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 May 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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NELA website

For latest news, membership information and back copies of publications see our website at **www.nela.org.au**

contents

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editorial

Dear Readers,

Sustainable Development: Is It Time for a New Concept?

In this issue, we feature the 2002 NELA Gerry Bates Essay Prize winner, Tobin Bennett with an essay on the movement towards ecologically sustainable development. Tobin has provided a convincing argument that the concept of sustainable development as recognised in international declarations is fundamentally flawed. This point is only too obvious at present in Australia where we see many signs that the federal government is showing scant respect for the precautionary principle in areas such as climate change and biotechnology, and several State governments showing little regard for conservation of biodiversity, particularly native forests. Recent cases like the Nathan Dam in Queensland and the Meander Dam in Tasmania have also revealed a weakness in current environmental impact assessment processes, where political interests seem to be prevailing over environmental objectives.

The irony is that the corporate sector is showing far greater leadership on environmental management than many of our political leaders. The second paper in this issue, by legal practitioners Sean Lucy and Megan Utter, argues that in the wake of recent corporate governance failures such as Enron and HIH, sustainability performance indicators are of increasing importance to determinations of the 'true value' of a company, particularly in industries that are susceptible to major environmental risks. They argue that directors need to be increasingly careful that corporate disclosure obligations are duly satisfied on these 'non-financial' aspects of business operation.

Also in this issue we have an overview of recent developments in planning law in Victoria by Denise Turner, and a case note by Brendan Sweeney on the recent decision in *Johnson Tiles* by the Supreme Court of Victoria, dealing with claims for economic loss arising from the 1998 Longford gas explosion. This significant judgment may be of wider interest to practitioners in other States.

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).

SOUTH AUSTRALIAN EDITOR: Will Webster

Barrister and Solicitor, Mellor Olsson wwebster@mellorolsson.com.au

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.

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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

INTERNATIONAL

Editor: David Jones

Kyoto Protocol and Climate Change Developments

The European Union has legislated to make the provisions of the Kyoto Protocol legally binding on all of its member States, including the 10 new nations that are set to join in May 2004. This means that even though the Protocol is not yet in force (waiting on either Russia or the US to sign) the EU States will be required to comply with its provisions. In itself this is not overly surprising, as the EU Emissions Trading Scheme set to come online in 2005, was always aimed at achieving the emission reductions contemplated by Kyoto, with some member states already aiming beyond those. However, the move sends a clear signal to countries such as Australia and the US about the political stance they have chosen to take on the climate change issue.

On the Russian front, ratification is starting to look less likely. The argument for Russia's logical participation has always been that its Kyoto emissions target, being based on 1990 emission levels, would result in it receiving a "windfall" of emissions. ie. its emissions would already be substantially below its target level due to the country's economic slowdown of the mid to late 1990s. This would have meant that it would have a store of emission reductions that it could sell to other countries that were having difficulty complying with their targets, giving Russia a financial incentive to sign up. However, recent analysis by the UN suggests that its current period of rapid growth may take away this incentive – at the very least, the advantages are now far less clear.

Treaty for Protection of Albatrosses and Petrels

Following South Africa's signing of this Treaty in November, the TPAP entered into force on 1 February 2004. Australia, as one of the five key parties to this agreement, (Ecuador, Spain and New Zealand have also ratified) has been acting as the Interim Secretariat and will continue to do so until the permanent role is determined at this year's first meeting of the parties.

The TPAP provides primarily for the collection and analysis of information relating to these bird species, with management plans to be put in place based on this data, to protect them from impacts of fishing operations and habitat damage. To date, research is indicating that the main threat to these seabirds is entanglement in fishing long-lines, and comments from David Kemp (Australian Minister for Environment and Heritage) suggest that this practice will be at least the initial focus of the main policy and regulatory initiatives under the Treaty.

Upcoming Meetings

There are a large number of international treaty conferences throughout April and in the following months. These include:

- the sixth meeting of the Commission on Sustainable Development;
- the South African NGOs meeting on Governance and Accountability, which will examine the development of "best practice" procedures for non-government organisations in South Africa, and a Code of Good Governance for the not for profit sector. This is likely to have some interesting outcomes with much broader applicability;
- the second Annual Brussels Climate Change conference, which will look at developments within the EU, carbon trading markets and actions of major EU trading partners such as the US, Japan, Canada, Russia and Australia;
- Lagoon and Coastal Wetlands Conference, which will focus on values and functions of coastal lagoons and wetland systems, climate change impacts, adaptation strategies and sustainable use.

For more details on upcoming meetings and international developments generally, visit http://www.iisd.ca/.

National Reserves System Directions Statement Released for Public Comment

The joint chairs of the Natural Resource Management Ministerial Council, Dr David Kemp and Mr Warren Truss, have released for public comment *Directions for the National Reserve System—A Partnership Approach*. The document outlines the future development of Australia's protected area system. The document has been prepared to assist government agencies, non-government organisations and the community in the development of a comprehensive, adequate and representative (CAR) protected area system across Australia. The document is available on the Australian Government Department of the Environment and Heritage (DEH) website (www.deh.gov.au).

Directions for the National Reserve System propose a standards approach to the establishment of protected areas. It includes an agreed set of minimum standards which protected areas must meet to be included in the national reserve system and to count towards meeting reservation targets. These include a common approach to the application of World Conservation Union (IUCN) protected area categories, and the need to ensure that all protected areas, whether public or private, are established through secure means.

A key aim in developing the national reserve system is the maintenance of the values for which the lands were protected. A set of broad management principles has been identified, which embodies contemporary thinking on protected area management to help achieve this aim and provides the basis for standards for protected area management.

The document acknowledges the need to establish and manage protected areas within a landscape context on the basis that conservation objectives can best be achieved through an integrated approach at the landscape level. It is recognised that involvement of the community and relation with neighbours are critical issues in the successful establishment and management of protected areas.

National Pollutant Inventory Data Released

The National Pollutant Inventory (NPI) is a national cooperative program by the Australian, State and Territory Governments that provides data on emissions of pollutants to the environment. Emissions are estimated for industrial facilities across Australia and for diffuse sources such as transport and domestic activities in airsheds, and agriculture in water catchments. The information is available to the public via an online database (www.npi.gov.au).

Data for 2002–2003 held in the NPI was released in January 2004. Features of the 2002–2003 data are:

- the NPI now holds emission data for 90 substances for close to 3400 facilities, 33 airsheds and 31 water catchments around Australia
- there was a 13 per cent increase in the number of facilities reporting in 2002–2003, from 2,972 to 3364
- of the 90 substances reported in the NPI, there were reduced emissions from 50 substances, including potential harmful chemicals such benzene and lead,
- industry reported lower emissions of sulfur dioxide and oxides of nitrogen, which cause poor air quality
- emissions of cadmium, cobalt and zinc have increased
- motor vehicles remain the chief cause of air pollution in six out of eight capital cities.

Invitation to Comment on the Gene Technology Regulator's Risk Analysis Framework

The Gene Technology Regulator administers the national regulatory system for gene technology. The *Gene Technology Act 2003* requires the Regulator to prepare a risk assessment and risk management plan for all licence applications to deal with genetically modified organisms (GMOs). In preparing these plans the Regulator uses a risk analysis framework (RAF) to assess the risks that may be posed by GMOs and determine the measures necessary to manage the identified risks.

The Regulator has begun a review of the RAF and has invited submissions from the public and interested organisations on suggested enhancements and potential changes to the RAF. A copy of the RAF and further information are available via the Office of the Gene Technology Regulator website www.ogtr.gov.au.

The review of the RAF will not deal with food labelling, herbicide and pesticide use and marketability and trade implications of gene technology. These are the responsibility of other agencies and authorities.

COMMONWEALTH

Editor: John Ashe

Nathan Dam Case—Appeal by Minister

(See also National Environment Law Review No 4/2003, 24–25.)

In *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463 ('the Nathan Dam Case'), decided on 19 December 2003, the Federal Court set aside decisions by the Minister for the Environment and Heritage in relation to the proposed Nathan Dam on the Dawson River in Queensland. The case concerned the extent of the enquiry to be undertaken by the Minister under the *Environment Protection and Biodiversity Conservation Act 1999* ('EPBC Act') in relation to the proposed development and whether this required an assessment of downstream agricultural development and impacts on the Great Barrier Reef World Heritage Area ('the Area'). The applicants were concerned that a dam would enable cotton farming under irrigation to be undertaken and that chemicals used in that farming might travel downstream with consequential adverse impacts on the Area.

The Minister considered that the Act only required him to consider the effects of the operations of the dam by the entity proposing it and did not extend to consequences which might flow from decisions by others to use chemicals. Justice Susan Kiefel held, however, that the enquiry required is a wider one and that the Minister was therefore obliged to reconsider the matter. Justice Kiefel set aside the Minister's decision that the proposed dam was not a controlled action in respect of any impact that the dam might have on world heritage values or listed migratory species.

The Minister has appealed the court's decision. The Appeal Notice argues that the test for the breadth of environmental assessment required under the EPBC Act should be when adverse impacts are 'inherently or inextricably' involved in a proposed action rather than the wider interpretation held by Justice Kiefel. Subject to confirmation, the case is set down for hearing before the Full Federal Court on 19 May 2004 in Brisbane.

EPBC Act Developments

New Heritage Protection Regime Comes into Effect

(See also National Environment Law Review No 3/2003, 10.)

The Commonwealth's new heritage protection regime came into effect on 1 January 2004.

On 18 February 2004 the Minister for the Environment and Heritage Dr David Kemp, announced the names of the six members of the Australian Heritage Council (the Council), the successor to the Australian

Heritage Commission (AHC). The chair is Mr Tom Harley, the former chair of the AHC. The other members are Mr Roger Beale AM, Mr Michael Kennedy, Ms Jane Lennon AM, Dr Denis Saunders, and Dr Richard Walley OAM.

