power of the Minister because:

   (a) the time limits in cl 53(8) are in breach of the priorities between licence holders in s 58(1) of the Act; and

   (b) it does not comply with Target 16a of the SWMOP which provides that improved and extended water markets should be established by making all share components of access licences transferable.

21 s 9 & 5 WM Act

22 Cl 49 provides that

"Where extraction components of an access licence do not specify the rate as a share of supply capacity or a volume per unit of time, then whenever supply capability is insufficient to satisfy all orders for water in any section of this water source at any time then:

(a) water will be supplied to domestic and stock access licences, local water utility access licences and regulated river (high security) access licences that have placed orders for water, and

(b) then any remaining supply capability will be shared between regulated river (general security) access licences that placed an order for water, in proportion to the share components specified on the access licence."

In relation to the first ground of priorities - After reading and hearing the written and oral submissions of both parties, Pain J concluded that the parties had agreed on the appropriate interpretation of cl 49 and that it was unnecessary to consider the making of a declaration with regards to its validity. For the sake of completeness cl 49 was constructed to mean that:

> *"priority is made at the time of delivery of the water when orders have been received. At the time water is released priority is given to orders from the class of access licence holders in par (a)."*

In relation to the second ground of appeal, the Council argued that the time limit of two months from the start of the water year for the making of water dealings is a breach that impinges on the priorities between licence holders under s 58(1) which gives priority to high security licence holders. It argued that placing limits on the priority system was a subversion of the scheme itself and the Act. The issue here was if water was required for environmental purposes, then that water should, at first instance, come from lower security access licenses, rather than high security licenses.

The Minister argued firstly that water could only be used if it had been ordered and then that cl 53(8) was not inconsistent with the Act (in particular s 71G, which requires the Minister to consent to transfers to other access holders). It was also argued that there is no unfettered right to assign water allocations to other access holders.

Pain J agreed with the Minister and held that there was no recognition in the Act of an unfettered right to deal in the share component of a licence and thus no inconsistency between cl 53(8) and s 71G. She held that while it may be government policy to encourage dealings in the share components of licences once allocated, there is no right to unrestricted dealings. Her Honour noted that section 71G provides that the Minister 'may', not 'must' consent to the transfer of water and that whether the Minister consents or not is a matter for the Minister himself. If access holders wish that the Minister consider the transfer of water from one access holder to another, they can only be made in the first two months of the water year.

In relation to the question of consistency with the SWMOP - Pain J held that the WMP must "be consistent" in general terms with the whole of the SWMOP. She held that even if the WMP was not consistent with Target 16a specifically, it cannot be said that the plan was in general terms inconsistent with the whole of the SWMOP because other targets in the SWMOP are met by the WMP. She went on to say that:

> *"The drafting of the SWMOP does not suggest that the targets have a binding rule-like quality such that a breach would give rise to invalidity."*

A critical issue in the Murrumbidgee case was as to the meaning of the words "in general terms" in section 50(2) of the WM Act. This issue is surfacing in all of the cases currently before the Court and is important as it determines how far the Minister can deviate from strict compliance with section 20 of the Act when making a Minister's Plan. It is interesting to note that these words were only incorporated into section 50(2) of the WM Act in late December 2002, just weeks before some Water Sharing Plans were gazetted.

Additionally in the Murrumbidgee case, the Council raised the questions of whether cl 53(8) of the WSP, which prohibits a dealing in water allocations from a high security access licence water allocation account if the application is received after 1 September in any water year, is invalid and beyond the power of the Minister on the basis that:

(c) Cl 53(8) is fails to comply with s20(4) of the Act because it does not comply with the cl 10 of the Principles Order, which provides that the objective of access licence dealings is to help facilitate the maximisation of "social and economic benefits to the community of access licences".