An initial task of the new body will be to consider nominations of places in the new National Heritage List. Dr Kemp has, as his first nomination, nominated the Royal Exhibition Building and Carlton Gardens. The building is also currently being assessed by the World Heritage Committee for inclusion in the World Heritage List.

Shark Fishermen Fined for Breaches of EPBC Act

Two shark fishermen have been fined for illegally fishing in the Great Australian Bight Marine Park when the park was closed in order to protect whales.

In December 2003 the Federal Court fined Ronald David Atterton $25,000 for entering the park at a time when commercial fishing boats were banned from entering the park. Mr Atterton's boat had been detected near the Head of the Bight, an area which is a significant breeding ground for the endangered southern right whale. The area is closed to commercial fishing for six months of the year during the whale's annual migration.

In January 2004 the Federal Court fined Robert John Wilson $12, 500 for a similar offence. The court took into account Mr Wilson's claim that he did not know that his boat had drifted across the boundary of the closed area while he was setting fishing nets. Although accepting that the breach was a first offence and was not deliberate, the court held that the breach was the result at least of negligence and perhaps recklessness.

Both incidents were detected in October 2001 in a joint operation by the Australian Customs Service and National Parks and Wildlife South Australia.

Listed Species Permits Consultation Register —Call for Nominations

The Department of the Environment and Heritage (DEH) has established a register of persons or bodies to be consulted on applications for permits to undertake actions that may impact on listed species, as specified under section 266A of the EPBC Act. DEH is calling for applications from persons or bodies wishing to have their names include in the register. The current registration period is from 1 September 2003 until 30 August 2004.

Live Imports Stakeholder Email List

If you would like to provide comments on application to amend the live import list, send your email address to wsm@deh.gov.au with a request to be added to the live imports stakeholder email list.

Wildlife Conservation Plan for Migratory Shorebirds

In consultation with interested stakeholders, DEH is developing a Wildlife Conservation Plan for Migratory Shorebirds. DEH has prepared a factsheet on the consultation process, which is available from the department's website: www.deh.gov.au.

Exotic Animal Guide

DEH has placed on its website an Exotic Animal Guide, to assist those who have an exotic animal or are thinking of getting one in understanding and complying with Australia's laws that regulate the import and private keeping of exotic animals in Australia.

Farmers and the EPBC Act

In order to help farmers work with the EPBC Act, DEH has established on its website a page of quick reference links for the farming sector. The page is designed to make it easier to navigate through the online resources provided by the department. The site is a pilot project. The page includes links organised under headings relevant to the farming sector.

Chemicals Legislation Passed

The Agricultural and Veterinary Chemicals (Administration) Bill 2004 and the Industrial Chemicals (Notification and Assessment) (Rotterdam Convention) Bill 2004, introduced together, passed both houses in March 2004 and received Assent on 11 March 2004.

The Agricultural and Veterinary Chemicals (Administration) Bill 2004 amends the *Agricultural and Veterinary Chemicals (Administration) Act 1992* in relation to: the management of pesticides under consideration by the international community because of particular human health or environmental concerns; regulation-making powers, including to enable the collection of prescribed information about prescribed chemicals; and offence and penalty provisions for failure to comply with national control mechanisms.

The Industrial Chemicals (Notification and Assessment) (Rotterdam Convention) Bill amends the *Industrial Chemical (Notification and Assessment) Act 1989* to give effect to Australia's obligations under the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.

Great Barrier Reef Marine Park Amendment Legislation Passed

The Great Barrier Reef Amendment Bill 2004 passed both houses in March 2004. The bill amends the *Great Barrier Reef Marine Park Act 1975* to:

- restructure the method of payment and collection of the Environment Management Charge levied on standard tourism operations to clarify that GST is not payable
- extend the powers of inspectors to search aircraft and vessels and the powers of magistrates to issue search warrants.

Australian Government Seeks Industry Advice on New Ozone and Synthetic Gas Regulations

The Government is seeking industry assistance with the development of end-use regulations under the *Ozone Protection and Synthetic Gas Management Act 1989*. Amendments to the Act, including a change in its title, were passed in late 2003. The Act provides a national approach to managing the supply and end-use of ozone-depleting substances and their synthetic greenhouse gas replacements. These are in common use in the refrigeration, air conditioning and fire protection industries.

Regulations are being developed to control and manage the use of synthetic gases, including licensing requirements for all refrigeration and air conditioning tradespeople. To assist in this process the Government has called on all interested industry bodies and stakeholders to provide comment on discussion papers that have been released. These papers are available on the DEH website.

The Government is working with the National Refrigeration and Air Conditioning Council (NRAC) to assist the refrigeration and air conditioning industries in their transition to the new regime. The Government has said it will honour NRAC certifications of tradespeople at no additional cost when a national licence scheme comes into place after the regulations are finalised.

NRAC will help the refrigeration and air conditioning industry with information about the new regulatory requirements and will liaise with education providers about the provision of training for tradespeople.

Regulations Amended to Protect Oil Recyclers

An amendment has been made to the *Product Stewardship (Oil) Regulations 2000* to ensure that certain oil recyclers are not disadvantaged as a result of changes to the *Excise Tariff Act 1921* which took effect on 1 February 2004. Those changes remove excise exemptions for some oil recyclers. The amendments to the *Product Stewardship (Oil) Regulations 2000* will ensure that producers of Blended Light Fuel Oil continue to receive an equivalent level of benefit and are not disadvantaged.

Review of Fuel Quality Standards Act

Dr Kemp has appointed Dr Brian Robinson to chair the panel that has been established to review the *Fuel Quality Standards Act 2000*. The Act established the first national regime to ensure consistent fuel quality across Australia, and standards have been introduced progressively since 1 January 2002.

The review will be examining whether the Act is meeting the Government's objectives for fuel quality standards, and in particular whether it works effectively in developing standards for emerging and alternative fuels.

Submissions to the review are requested by 16 April 2004.

Minister Calls for Public Comment on Water Efficiency Labelling Proposals

The Government is seeking public comment on its proposals for a mandatory national Water Efficiency Labelling and Standards (WELS) Scheme. The proposed scheme applies to a range of products, including clothes washing machines, dishwashers, toilets, showerheads, urinal systems, taps and flow control devices.

Under the WELS Scheme clothes washing machines, dishwashers, toilets and showerheads will need to be registered with the WELS Regulator and rated and labelled in accordance with a designated technical standard. Urinal systems will need to be registered with the WELS Regulator and rated but will not need to be labelled. Taps and flow control devices will be able to be registered and labelled on a voluntary basis.

A Regulation Impact Statement has been prepared on the proposed scheme and is available on the DEH website.

Written submissions are requested by 16 April 2004.

Australian Climate Change Science Guide Released

In December 2003, the Minister for the Environment and Heritage, Dr David Kemp, released an up-to-date and comprehensive guide to the science of climate change in Australia. Dr Kemp launched the document, *Climate Change: An Australian Guide to the Science and Potential Impacts*, at the ninth session of the Conference of the Parties to the United Nations Framework Convention on Climate Change in Milan.

The guide has a strong focus on Australia and the Southern Hemisphere, and presents research to advance the understanding of global and regional climate change and its impacts on natural and managed systems. It provides the basis for international and domestic policy development and for adaptation strategies.

Minister Launches Campaign to Keep the Sea Plastic Free

On 10 March 2004 the Minister for the Environment and Heritage, Dr David Kemp, launched the *Keep the Sea Plastic Free* campaign, funded by the Natural Heritage Trust. The campaign aims to encourage Australians to take further action to reduce the impact of plastic rubbish on marine wildlife. Further information and resource materials are available on the DEH website.

Sea Dumping in Australia—Historical and Contemporary Aspects

DEH and the Department of Defence have together published the report by Mr Geoff Plunkett, *Sea Dumping in Australia—Historical and Contemporary Aspects* (2003). The report brings together a number of studies on all aspects of sea dumping in Australia and its Territories, previously available only in a number of disparate sources. The report comprises the papers:

- *A History of Sea Dumping off Australia and its Territories*
- *Scuttled and Abandoned Ships in Australian Waters*
- *Chemical Warfare Agent Sea Dumping off Australia.*

The report was originally published in 1996, and has been updated to take account of developments in sea dumping both domestically and internationally. For further information, contact Geoff.Plunkett@defence.gov.au.

Impacts of Native Vegetation and Biodiversity Regulations—Productivity Commission Draft Report

In December 2003 the Productivity Commission released a draft report, *Impacts of Native Vegetation and Biodiversity Regulations*. The draft report finds that, in most jurisdictions, the costs of native vegetation and biodiversity regulations can be reduced while increasing environmental benefits. Other conclusions are:

- the effectiveness of restrictions on the clearing of native vegetation has been compromised by: a lack of clear objectives; negative incentives for landholders to retain and care for native vegetation; and the inflexible application of targets and guidelines across regions with differing characteristics such that perverse environmental outcomes often result
- many landholders are being prevented from developing their properties, switching to more profitable land use, and from introducing cost-saving innovations; and restrictions on clearing regrowth and woodland thickening are reducing areas that can be used for agricultural production
- some costs could be reduced and effectiveness improved if regulatory regimes followed good regulatory practices that promoted transparency and accountability
- more fundamental change is required to promote better targeting of policies to address clearly-specified environmental problems
- there is an urgent need for a process to clarify landholder and community responsibilities
- it is reasonable to expect landholders to bear the costs of conservation that primarily benefits the individually or as a group, but landholders should be given greater responsibility for determining solutions to localised environmental problems
- the community should pay for the provision of environmental services, such as biodiversity conservation, that it demands; and these should be 'bought' from landholders through mechanisms such as voluntary agreements and auctions.

Aquaculture Industry Hampered by Complex Regulation—Productivity Commission Research Paper

A Productivity Commission research paper, released in February 2004, has found that the aquaculture industry is constrained by an unnecessarily complex array of legislation and regulatory agencies.

The research paper, *Assessing Regulatory Arrangements for Aquaculture*, discusses the appropriateness, efficiency and effectiveness of regulatory arrangements for aquaculture production in Australia. It identifies a number of key regulatory areas, including environmental protection, land use planning, marine and coastal management and land administration.

The study shows significant differences in the way aquaculture is regulated across states. It finds that in most jurisdictions there are complex approval processes for aquaculture and obtaining approvals can take considerable time. There is scope to rationalise the number of approvals and better coordinate approval processes, Commissioner Neil Byron said.

Government Committed to Mandatory Renewable Energy Target Scheme

On 16 January 2004 the Government released the report of the Mandatory Renewable Energy Target Review. In releasing the report, the Acting Minister for the Environment and Heritage, Senator Robert Hill, said that the Australian Government remains committed to the current Mandatory Renewable Energy Target (MRET) scheme.

The review panel provided its report to the Government in September 2003. The panel found that the MRET had contributed significantly to additional renewable energy generation, with 190 power stations accredited. Of these, 84 have been commissioned since the MRET came into operation. The MRET's interim targets for electricity generation during its first two years have been exceeded, with no evidence of significant shortfall by liable parties.

To date, growth in renewable energy generation has primarily come from the hydro and solar hot water sectors, with strong growth in the wind sector coming from a small base. Generation from biomass, including bagasse, has not as been significant as expected before the introduction of MRET. The measure has had only a marginal influence on generation from solar photovoltaics, and no renewable energy certificates have been created from wood waste sourced from native forests.

The review found that to date the MRET has made only a small contribution to greenhouse gas abatement, although this is expected to increase as interim targets increase.

The Government will be considering its response to the report in the coming months in the context of broader energy and climate change directions.

The report is available at www.mretreview.gov.au.

Increase In Publication Orders In Sentencing For Environmental Offences

Section 250 orders

There has been an increase in the number of orders requiring the advertising of convictions for environmental offences under the *Protection of the Environment Operations Act* 1997 ('POEO Act'). The orders can be made in addition to a monetary penalty when sentencing for a variety of offences. Section 250 (1) provides *'the court may do any one or more of the following …(a) order the offender to take specified action to publicise the offence and its environmental and other consequences and any other order made against the person'*. Generally, the court will issue an order that specifically outlines what must be contained in the advertisement, its size as well as specify which newspapers, annual reports and/or newsletters the advertisement is to be published in.

In *Environment Protection Authority v Incitec Limited* [2003] NSWLEC 381, the defendant operated a chemical manufacturing facility and pleaded guilty to an offence under s64(1) of the POEO Act, in that it contravened a condition of its environment protection licence by discharging waste water with a pH level below 6.2 into the Hunter River. Although the defendant undertook numerous corrective measures and training programmes to prevent further offences, McClellan CJ held that because the defendant was found guilty of a previous offence that was similar in nature, the present offence should be considered serious and foreseeable. In imposing a fine of $90,000, the court held *'it will often be the case that the appropriate monetary penalty may not carry with it a significant reminder of the responsibilities which licence holders must accept and that publicity of offences and knowledge of the consequences is likely to operate in these circumstances as a significant deterrent'*. McClellan CJ ordered the defendant to publish a specific advertisement in the Financial Review in the early general news section as well as in the defendant's executive summary of its annual report.

In *Environment Protection Authority v HTT Huntley Heritage Pty Ltd* [2003] NSWLEC 142, Pearlman J ordered the defendant to publish an advertisement in the Illawarra Mercury and the Sydney Morning Herald as well as a notice to all shareholders of the defendant. Similar to *Incitec*, the defendant was convicted for contravening its licence under s64(1) POEO Act. However, in this case the defendant was found guilty of bringing onto the premises 37,000 tonnes of prohibited construction and demolition material for around 5 months. Consequently, the defendant was fined $60,000 and a daily penalty during the month of August which added up to $117,000. Other cases that have had a publication orders as part of the formal orders include *Environment Protection Authority v Australian Pacific Oil Company Pty Limited and Others* [2003] NSWLEC 279 and *Environment Protection Authority v Warringah Golf Club Limited* [2003] NSWLEC 222.

However, in *Environment Protection Authority v Rethmann Australia Environmental Services Pty Ltd* [2003] NSWLEC 351, Talbot J held in rejecting the request from the prosecutor for a publication order that *'a general public notice is unnecessary where the company has taken steps to overcome what deficiencies there were in operation that inherently depend upon the reliability of employees to be faithful to the principles of common sense…'*. Justice Talbot held that pleading guilty is "sufficient approbation". The EPA guidelines on its website stated that publication orders should mainly be reserved for corporate offenders as it is likely to be a greater deterrent than individuals.

Other 'additional' orders

Besides publication orders, s 250 of the POEO Act 1997 (NSW) (and *Environment Protection Act* 1970 (Vic) under s 67AC) provide the court with broad powers to enforce a variety of sentencing options. These orders include carrying out specified restoration projects (s250 (1) (c)) and carrying out an environmental audit of activities carried on by the offender (s250 (1) (d)).

Other options are also available under s248 (1) of the POEO Act 1997 (NSW) where an offender can be ordered to pay the costs and expenses incurred during the investigation of the offence and a monetary benefits penalty order under s 249(1) where the offender is ordered to pay a sum up to the amount of monetary benefit derived from the offence. These options are relatively new and were introduced in 1999 following concerns that an imposition of a fine is not always an adequate or appropriate punishment.

Changes To The Procedures For Environmental Planning And Protection Appeals (Class 1) In The Land & Environment Court

On 25 August 2003, a new chief judge of the Land & Environment Court was sworn in. Peter McClellan QC, a former leading barrister, sometime Commissioner of Inquiry and Supreme Court judge replaced Mahla Pearlman. His Honour Justice McClellan has wasted no time in implementing reform. In relation to "Class 1 environmental planning and protection appeals" (most commonly development application appeals) a number of significant changes have been effected. Some of these changes were effective from 2 February 2004 with the remainder effective from 1 March 2004 and are incorporated in revised Pre-Hearing Practice Direction, Expert Witness Practice Direction 2003 and changes to the *Land & Environment Court Rules 1996*.

Court Appointed Experts and Joint Conferencing

With the objective of achieving shorter hearings and reducing costs to the parties, experts can now be appointed by the court. These experts are chosen with the agreement of the parties and who, it is intended, will be the only expert giving evidence on particular issues. Multiple expert witnesses on the same issues will be actively discouraged. From 1 March 2004, in all cases, the parties at the first callover will be asked to explain to the court, if there is a need for expert evidence, why that evidence should not come from an expert appointed by the court. The general procedure relating to expert evidence has also been changed. Most importantly, the court has specified detailed requirements for joint conferencing between experts. These requirements, set out in the Expert Witness Practice Direction, allow the court to direct experts to prepare joint reports. The Practice Direction also establishes a procedure for preparing that joint report.

Statement of Basic Facts

In planning appeals (other than appeals against designated development by an objector) the respondent consent authority will be required to file and serve a Statement of Basic Facts together with their Statement of Issues. This statement is to be prepared and signed by a qualified town planner employed or engaged by the consent authority.

The matters to be included in the statement included a brief description of the proposal, the site, the locality, the statutory controls and the actions of the respondent. It should not include matters of opinion. Expert reports must not repeat matters in the Statement and where ever possible the expert should state whether the Statement is adopted or not. At the hearing, the court will accept the Statement as being correct except for any matter disputed by the applicant.

Case Management

At the first callover of the appeal, the parties must now indicate to the court where the matter is appropriate for case management by a judge or commissioner of the court. In determining whether the matter is appropriate for case management or not the court must consider the size and cost of the development, the number and complexity of issues, the likely number of witnesses and the likely length of the hearing. If the court determines that the matter is appropriate for case management then it shall be assigned to a judge or commissioner for the purpose of making any necessary directions and supervising the preparation of the matter for hearing. Also at the first callover, each party is to inform the court whether the matter is suitable for mediation. However, these changes do not include a rule which allows the court to compel mediation.

Costs

The previous rule in relation to costs in planning appeals was that no order would be made unless "exceptional circumstances" existed. This rule has now been changed in order to lower the threshold. The

new rule is that no order for the payment of costs will be made in planning appeals unless the Court considers that the making of a costs order is, in the circumstances of the particular case, fair and reasonable. For a discussion of this amendment, see *Gee v Port Stephens Council* ([2003] NSWLEC 260). An application for costs can be made to a commissioner; however the concurrence of the chief judge is required before the court can award costs.

Other Changes

- Planning appeal hearings shall commence at 9:30am on the site the subject of the appeal.
- Requirements for plans that are to be tendered with the court have been imposed; these are aimed at achieving consistency in the use of plans.

Changes In Nsw Contaminated Land

Important amendments to the *Contaminated Land Management Act 1997* (the "CLM Act") with regard to the NSW contaminated site auditor scheme (the "auditor scheme") came into operation on 1 February 2004.

Review of the site auditor scheme

The auditor scheme, provides a system for the accreditation and regulation of site auditors to, among other things, achieve a level of certainty in the process of assessing and managing contaminated sites, by providing for the independent review of reports prepared by environmental consultants for landowners, developers, industry and planning authorities.

In 2002, the NSW Environment Protection Authority ("EPA") released a consultation paper which outlined a proposal to amend the auditor scheme. This consultation paper set out in some detail proposed amendments to the CLM Act and the *Contaminated Land Management Regulation 1998* (the "Regulations") which regulate the auditor scheme. At the same time, the EPA also released the *Contaminated Sites: Draft Guidelines for the NSW Site Auditor Scheme* to revise the guidelines which currently govern the appointment and accreditation of site auditors and how they conduct their activities.

Following public consultation, the *Contaminated Land Management Amendment Act 2003* (the "amendment Act") was assented to on 10 December 2003. The related *Contaminated Land Management Amendment Regulation 2004* (the "amendment regulation") was also gazetted on 30 January 2004 to make minor amendments to the Regulations.

The recent changes

The amendment Act makes the following changes to the CLM Act.