Pain J held that a Minster's WMP should comply, in general terms, with cl 10 of the Principles Order. She held that s 71L(a) and (b) of the Act implied that the Principles Order should be given priority over the licence access dealing rules in any WPM. This construction is confirmed by s 20(4)(a) and (b) which makes the power to regulate dealings in a management plan subject to access licence dealing principles. However,

clause 10 of the Order was also found to be subject to the other principles set out in the Order, in particular clause 7 (impact on water sources) and therefore justified cl 58 of the WSP. Her Honour found that the Minister's ability to restrict dealings for environmental purposes, in this case for maintaining the 'water cap' in the Murray–Darling basin, was broad, stating that;

> *"the overall aim of achieving the "water cap" to which the Plan is directed is to reduce water extraction in the Murray-Darling Basin in order to achieve better water quality, increase environmental flows and habitat protection. I consider this strategy as implemented by cl 53(8) of the Plan satisfies cl 7(1) and (2)."*

This point is of interest as it suggests that the Judge was taking into consideration the overarching priorities set by the Act, insofar as environmental water requirements may be put before consumptive needs if the system is exceeding the Cap.

4. Socio-economic Considerations

As noted above, there have been a number of legal challenges made to WSPs, primarily by irrigators dissatisfied with the planning process and the resultant plans gazetted by the Minister. Whilst the Murrumbidgee case is the only one to have been finally determined by the Court to date, at least another 6 irrigator challenges are being processed by the Court and to are expected be heard in early 2004. These cases are currently being case managed by the chief Judge of the L&E Court.

One of the central themes in these cases is that the water management committees have failed to have due regard to social and economic impacts of providing certain environmental contingency allowances **(ECA)** when preparing the plans. In this respect, modelling was done by DIPNR on behalf of all the water management committees to determine what effect certain allocations for environmental and consumptive water would have, in particular on the productivity and profitability of irrigated agriculture in the relevant area. Many irrigators have taken the view that the modelling and subsequent studies commissioned to interpret the socio-economic effects have been inadequate. In addition, some irrigators are arguing that their own consultants' reports were not taken into consideration in the preparation of the plans and that this represents either a failure to accord those groups procedural fairness or a failure to take into account a relevant consideration.

5. Procedural Fairness

As noted above, related to the issue of failure to consider social and economic considerations is the purported failure of the Minister to accord procedural fairness to participants in the planning process.

The question of whether this ground of judicial review could be considered by the Court was raised in interlocutory proceedings before the L&E Court in the case of *Upper Namoi Water Users Association Inc v Minister for Natural Resources* [2003] NSWLEC 175. In that case the Minister for Natural Resources asked that the Court determine as a preliminary point whether the doctrine of legitimate expectation and procedural fairness applied to the Minister's decision to make a water sharing plan under section 50 of the WM Act. The proceedings were brought at an interim stage on the basis that a finding in favour of the Minister would substantially limit the grounds of review in the case (deleting some 14 of 80+ grounds of appeal). The Court was not prepared to rule on the question of whether the rules of procedural fairness had been excluded, on the basis that such a decision was contingent on a detailed review of the WSP and the whole of the facts in the case. Accordingly, this question will be explored in detail when that case goes to hearing.

One of the primary concerns in relation to the procedural fairness argument appears to be whether water management committees were misled by the Minister insofar as they assumed that they, not the Minister, would be making water sharing plans[23]. It is my understanding that this issue is also the subject of legal challenge on the basis that committees acted under the assumption that the plans they were preparing would be adopted as WSPs, rather than be advisory to the Minister only.

23 Management committee constituted under Part 2 Chapter 2 WMA contrasted with advisory committees under s. 388 WMA

National Action Plan

On 29 August 2003, CoAG agreed to develop a National Water Initiative to:

- improve the security of water access entitlements, including clear assignment of risks of reductions in future water availability and by returning over-allocated systems to sustainable allocation levels;
- 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 across and between districts and States (where water systems are physically shared), involving clear rules for trading, robust water accounting arrangements and pricing based on full cost recovery principles; and
- encourage water conservation in cities, including better use of stormwater and recycled water.