- It creates an accreditation panel to advise the EPA on the suitability of applicants for accreditation as site auditors.
- It amends and clarifies the auditor scheme by modifying the application, accreditation and renewal process.
- It amends and clarifies provisions relating to site audit reports and site audit statements.
- Its strengthens the EPA's powers with respect to issuing directions to site auditors, and disciplinary powers concerning matters such as false audits and the revocation, suspension and refusal to renew accreditation.
- It modifies cost recovery provisions in relation to the carrying out of an investigation or remediation order.

In summary, the aim of these amendments is to ensure that site audits are of the highest calibre and that auditors maintain a high professional standard during the term of their appointment. The amendments provide the EPA with better means to enforce these standards by expanding the grounds on which the EPA can take action against auditors, and by providing the power to issue binding direction to them.

Cost recovery

Significantly, under the amendments, land owners who have some responsibility for contamination are now able to claim a portion of their costs from each person who also had responsibility for the contamination. Previously, section 36 enabled only those who had no responsibility or who had principal responsibility for the contamination, were able to recover a portion of their costs from others who had responsibility for the contamination.

Further changes on the way

In addition to these specific amendments, the whole CLM Act is presently under review. In mid-2003, the EPA released the *Issues Paper: Review of the Contaminated Land Management Act 1997* for public comment. Following extensive public consultation, the EPA is currently considering whether changes are necessary to enhance the operation of the legislation and a report on the review was tabled in Parliament in October 2003.

The report provides that the EPA is considering legislative changes to:

- enhance the voluntary remediation proposal provisions;
- the term 'significant risk of harm';
- the triggers for the duty to notify the EPA of contamination; and
- the application of the 'polluter pays principle'.

It is expected that a draft Bill to amend the whole CLM Act will be available for public comment in the second half of 2004.

Victoria's First Commissioner for Environmental Sustainability Appointed

The Commissioner for Environmental Sustainability Act 2003 provides for the appointment and objectives, functions and powers of the Commissioner for Environmental Sustainability. The Office of the Commissioner is independent and reports directly to the Minister for the Environment. The role of the Commissioner involves:

- preparing State of the Environment reports;
- annual audits of government departments' implementation of environmental management systems; and
- auditing public education programs on ecologically sustainable development.

In late 2003 Dr Ian McPhail began a five-year appointment as Victoria's first Commissioner for Environmental Sustainability. Dr Ian McPhail has previous experience working in a variety of education and environment roles within local, state and federal government. Dr McPhail was previously the Deputy Secretary of the Environmental Protection Agency in Queensland. He has also served as Chair of the Great Barrier Reef Marine Park Authority, the Chief Executive Officer of the South Australian Education Department, and a member of the Murray Darling Basin Commission.

For further information, refer to the Department of Sustainability and Environment's (DSE's) website: http://www.dse.vic.gov.au.

Securing our Water Future – Green Paper for Discussion

In late 2003, the Victorian Government released its Green Paper 'Securing Our Water Future' on water reform. The purpose of the Green Paper is to promote community discussion regarding optimal use of Victoria's water resources.

In summary, the Green Paper examines the following issues:

- balancing the allocation of water between human needs and those of the environment;
- increasing the use of recycled water;
- developing water trading schemes;
- improving the efficiency of irrigation;
- strengthening environmental flows regulation;
- developing a pricing framework that takes into account the environmental costs of water use to ultimately increase water use efficiency; and
- reviewing and improving the legislative framework.

Over 660 public submissions were received from metropolitan and regional Victoria in response to the Green Paper. The Government is now considering all submissions in preparation for the White Paper which is due for release in the first half of 2004.

For further information, refer to the Department of Sustainability and Environment's (DSE's) website: http://www.dse.vic.gov.au.

Goulburn River Fish Kill – January 2004

In January 2004 approximately 1,000 native fish including the endangered Murray Cod and Trout Cod were killed in the Goulburn River near Nagambie, northern Victoria. The cause of the kill is not known. Following inquiries from local environmental groups and recreational anglers, Minister Thwaites recently announced an independent audit to investigate the source of the fish kill.

Point Nepean National Park

In December 2003, the Commonwealth Government announced that it would hand 90 hectares at Point Nepean (south-east of Melbourne) to the Victorian Government for inclusion in the existing National Park in five years. Under the conditions of the Point Nepean Community Trust, the buildings in the heritage precinct will be available to not-for-profit and community groups and the 55 hectares of bush land will be protected in perpetuity by the Trust.

Hazardous and Prescribed Wastes - Long Term Containment Facilities

In Victoria, hazardous wastes and wastes that can have an adverse effect on amenity (for example odour) are referred to legally as 'prescribed wastes' and are currently sent to prescribed waste landfills. These facilities are being phased out and will be replaced with long-term containment facilities.

Long-term containment will provide safe final storage for wastes that cannot be avoided or diverted to productive purposes. These wastes are also referred to as residual wastes. The key features of containment facilities include:

- No emissions to the maximum extent achievable;
- Design to safely contain waste for hundreds of years; and
- A systems based approach which incorporates a high level of waste treatment, engineering, management and community assurance.

Long-term containment is a commitment to the long-term management and after-care of hazardous wastes as outlined in the industrial waste management policy (Prescribed Industrial Waste). Long-term containment of hazardous waste is not about redesigning current processes for landfill disposal and presents an opportunity for innovative design to ensure hazardous wastes are contained and monitored rather than disposed and forgotten.

For further information, refer to EPA's website: www.epa.vic.gov.au.

Vegetation Clearing

A key election policy for Queensland's 'Team Beattie' related to the phasing out of broadscale land clearing in Queensland by December 2006. Arising from this commitment, a draft *Vegetation and Other Legislation Amendment Bill 2004* was approved by Cabinet on 15 March.

A series of briefings have been given to stakeholders, led by the Minister for Natural Resources Mines and Energy, Stephen Robertson, about the proposed legislation. According to press releases from Mr Robertson, the Bill will focus on a more consistent approach to management of regrowth across all tenures and allow "landholders the opportunity to voluntarily negotiate and confirm boundaries of non-assessable regrowth on their properties through an agreed property scale map of assessable vegetation". Queensland proposes to offer a $150 million compensation package to affected landholders, at this stage without Federal Government support.

A moratorium on clearing (subject to limited exceptions) has been in place since May 2003. Applications lodged but not processed before that date will be able to be determined following commencement of the new legislation. Additional capped clearing rights will be available, which will be allocated by ballot in about September 2004. However, the government has committed in another election policy that there will be zero further clearing of "remnant and of concern" native vegetation on the Cape York Peninsula.

Koalas

Under an amendment to the *Nature Conservation (Wildlife) Regulation 1994 (Qld)*, the listing for the koala has now been changed from "common wildlife" to "vulnerable wildlife" for the south-east Queensland bio-region. This has little to do with actual population numbers. The echidna, koala (for an area other than the southeast Queensland bioregion) and platypus have been listed as "common wildlife". The amendment commenced 5 March 2004.

Nature Conservation

The *Nature Conservation Act 1992* has been amended by the *Environmental Legislation Amendment Act 2003*, which received on assent 3 December 2003. The key changes are to:

- Allow members of the public to seek declarations and orders in the Planning and Environment Court about matters under the *Nature Conservation Act 1989*. (This could previously only be done by way of judicial review in the Supreme Court.)
- Transfer the definition of "service facility" to the definitions schedule and clarify the permit provisions for national parks. (The EPA has always had power to grant leases, agreements or permits to use national parks for purposes not inconsistent with their management principles or with a previous grazing use. This includes "service facilities" such as telecommunications infrastructure, electricity, pipelines for oil or gas, water and sewerage.)

The Act will also make numerous changes to the *National Environment Protection Council (Queensland) Act 1994,* to reflect procedural changes to the corresponding Commonwealth legislation. It makes minor drafting changes to the *Environmental Protection Act 1994*, and it includes provisions to protect the safety of children from dangerous animals in recreational areas.

Aboriginal Cultural Heritage Act 2003 (Qld) and Torres Strait Islander Cultural Heritage Act 2003 (Qld)

This package of legislation (outlined in previous updates) is due to commence in April 2004. It will repeal and replace the *Cultural Record (Landscapes Queensland and Queensland Estates Act) 1987*. In summary:

- The Acts recognise Aboriginal/Torres Strait Islander ownership of human remains and burial items, secret and sacred material currently held in State collections, and cultural heritage previously removed from the country;

- The legislation will abolish the need for permits, provided that mining tenement holders comply with a general duty of care;
- This general duty of care is to take reasonable and practical measures to avoid damaging or destroying cultural heritage;
- A cultural heritage register will be established, with controlled access; and
- Cultural heritage plans will be mandatory in certain circumstances.

The Department of Natural Resources, Mines and Energy is to administer the new legislation, and the Land and Resources Tribunal will deal with appeals.

Environmental Protection Act 1994 (Qld) amendments

This has been amended by:

- the *Chemical, Biological and Radiological Emergency Powers Amendment Act 2003*, which commenced on 27 August 2003; and
- the *Environmental Protection Legislation Amendment Act 2003* - date of assent 3 December 2003 - ss 1–2, 42–44 commenced on date of assent; remaining provisions not yet proclaimed into force - proposed for mid or late 2004.

Under the *Chemical, Biological and Radiological Emergency Powers Amendment Act 200*, Section 23(2) is amended to insert a reference to the *Public Safety Preservation Act 1986* (Qld), so as to ensure that responses to chemical, biological or radiological emergencies to protect human health and lives are immune from prosecution under the Environmental Protection Act 1994. This is an amendment which many would regard as overdue. It is unclear why the legislature has not gone further and clarified that all emergency responses to protect human lives and health should be given priority. At present, unless an emergency is of a type covered by one of the Acts specifically listed in Section 23, it is necessary to rely on the tenuous defence of Extraordinary Emergency under the *Criminal Code 1899*, which was not originally intended for environmental offences.

Under the *Environmental Protection Legislation Amendment Act 2003*, the only provisions which had come into force at the time of writing this article were minor amendments to the transitional provisions relating to mining activities. The amendments formally acknowledge that environmental authorities which had been issued before 1 January 2001, relating to mining tenements which had not yet been granted at that date, take effect from the time that the mining tenements are granted. Most people would have made that logical assumption before the amendment anyway.

The provisions which have not yet commenced are more substantial. This legislation will streamline the approval process for all "environmentally relevant activities" which are **not** part of mining or petroleum projects (known as "Chapter 4 activities"). There will no longer be environmental licences/approvals for Chapter 4 activities. Existing licences and approvals will be deemed to be development permits, and the administering authority may issue replacement documentation. The development permits will then "run with the land", ie, they will not need to be transferred upon a change of operator. Operators will only need to hold "registration certificates" with the administering authority (which will still give the administering authority an opportunity to check the suitability of operators).

Some mines currently hold transitional "integrated authorities", including both Chapter 4 activities and mining activities. Once the amending legislation takes effect, the Chapter 4 activities will be split off and treated as a development permit, and the remainder will only relate to the mining activities. Although this provision is expressed ambiguously, it should only apply to integrated authorities covering Chapter 4 activities located outside the mining tenements.

Various mobile or temporary environmentally relevant activities, such as dredging, will now have codes of compliance, rather than environmental licences or development permits.

The referral triggers have also been substantially changed for development applications involving contaminated land, but these provisions do not apply to land being used for mining or petroleum activities.

Draft Clearing Regulations Released

The draft *Environmental Protection (Clearing of Native Vegetation) Regulations 2003* were released for public comment earlier this year. These regulations are significant because they support the new clearing regime which was passed by Parliament late last year in the *Environmental Protection Amendment Act 2003*. The new clearing regime will not commence until the regulations are finalised.

In short, the new clearing regime inserts a new offence of causing or allowing clearing of native vegetation into the *Environmental Protection Act 1986*. The exceptions to the offence are clearing in accordance with a clearing permit, clearing which is authorised under law (as listed in schedule 6 of the Act) and clearing which is prescribed under the regulations and which is not done in an "environmentally sensitive area".

The draft regulations will prescribe:

(a) the kinds of intentionally planted indigenous aquatic or terrestrial vegetation which will fall within the definition of "native vegetation" and which is likely to require a clearing permit to clear;

(b) in regulation 6, clearing which will be exempt from the offence under the Act and which will not require a clearing permit provided it is not done in an "environmentally sensitive area". The clearing will only be exempt if it is done with the specified person's authority, if the clearing is reasonably necessary to achieve the purpose of the clearing and if the clearing is done in such a way as to avoid or limit damage to neighbouring native vegetation. The categories of clearing which will be exempt under the draft regulations are limited, but include, for example, clearing to construct a building, clearing to reduce danger to people, clearing for cultural purposes of Aboriginal persons, clearing along a fence line, clearing for walking, vehicular and fire access tracks and clearing in accordance with permits granted under other legislation. Each exemption will only apply in specified circumstances;

(c) fees which will apply for clearing permit applications and other applications under the new clearing regime;

(d) the records which the CEO of the Department will keep; and

(e) areas which will be "environmentally sensitive areas" (clearing of which is likely to require a clearing permit). These include, for example, declared World Heritage properties, areas registered on the Register of the National Estate, Ramsar Wetlands, areas within 50m of rare flora and Bush Forever Sites.

NELA made a submission to the Department on the draft regulations which was circulated to WA members. The Department is currently considering the submissions it received and has formed a working group of key interest groups to work through some issues that have arisen.

Interim Guide to Community Involvement

The Department of Environment has released the Interim Guide to Community Involvement which provides advice on how to undertake effective community consultation. The guide is open for comment for 12 months, until December 2004, to enable companies to test the guide and provide feedback. The guide can be downloaded from the Department's website at www.environ.wa.gov.au.

Carbon Rights Legislation

The Carbon Rights Act 2003, Tree Plantation Agreements Act 2003 and *Acts Amendment (Carbon Rights and Tree Plantation Agreements) Act 2003* were proclaimed on 23 March 2004 and commenced on 24 March 2004.

The *Tree Plantation Agreements Act* will provide for the making and effect of tree plantation agreements and the creation and registration of plantation interests in land. The *Carbon Rights Act* will provide for the creation and registration of carbon rights and related carbon covenants as interests in land. The *Acts Amendment (Carbon Rights and Tree Plantation Agreements) Act* provides for amendment to other

legislation that will support the creation and registration of these interests in land. Please refer to previous editions of the NELR for more detailed summaries of the legislation.

Environmental Protection (Unauthorised Discharges) Regulations 2004

The Environmental Protection (Unauthorised Discharges) Regulations 2004 commenced on 12 March 2004. The new regulations amend the Environmental Protection Regulations 1987 and repeal the Clean Air Regulations 1967.

The regulations introduce a new offence of discharging into the environment, in connection with a business or commercial activity:

(a) materials listed in schedule 1 of the regulations, including detergent, dust produced by a mechanical process, paint and sewerage;

(b) visible smoke caused by burning materials listed in schedule 2; and

(c) dark smoke caused by burning any material.

Meeting with the Minister for Environment

In March, Members of the Western Australian NELA executive committee met with the Dr Judy Edwards (Minister for Environment), Denise True (Department of Environment), Sam Wilkinson (Advisor to the Minister) and David Mell (CALM). The meetings are held quarterly and are a useful forum for the Minister to provide NELA with updates on legislation and government policy and for NELA to provide feedback to the Minister.

At the March meeting we discussed the draft Clearing Regulations, the Contaminated Sites Regulations, the Biodiversity Bill, the Swan River Trust Bill, the enforcement review and the licensing review. The Minister informed us that the draft Contaminated Sites Regulations will soon be released for public comment. The Minister has also arranged for the Department to give NELA a more comprehensive briefing on the Swan River Trust Bill and the Department's amended enforcement policy. NELA is seeking to assist the Department to improve their response to due diligence enquiries.

As a result of the positive outcome of these meetings, NELA is also hoping to arrange a regular meeting with representatives of the Department of Environment.

WA State Conference

The National Environmental Law Association (WA Division) is holding its annual conference at the Old Swan Brewery, Mounts Bay Road, Perth on Thursday 30 September 2004. The topic of the conference is "River Systems: Managing a complex natural resource". The conference will focus on water quality, water quantity and land use issues associated with this complex natural resource. The conference will also feature a discussion on the steps being taken at the legislative and policy levels to attain a balance between competing interests with respect to the Swan River.

We are currently seeking presenters to give papers on issues relating to these matters. If you are interested in presenting a paper for the conference or participating in any other way, please contact Sarah Hohnholt on (08) 9429 7687 or email sarah.hohnholt@minterellison.com.

Cabinet Reshuffle

On 4th March 2004 SA Premier Mike Rann reshuffled his Cabinet to coincide with the halfway mark of his first term in office. Seven members of the 14 strong Cabinet were affected, most notably (for NELA) being the appointment of Trish White as Minister for Urban Development and Planning, in lieu of Jay Weatherall. Ms White also took on the Transport, and Science and Information Economy portfolios. Mr Weatherall has taken on the Families and Communities, Housing, the Ageing and Disability portfolios. Minister John Hill has retained his responsibilities for Environment and Conservation, and the River Murray, among others.

Reforms To SA Planning System

On 27th February 2004 the draft *Development (Sustainable Development) Amendment Bill* was released for public consultation. The consultation period continues to 11th May 2004. The draft Bill gives a higher priority to strategic planning and policy formulation, in an attempt to streamline the development assessment process. The intention of the draft Bill is certainly to engage the community more at the policy end of development control, rather than at the point of assessment. At the same time, the role of elected members, at an assessment level, is also diminished. The draft Bill is substantial, and proposes a wide range of amendments. Under the draft Bill, the State Government will continue to prepare the Planning Strategy, which guides development within South Australia, however the Strategy will be reviewed at least every five years to ensure that it is up to date and sets clear directions for public and private sector developments. The draft Bill requires each Council or regional group of Councils to establish a Strategic Planning and Development Committee, to undertake strategic and infrastructure planning, and review and update Development Plans. Councils are to undertake a full strategic planning review every five years, in consultation with the community. At a grass roots level, the Bill proposes renaming the *Development Act 1993* to the "*Sustainable Development Act*". The new objects of the Bill incorporate the concept of "sustainability" in the natural and constructed environment. NELA (SA Division) is in the process of preparing submissions to the new Minister for Urban Development & Planning the Hon Trish White.

Heritage Listing Processes Under Review

Following an "interim register" listing of four significant houses in Griffith & Braddon in October 2002, a formal variation to the Territory Plan to confer heritage protection on the houses was finally tabled in parliament in February 2004.

The protections not only include restricting alterations or additions to the houses to maintain consistency with original details, materials and finishes, but also purport to restrict development on neighbouring properties (which fall within medium density residential areas) to that which is "sympathetic to the houses". As a result of the complicated and time consuming notification, consultation and listing processes, the more important outcome of this is that the Heritage Council and the ACT Planning & Land Authority now propose to review the heritage listing process as a whole, in the hope of streamlining it.

Planning Appeals Reform

9 months on from the changes to the planning appeals system, results appear to be positive. The main changes introduced in July 2003 included powers of the Administrative Appeals Tribunal to order parties to undertake mediation, and to award costs against a party if they fail to follow such a direction. A new time limit of 120 days for decisions in relation to planning and environment matters was also introduced.

While the numbers are not large, statistics show that 15 out of 23 cases referred to mediation since the amendments commenced, have been successfully resolved through this process. The AAT is currently using the Institute of Mediators and Arbitrators Australia to conduct its mediations, an interesting departure from Court and Tribunal appointed mediators that are often seen in other jurisdictions.

Prohibition of Human Cloning

Consistent with the approaches of the other States, the ACT has introduced separate bills to prohibit the cloning of human embryos and to regulate embryo research, as part of the COAG endorsed national scheme to apply throughout Australia.