Details are to be specified in an intergovernmental agreement for consideration at the first COAG meeting in 2004. The agreement will indicate specific actions in each jurisdiction. The 2003 meeting also approved a new $500 million State and Commonwealth funding plan to increase flows in the Murray River.

The WM Act is likely to be further amended in light of the National Water Initiative to provide mechanisms at State level for water markets and trading across States. With many of the licensing and approvals mechanisms in the Act due to come into force in early 2004, the intention of the NSW Government to work in concert with the national plan is likely to further delay the full implementation of WM Act.

Wentworth Blueprint for a National Water Plan

The Wentworth Group have made the following key recommendations to CoAG in their Blueprint for a National Water Plan release in August 2003. National water reform should:

- protect river health and the rights of all Australians to clean, usable water by:
- ensuring that the environmental needs of our river systems have first call on the water required to keep them healthy, protecting both their environmental values and the ability to meet human needs in the future
- establishing a new, nationally consistent water entitlement and trading system that provides security to both water users and the environment by:
- defining water entitlements as a perpetual share of the available water resource;
- clearly articulating the way water can be used in each catchment to protect both the environment and other uses
- engaging local communities to ensure a fair transition by:
- supporting community based catchment and estuary management;
- establishing water trusts to provide active and accountable environmental management;
- reducing freshwater use in towns and cities.

Concluding Remarks

The New South Wales Government's commitment to integrated catchment management and the objectives of the WM Act are being eroded through political processes and arguably by the flaws in the plan making process. At present, environmental allocations are being subordinated to other consumptive and economic uses. If whole catchments are not managed in an integrated fashion then beneficial environmental outcomes will not be achieved, nor will entitlement security for consumptive users.

The initiatives being discussed by COAG and the Wentworth Goup offer some indication that Governments and other stakeholders wish to sort this issue out as a priority. However, if agreement can only be reached about key iconic environmental locations and not whole river systems[24], the process may not achieve much at all. Further, the current reform process is likely to lead to further amendments to the WM Act and other instruments which leaves stakeholders in limbo until COAG meet in April 2004.

24 see recent media reports 13 and 14 November 2003 Sydney Morning Herald stating that the current proposal before the Government is that environmental water will only go to 5 key sites in the Murray Darling Basin

in focus

An interview with Mick Bourke, Chairman, EPA Victoria

Mick took over chairmanship of the EPA just over 12 month ago, with a hard act to follow in replacing the highly regarded Dr Brian Robinson. NELR caught up with Mick at Southbank on 27October 2003 to find out how he was approaching his new role.

Firstly, on Mick's background, we discovered Mick brings to the EPA considerable public sector business management experience from his earlier roles as the CEO of various water authorities including the Coliban Water Authority (based in regional Victoria, at Bendigo) and City West Water (in Melbourne). As manager of City West Water, in the industrial heartland of Melbourne, Mick was already familiar with the some of the EPA's major clients, and this has helped greatly in allowing him to make a smooth transition.

In Mick's view, Victoria's pollution situation is generally well managed by industry but there is still room for improvement through a more holistic approach focusing on resource efficiency. Thus he considers the most important challenge facing the EPA is to establish strong communication with business managers. This is generally not a problem for large corporate businesses, which typically have a well informed environmental management team. However, many small to medium sized enterprises are commonly managed by individuals or couples with little free time to look at environmental issues, and as a consequence, they may be very suspicious of approaches from the EPA. Mick believes one of the best ways to sell environmental strategies to this SME sector is through partnerships with industry associations such as the Australian Industry Group. In this way the EPA can be involved as a contributor to industry based training sessions, and more sustainable business practices can be introduced as cost saving management strategies, rather than a compliance issue.

One common problem is businesses that may be under trading difficulties or subject to parent company policies which restrict cash-flow for capital investment in new pollution control strategies, and more sustainable product design. In particular, Mick feels frustrated when the EPA can see that the required expenditure would be a very sound investment as the cost of such improvements would be recovered very quickly through reduced operating costs. Nevertheless Mick has been pleased to find that many businesses can still achieve great strides under a tight budget, and he mentioned the recent efforts of Mobil at its Altona Refinery as a good example.