Human Rights Legislation

Details of the new Human Rights Act in the ACT have been reviewed in previous editions of NELR. Ongoing threats from the federal government and some other States to try and have this legislation overturned, suggest that it will be a hot topic for some time to come.

case notes

Victorian Environment Protection Authority Prosecution Update May 2003 – February 2004

Prosecutions under the *Environment Protection Act* 1970

by Henry Jackson, Solicitor, Environment Protection Authority, Victoria

Pivot Limited

Offence Sections 41(1)(a) of the *Environment Protection Act 1970* ("the EP Act") – pollution of the atmosphere (offensive to the sense of human beings)

Maximum Penalty A fine of $240,000*

On 21 May 2003 at Portland Magistrates' Court, Pivot Limited ("Pivot") pleaded guilty to a charge of polluting the atmosphere on 18 and 19 February 2002, so as to make it offensive to the senses of human beings contrary to section 41(1)(a) of the EP Act.

The charge related to complaints of offensive odour emanating from Pivot's fertilizer manufacturing facility at Portland on 18 and 19 February 2002. The complainants described the odour as being like sulphur, smelly socks, fertilizer and sheep manure and associated the odour with Pivot. Pivot investigations found that contaminated acid supplied by Pasminco, Port Pirie was the source of odour.

The Court convicted Pivot and:

(a) pursuant to s.67AC of the EP Act, ordered it to pay $30,000 towards a local environmental project – the eradication from the Walook Swamp and lowlands area of exotic species and replanting those areas with local native species;

(b) pursuant to s.67AC of the EP Act, ordered it to publicise the offence in the Portland Advertiser;

(c) placed it on an undertaking to be of good behaviour for a period of 12 months, with a special condition to contribute $5,000 to the Court Fund, to be distributed to the Portland & District Hospital ($2,000), the SES ($1,500) and the CFA ($1,500);

(d) ordered it to pay EPA's costs of $5,820.

Mobil Oil Australia Pty Ltd and Captain James Alexander Douglas

Offence Section 39(1))(c) of the EP Act – pollution of waters (potentially harmful to fish and aquatic life)

Section 41(1)(b) of the EP Act – pollution of the atmosphere (potentially harmful to the safety, welfare and property of human beings)

Maximum Penalty A fine of $240,000*

On 21 May 2003 at the Melbourne Magistrates' Court, Mobil Oil Australia Pty Ltd and Captain James Alexander Douglas each pleaded guilty to one charge of polluting the atmosphere contrary to section 41(1)(b) of the EP Act and one charge of pollution of waters contrary to section 39(1)(c).

The charges related to a discharge of petrol–contaminated ballast on the 5th of July 2001 while the MT Tasman (a tanker vessel) was berthed at Holden Dock in Yarraville. The discharge caused widespread odour over Newport, Yarraville and Spotswood and pollution of the Yarra River from Holden Dock to Williamstown.

* Of which $100,000 is available when the matter is heard summarily in the Magistrates' Court.

The discharge occurred as a result of a crack, between a tank containing petrol and a separate ballast water tank, which allowed petrol to leak into the ballast. When the contaminated ballast water was subsequently discharged in a routine operation early on the morning of the 5th of July 2001 as much as 4,000 litres of petrol was also discharged.

The subsequent investigation showed that Mobil had procedures in place for the testing for hydrocarbon vapours in ballast tanks on each loaded voyage. These procedures accorded with standard international industry practice. This ballast space testing was not undertaken on the immediately prior journey nor was it undertaken prior to berthing at Holden Dock.

On 28 May 2003, the Court convicted and fined Mobil Oil Australia Pty Ltd $50,000 and awarded $30,470 in costs to the Authority and $3,029 in clean up costs to Marine Safety Victoria. Captain Douglas was fined $7,500 without conviction.

WM Waste Management Services Pty Ltd, Allan Turriff & Reginald Howarth

Offence WM Waste Management Services Pty Ltd & Allan Turriff

Section 27A(2) of the EP Act – dumping industrial waste at a premises not licensed to accept it

Reginald Howarth

Section 27(1) –permitting the depositing of industrial waste onto unlicensed land

Maximum Penalty A fine of $500,000* in relation to s.27A(2)

A fine of $240,000* in relation to s.27(1)

On 29 May 2003, at the Ringwood Magistrates' Court, WM Waste Management Services Pty Ltd and its former operations manager, Allan Turriff, pleaded guilty to a charge of dumping industrial waste at an unlicensed landfill. Reginald Howarth pleaded guilty to a charge of allowing waste to be deposited on to his land without a license.

Between 7 September and 14 December 2001, WM Waste Management Services Pty Ltd dumped approximately 1200 cubic metres of waste at a rural property located at 47 Monbulk Seville Road in Seville, owned by Mr Howarth. The waste included foundry sands and building and demolition waste consisting of timbers, bricks, plaster and concrete. Mr Turriff, who was then the operations manager of the company, entered into an arrangement with Mr Howarth to use the property for the waste dumping in exchange for a payment of approximately $6 per cubic metre.

On 14 January 2002, the Authority issued a section 62A clean up notice against the company and Mr Howarth. A clean up was then conducted and the remaining waste removed from the site.

Without convicting any of the three defendants, the Court placed each defendant on an undertaking to be of good behaviour for 12 months, with a condition that WM Waste Management Services Pty Ltd pay $10,000, Allan Turriff pay $3,000 and Reginald Howarth pay $4,000 into the Court Fund.

In addition, the Court ordered that the company pay EPA's costs of $2,270.90, Mr Turriff pay EPA's costs of $1,661.30 and Mr Howarth pay EPA's costs of $1,617.30.

Jancassco Pty Ltd, Testing and Commissioning Services (Vic.) Pty Ltd, Technosafe Waste Disposal Pty Ltd and Kenneth Robert Carlile

Offences

Jancassco Pty Ltd

a. s.59D – provide incorrect / false information to EPA –

b. s.59D – conceal information from EPA (two counts for different time periods)

c. s.27(2) – breach of licence (exceed weight)

d. s.27A(1)(c) – cause an environmental hazard

e. s.27A(2)(a) – abandon industrial waste

Technosafe Waste Disposal Pty Ltd

f. s.59D – provide misleading information to EPA Officers

g. s.30D(3) – breach Notifiable Chemical Order (PCBs)

Testing and Commissioning Services (Vic.) Pty Ltd

h. s.27(1A)(a) operate unlicensed schedule 4 premises (two counts for different time periods)

Kenneth Robert Carlile

i. s.59D – provide incorrect / false information to EPA

j. s.59D – conceal information from EPA (two counts for different time periods)

k. s.27A(1)(c) – cause an environmental hazard

l. s.27A(2)(a) – abandon industrial waste

m. s.59D – provide misleading information to EPA

n. s.30D(3) – breach Notifiable Chemical Order (PCBs)

Maximum Penalty

s.27(1A) – $240,000*#

s.27(2) – $240,000*

s.27A(1) – $240,000*

s.27A(2) – $500,000*

s.30D – $240,000*

s.59D – $240,000*#

At the Dandenong Magistrates' Court on 10 June 2003, Jancassco Pty Ltd, Testing and Commissioning Services (Vic.) Pty Ltd, Technosafe Waste Disposal Pty Ltd and Kenneth Robert Carlile each pleaded guilty to several offences under the EP Act relating to the unsafe storage of waste containing polychlorinated biphenyls (PCBs) at two premises in Dandenong.

The offences related to the unlicensed and unsafe storage of PCB waste and pesticides and were committed in Dandenong South at 101 Ordish Road ("101") or 103 Ordish Road ("103") between 1998 and 2002, a period during which Mr Carlile had been a director of all three companies. Prior to and during that period, Jancassco Pty Ltd had operated the premises it rented at 101 under an EPA licence.

Charges were laid in relation to timeframes either side of the increase in penalties provided for by the Environment Protection (Enforcement & Penalties) Act 2000. Those earlier charges carried a maximum fine of $20,000 in each case.

The Court was told that, underlying most of the offences was a scheme involving (1) the acceptance of waste by Jancassco Pty Ltd at 101, (2) the payment up–front to Jancassco by the waste generators for anticipated services (eg treatment or on–sending for destruction), but then, in many instances (3) the secret re–location of the waste to the warehouse at 103 where it remained and (4) the abandonment of the waste.

The court noted that it was concerned to balance the need for general deterrence against submissions to the Court that Mr Carlile and the three companies were impecunious. At the time of sentencing, Mr Carlile was a bankrupt and Technosafe Waste Disposal Pty Ltd was in voluntary liquidation.

The magistrate heard applications pursuant to s.65A of the Act for orders of compensation for clean-up costs to EPA and another party affected by the offences but did not make any order for compensation, given the defendants' financial circumstances.

The three companies were each ordered to pay an aggregate fine of $20,000. Mr Carlile was placed on a community based order requiring him to undertake 300 hours of unpaid community work over 24 months.

All four defendants were jointly and severally ordered to pay EPA's legal costs of $26,702.49.

Master Waste Pty Ltd

Offence Section 30D of the EP Act – contravene the provisions of a Notifiable Chemical Order

Maximum Penalty A fine of $240,000*

On 3 November 2003 at Sunshine Magistrates' Court, Master Waste Pty Ltd ("Master Waste") pleaded guilty to a charge of contravening a provision of the varied Notifiable Chemical Order ("NCO") relating to polychlorinated biphenyls ("PCBs"), contrary to section 30D of the EP Act.

The charge related to the transporting by the defendant of two loads of PCB–contaminated material (namely, waste derived fuel oil), one to West Coast Rail, the other to Pyramid Hill Pet Food Supplies, on Friday 22 September 2000, without the written approval of the Authority. Such written approval is a requirement of clause 3(a) of the NCO.

The Court was told that Master Waste, prior to dispatching the loads, was ignorant of the fact that the oil was contaminated with PCBs. But the Court was also told that the essential reason for the ignorance was that the defendant had deliberately sent out the fuel oil *before* receiving preliminary analytical results from MGT laboratories. That decision, described to the Court as "reckless", was also in breach of the (then draft) Environmental Improvement Plan which committed the defendant to never send oil out until results had been received.