Mick also had some interesting observations on the role of government. Firstly, as a result of privatization of infrastructure such as the electricity generation plants, the business may have severely restricted cash flow because the purchasers may have overestimated business returns. This problem is exacerbated when you consider that government funding is also compromised as it has foregone the profits from these former state owned enterprises. Another related question is how much infrastructure should be provided by government – for example if drainage facilities are provided to a new industrial estate, businesses may assume they have a right to discharge. It may be a better strategy from a sustainability viewpoint to not provide drains so that businesses will manage (and hopefully eliminate) waste on-site.

In conclusion, it seems clear that the State of Victoria and the EPA have done extremely well to pick up such a highly personable and well seasoned natural resource manager for this key role.

literature watch

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 2

- Section 100 – A Barrier to Environmental Reform? By David Connell
- Law and Poloicy for Sustainable Water Quality Management: Focus on the Sydney Water Catchments by Alex Gardner
- Transgenic Crops and Genetic Contamination: Assessing the Need for a Regulatory Response to Protect Organic Farmers, by David Dalton

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

Environmental and Planning Law Journal

(Thomson Lawbook Co) Volume 20 Number 5 (October 2003)

- Beach Protection in NSW: New Measures to Secure the Environment and Amenity of NSW Beaches, by Bruce Thom
- The Implications of Electricity Restructuring for a Sustainable Energy Framework: What's Law Got to Do With It?, by Rosemary Lyster.
- The Legal Aspects of Indoor Air Quality: An Examination of the Total Volatile Organic Compounds Concept and its Relevance to Current OH&S and Environmental Standards, by Desiree Mesaros.

Impact

(Quarterly Journal of the National Environmental Defenders Network)

Number 71, September 2003

- 'Federal Environment Minister Takes Action under EPBC Act' by Chris McGrath
- 'Review of Commonwealth Mandatory Renewable Energy Target' by Ilona Miller
- 'Review of the Environmental Policy of the Export Finance and Insurance Corporation' by Elisa Nichols
- 'Productivity Commission Inquiry: Native Vegetation and Biodiversity Regulation' by Rachel Walmsley
- 'Victorian Water Law: Environmental Flows' by Barnaby McGrath
- Genetically Modified Organism Free Zones' by Lee McInstosh

Recent conference papers

2003 NELA Annual Conference, Broken Hill, 23-25 October 2003

Thursday 23 Oct:

- 'Shifting Sands - The implications of climate change & changing coastline for private property and public authorities', by Professor Zada Lipman & Robert Stokes, Centre for Environmental Law Macquarie University.
- 'No GATS, No Glory?' The environmental implications of trade in services. Professor Jan McDonald, School of Law, Griffith University.
- 'Environmental Treaties Compliance', by Greg Rose, University of Wollongong.

Friday 24 Oct:

- Keynote address by the Hon Justice Nicola Pain (in absentia, presented by Stefani White)
- 'From " No Net Loss" to ' Net Gain" - Victoria's Native Vegetation Management Framework' by Tania Heber & Lucy Vaughan, Maddocks Lawyers.
- 'Land Clearing Control: Cultural Values and Adaptable Assessment', by Dr Alan Stewart, Graduate School of Environment, Macquarie University.
- 'A Comparative Analysis of Assisted Dispute Resolution Available in Australia & New Zealand: How Can We Use ADR for Environment Disputes?' By John Haydon, EcoDirections.
- 'Statutory Tools - The Next Generation' by Joanna Cary, Henry Jackson (Environment Protection Authority Victoria) & Wayne Gumley (Monash University).
- 'Conservation & Compensation for Private Landowners - Walking the Tightrope' by Michelle Jenkins & Alex Gardner, University of Western Australia.
- 'Legal Aspects of Environmental Allocations in Water Management Planning', by Ilona Millar, Environmental Defender's Office NSW
- 'Australian Identity and the Control of Weeds', by Elisa Arcioni