The MGT results were faxed to the defendant on the afternoon of the offence date (although the fax was not actually collected until the following Monday morning). The MGT fax showed a 5mg/kg concentration of PCBs in one batch of waste oil supplied to Master Waste on 14 September 2000. That batch, which had come from the Jeeralang power station operated by AES Transpower Holding Pty Ltd (with a Waste Transport Certificate not declaring the presence of PCBs), was part of the mix of oil delivered to the two customers on 22 September 2000. Subsequent full analysis showed a concentration of 47ppm in the incoming AES batch. As for the concentrations in the loads delivered, analysis of the delivery going to Pyramid Hill showed 2.5ppm, while the result for the West Coast Rail load was 11ppm.

The Court was told that the NCO had been varied in February 2000, to more stringently control the handling and transporting of PCBs, following the discovery in December 1999 of PCBs in several loads of oil supplied by Master Waste to four of its customers.

Without imposing a conviction, the Court placed Master Waste on an undertaking to be of good behaviour for a period of 12 months with a condition that it pay $7,500 to Landcare Australia Limited. The Defendant was also ordered to pay costs to the Authority of $15,000.

Raymond Leigh Hammond

CURRENTLY UNDER APPEAL

Offence Section 27A(2) of the EP Act – dump industrial waste at a site not licensed to accept it

Maximum Penalty A fine of $240,000*

On 29 January 2004 at Hamilton Magistrates' Court Raymond Leigh Hammond was found guilty of dumping industrial waste on 1 July 2002 contrary to section 27A(2) of the EP Act.

The offence took place in July 2002 when Mr Hammond dumped septic tank waste at a former nightsoil depot in Dunkeld which had been closed since 1994.

At the hearing Mr Hammond contested the meaning of industrial waste and disputed the prosecution allegation that the dumped septic waste was potentially harmful to human beings. Expert opinion evidence was given in relation to the latter issue.

In his plea of mitigation, Mr Hammond claimed that he had no appropriate alternative place to dispose of the waste although there was evidence before the Court from Glenelg Region Water Authority which rebutted that claim.

Mr Hammond was convicted and fined $5,000 and was also ordered to pay the Authority's costs of $5,594.80.

Toll Transport Pty Ltd & Andrew David Lawson

Offence Section 39(1)(c) of the EP Act – pollution of waters (potentially harmful to fish and aquatic life)

Maximum Penalty A fine of $240,000*

On 10 February 2004 at Heidelberg Magistrates' Court, Toll Transport Pty Ltd and Mr Andrew Lawson each pleaded guilty to a single charge of water pollution contrary to section 39(1)(c) of the EP Act in relation to a spill of several hundred litres of diesel fuel at a service station at 490–500 Heidelberg Road Fairfield on 12 February 2002.

The spill occurred when the delivery hose being used to unload diesel from the tanker to an underground storage tank came away from the "fill point". In contravention of standard procedures, Mr Lawson had left the area of the unloading operation to perform paperwork in the truck's cabin. Several other breaches of procedure also contributed to the cause of the spill.

Toll Transport Pty Ltd admitted that Mr Lawson had not been retrained by Toll since he moved from BP in August 1998.

The Court, without convicting Mr Lawson, made the following orders:

a. to pay a fine of $2,500;

b. pursuant to s.67AC of the EP Act, to pay $2,500 to the City of Yarra for the purpose of an environmental education resource centre to be located at Alphington Primary School; and

c. to pay the Authority $5,800 in costs.

The Court, without convicting Toll Transport, made the following orders:

a. to pay a fine of $20,000;

b. pursuant to s.67AC of the EP Act, to pay $10,000 to the City of Yarra for the purpose of an environmental education resource centre to be located at Alphington Primary School;

c. pursuant to s.67AC of the EP Act, to publicise the offence, the Court proceedings and the Court order in the Financial Review, the Herald Sun and the Northcote Leader as well as on the Toll group website and in the Toll group quarterly in–house publication, Toll Talk; and

d. to pay $5,879.95 costs to the Authority.

Bentley–Chemplax Pty Ltd

Offence Section 39(1)(c) of the EP Act – pollution of waters (potentially harmful to fish and other aquatic life)

Maximum Penalty A fine of $240,000*

On 27 February 2004 at Sunshine Magistrates' Court, Bentley–Chemplax Pty Ltd ("Bentley–Chemplax") pleaded guilty to a charge of water pollution contrary to section 39(1)(c) of the EP Act.

The offence occurred as the result of a transfer of white oil from a large tank to a smaller mixing tank at Bentley–Chemplax's premises at Coode Island. The employee responsible for the transfer operation left Bentley–Chemplax's premises in the early afternoon of 11 September 2002 without turning off the transfer pump or closing a stormwater drain valve. The white oil overflowed the mixing tank, eventually discharging into the Maribyrnong River. The discharge continued until the following morning on 12 September 2002, when another employee arrived at the site. The exact quantity of oil discharged into the river is unknown but was estimated to be between 23,000 and 69,000 litres.

Without imposing a conviction, the Court ordered Bentley–Chemplax to pay $50,000 as part of an order pursuant to section 67AC of the Act, the money to be paid as follows:

a. $25,000 to the Museums Board of Victoria for the installation of integrated photovoltaic cells into the fabric of the buildings at Scienceworks; and

b. $25,000 to Melbourne's Living Museum of the West to fund an educational display and exhibition about the aquatic life in the Maribyrnong River and the local fauna of the Maribyrnong Valley.

In addition, the s.67AC order required Bentley-Chemplax to publish a notice in the Age, the Herald Sun, the Financial Review, the Williamstown Advertiser, on its website and in its Annual Report.

The Court also ordered Bentley–Chemplax to pay the Authority's costs of $17,108.74.

Johnson Tiles Pty Ltd v Esso Australia Pty Ltd [2003] VSC 27 (Supreme Court of Victoria)

Contributed by Brendan Sweeney, Senior Lecturer in Law Monash University

In 1998, there was a huge explosion at Esso's natural gas plant at Longford in Victoria. Esso was the sole supplier of natural gas to Gascor which was the sole distributor of gas in Victoria. The explosion shut down the Longford plant. As a result Melbourne was without any gas supply for a number of weeks. The explosion was due to the carelessness of Esso in maintaining its plant. As a result of the lack of gas supply, a number of gas customers (both business and private) and workers claimed they had suffered losses.

An action was brought in the Supreme Court of Victoria as a group proceeding pursuant to Part 4A of the *Supreme Court Act 1986* (Vic). The plaintiffs represented three groups of claimants: business users, domestic users and 'stood-down' workers.

The losses suffered by the business users group may be divided into two classes: (1) those who suffered physical damage as well as consequential losses, and (2) those who suffered no physical damage. The latter claimed economic losses, such as loss of profits (arising from an inability to meet demand because production had ceased). The domestic users' losses included the expenses of buying electrical appliances to replace gas appliances which could not be operated. These were purely economic losses. The employee losses were also purely economic. They included loss of wages for persons who had been stood down as a result of the failure of gas supply. Thus, except for the customers who suffered some physical damage, most of the claims fell into the category of pure economic loss (that is, loss not resulting from any physical injury to person or property).

Esso accepted that the flow of gas had been interrupted by its negligence in designing, installing, operating and maintaining the Longford plant. Thus, the critical issue for determination was whether Esso owed a duty of care to the plaintiffs or any member of the groups they represented to avoid the losses suffered.

At the time of the explosion the distribution of gas in Victoria was governed by a series of contracts between, first, Esso and Gascor (the distributor), secondly, between Gascor and the gas retailers, and, finally, between the gas retailers and the customers. Under these contracts Esso, Gascor and the retailers each in turn disclaimed any liability for economic loss arising from a failure to supply gas. The retailers were also protected against claims by customers for failure to supply gas by the provisions of the *Gas Industry Act 1994* (Vic).

In the Supreme Court Gillard J applied a three step methodology for determining the existence of a duty of care [745]:

- 'Reasonable foreseeability of injury;
- whether there is a relationship of proximity; and
- identification and consideration of competing salient features for and against the finding of a duty of care.'

According to Gillard J (at [755]) 'The cases establish the following relevant salient features -

- Reliance by plaintiff and undertaking of responsibility by defendant;
- a regime of contracts between various parties in a supply chain;
- a statutory regime regulating the supply of a service;
- whether the imposition of a duty of care would impose liability "in an indeterminate amount or an indeterminate time to an indeterminate class";
- whether a finding of a duty of care would be inconsistent with community standards in relation to what is ordinarily legitimate in the pursuit of personal advantage;
- the knowledge of the tortfeasor of an ascertainable class of persons likely to suffer harm if the tortfeasor was negligent;

- whether the claimants are vulnerable persons unable to protect themselves from harm;
- whether a duty would impair the legitimate pursuit by the tortfeasor of its own commercial interest.'

Applying these principles he decided:

- Esso owed a duty of care to gas customers to avoid a stoppage of gas *causing property damage*. This case was indistinguishable from *Donoghue v Stevensen and Grant v Australian Knitting Mills*.

  Esso did not owe any duty to the employees who had been stood down. The class was indeterminate. Esso could not possibly know the number of workers likely to be affected.

- Esso did not owe a duty of care to the business or private customers to avoid pure economic loss. There were a number of factors that favoured the existence of a duty of care, including:
  - That the losses were reasonably foreseeable;
  - That the class, although large, was not indeterminate. Esso knew the number of its business and private gas customers;
  - That Esso's actions were defensible as a legitimate business activity.

However, other factors suggested the absence of any duty. These included:

- In contrast to the plaintiffs in *Perre v Apand*, the gas customers were not totally reliant on Esso. Gas supply interruptions were not completely unknown or unexpected. The business customers could, and many had, taken out back-up precautions or insurance. The private customers were inconvenienced but not reliant on Esso. Esso's contracts showed that it had not assumed the risk for losses suffered as a result of a gas stoppage. Gillard J said (at [1347]): 'The gas customers are aware that there is no guarantee of uninterrupted supply, they know what steps can be taken to avoid or minimise the risk of harm to their particular business or interest and it is their choice as to what they should do. Gas customers are in a far better position than anyone else to assess their likely loss due to interruption of supply and if insurance is the preferred means of minimising the loss, they can take out insurance based upon a reasonable assessment of the likely harm and factor the expense of the premium into the price of their products or services.'
- The contractual framework was relevant and worked against the recognition of any duty to avoid pure economic loss. All the supply contracts contained a term that the supplier would not be responsible for losses suffered as a result of a gas stoppage.
- The statutory framework did not impose a duty on Esso for pure economic loss. Given this indication of legislative intent, it would be inappropriate for the court to impose such a duty.

On balance Gillard J decided that no duty was owed for purely economic loss.

Simes v Minister for Environment and Conservation

[2004] SASC 84 (Unreported)

Contributed by Will Webster

The appellant owned land in the Upper Willunga Catchment Area ("the Area"). In 1991 the appellant began using the groundwater from a bore on the property to irrigate pasture and vines. Under the Water Resources Act ("the Act") it was not necessary to obtain a licence to take water at this time as the wells in that Area were not prescribed resources.

During the period from about 1992 to December 1998, the Minister introduced a moratorium on the taking of water from the water resources in the Area. Various surveys were conducted to determine the level of irrigation in the Area. Irrigators identified were issued with authorisations to (continue) to take water. The appellant was not identified as an existing irrigator and was not notified of the moratorium.

On 24 December 1998 the Minister proclaimed that all wells in the area were prescribed resources. Those irrigators who had existing authorisations were advised of the necessity to make an application for a water licence and water allocation. The appellant was not contacted. The prescribed period, during which an application could be made, finished on 1 July 2000. The appellant did not apply for a water licence and allocation until 12 February 2002. The application was refused by the Minister on 24 February 2003.

The decision was appealed under section 36(6) of the Act. At first instance the Environment Resources and Development Court ("the ERD Court") held that the appellant was not an existing user within the meaning of section 36 of the Act and therefore has no right of appeal under section 36(6). Section 36(10) of the Act set out a definition for the term "existing user", with section 36(11) further stating that "…*A person ceases to be an existing user if he or she does not apply for a water licence within six months after publication in the Gazette of the regulation declaring the resource to be a prescribed resource."*

In dismissing the appeal, the Full Court of the Supreme Court held that:

1. The meaning of "existing user" was clear. For the purposes of section 36 of the Act, the appellant was not an existing user. There were no conflicting provisions that would make it necessary to alter the meaning of that term.

2. Whilst section 33 of the ERD Court Act 1993 gives the ERD Court a broad discretion to resolve disputes in a fair and expeditious way, Section 33 should not be construed so as to vary the substantive effect of the Act, in such a way as to result in the Court authorising or directing the Minister to do something which the Act does not permit.

Michelmore & Ors v Minister for Environment and Conservation

[2004] SAERDC 18 (Unreported)

Contributed by Will Webster

The appellant in this matter lodged an application for a water licence for an unlicensed pre-existing water use. The appellant was approximately one month late in lodging the application, with the Water Allocation Plan requiring all allocations to be received by 5pm on 31 July 2002. The Minister's delegate refused the application based on this ground alone.

The Environment Resources and Development Court determined that the relevant Water Allocation Plan was unambiguous and set out a specific time frame in which an application was to be made. The Court stated that it was not its role to review the provisions of the WAP but to apply them in accordance with the Water Resources Act 1997. As the decision of the Minister's delegate was consistent with the terms of the WAP, the appeal must be dismissed.

Each of the above decisions demonstrates the need for strict compliance by established users of water in South Australia with the timetables set for registering the use whether prescribed by the Act or Water Allocation Plans. This is notwithstanding the high levels of complexity of the regimes being imposed on water users, the completeness of the hydrological data relied upon, the degree of impact upon the water resource or the personal hardships which strict compliance can cause.

Winner of the NELA Gerry Bates Essay Prize 2002

The Movement towards Ecologically Sustainable Development (ESD): Giving Universal Legal Expression to the Fusion between Environment, Equity and Economy

By Tobin Joshua Bennett
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This is an interdisciplinary call to arms[1]. It is now imperative that workable solutions are identified and the role of every human being is appreciated, in an international effort to both arrest the dissipation of our natural environment, whilst simultaneously developing an informed international mind-set against which future approaches to environmental law and policy can evolve. Traditional, narrow and largely unhelpful, legal, economic, scientific and broad social theories are, to the extent that they contribute nothing and prevent everything, to be abandoned. In essence, the environmental debate must shed itself of the idiosyncrasies[2] that have, to date, prevented it from attaining universal acceptance and support.

International law plays a questionable role in the promotion of universal environmental understanding. Legal solutions do not represent the only approach to establishing an international regime for the protection of the environment. In fact, many existing international law doctrines, such as the principle of State sovereignty[3], present a hurdle by inadvertently acting as a shield for recalcitrant States looking to prevent international scrutiny of their domestic environmental management. However, the international legal order is more flexible than these criticisms give it credit. The international legal order has, historically, lent itself more to international political coercion than fear of specific instrument related sanctions[4]. Therefore, once an appropriate level of international understanding and acceptance of principles of international environmental law exist, any retreat from international forums will result in appropriate international sanction requiring States to, ultimately, fall into line. Moreover, once an appropriate level of international understanding and practice is achieved, this is evidence of customary international law that, although subject to the persistent-objector doctrine, States must adhere to without necessarily opting into[5]. In short, although the principle of State sovereignty presents problems for universal solutions to environmental issues, it is not unique to the environmental subject matter and should not divert attention away from the primary objective of altering the international mind-set for resolving environmental issues[6].

At the recent World Summit on Sustainable Development[7], it was declared that:

> *"Thirty years ago, in Stockholm, we agreed on the urgent need to respond to the problem of environmental deterioration. Ten years ago, at the UN Conference on Environment and Development, held in Rio de Janeiro, we agreed that the protection of the environment and social and economic development are fundamental to sustainable development, based on the Rio Principles. To achieve such development, we adopted… the Rio Declaration, to which we reaffirm our commitment[8]"*

At best, the concept of sustainable development (SD) is a precarious one. That is, although references to SD litter environmental literature, the content of the principle is chameleon like. Unexplored, SD, as a concept,

1 The problems associated with protection of the environment cannot be solved solely by laws. Instead a comprehensive approach to environmental protection, that focuses on legal and non-legal factors, is obligatory. Ramlogan, R. "The Environment and International Law: Rethinking the Traditional Approach" (2001-02) 3. *Res Communes: Vermont's Journal of the Environment*, 1 at 159.

2 Ramlogan, R. *Ibid* at 1.

3 "The concept of absolute sovereignty of States will have to make concessions as never before in face of today's emerging environmental crisis. There will have to be a high degree of willing subordination of national sovereignty in favour of the common good of all nations" – Sir Ninian Stephen, "The Growth of International Environmental Law" (1991) 8. *Environmental Planning Law Journal*, 183 at 185.

4 Blay, S *etal. Public International Law – An Australian Perspective*. Oxford University Press: Melbourne, 1997, at 12.

5 *Ibid*, at 62,68.

6 While acknowledging that Nation States are still in a virtual state of nature with respect to the exercise of power, few would dispute the fact that international law, daily, erodes the realm of that natural sovereignty and circumscribes it with treaties, trade agreements, UN Resolutions and a plethora of good faith accords: Panjabi, R. "From Stockholm to Rio: A Comparison of the Declaratory Principles of International Environmental Law" (1993). *Denver Journal of International Law and Policy*, 215 at 218.

7 Johannesburg, South Africa, 26 August – 4 September 2002. Hereinafter referred to as the World Summit.

8 The Johannesburg Declaration on Sustainable Development: Declaration 8. Hereinafter referred to as the Johannesburg Declaration.

is little more than political rhetoric. Critically, SD should not be viewed as a freestanding principle that cures otherwise anthropocentric views towards environmental management. Statements like those made at the World Summit perpetuate the SD myth. It is no good reaffirming a commitment to SD, as understood at the time of the Rio Declaration[9], if, at the time of the Declaration, there was no common understanding of what comprised SD[10].

This paper proposes a revised universal legal principle of Ecologically Sustainable Development (ESD). ESD should supersede current, misguided, terminology, such as SD, used to label long-term environmental objectives. As a principle, ESD would give an appropriately balanced international legal expression to three key areas of the environmental debate. First and foremost, ESD defines sustainability in terms of the environment and not in terms of the ability of the human race to continue an arbitrarily determined level of developmental exploitation. This is achieved through an expansive use of the precautionary principle (PP). Secondly, ESD appreciates the plight of the world's developing countries. In order to ensure the economic capacity of the developing world, to discharge environment obligations, intra-generational appropriation of wealth is required. Finally, ESD recognises that continuity of human existence in some way relies upon the ability of the race to develop. Critically the concept of development must be re-appraised and then re-defined, tending towards qualitative, as opposed to purely quantitative, indicators to measure growth.

Element 1 – Environment

A revised ESD must supersede current 'sustainable terminology'. McGoldrick[11] notes that the widespread use of the expression SD dates from the Report of the World Commission on Environment and Development (WCED), *Our Common Future*, in 1987[12]. The Commission's understanding of SD was as follows:

> *"Development that meets the need of the present without compromising the ability of future generations to meet their own needs [13]"*

Arguably, as conceived above, SD is little more than political rhetoric reconciling the competing agendas of so-called 'developers' and 'environmentalists'. At most, it is an unarticulated, western-democratic vision of a, supposed, sustainable level of exploitation that is, essentially, anthropocentric. Curiously, at the time of the WCED Report, the Commission had available to it, for reference, both the 1972 Stockholm Declaration[14] and the 1982 World Charter for Nature[15]. Despite this, the WCED Report, in developing the language of SD, has attempted to limit the environmental debate to the simple issue of maintaining human development both now and into the future. As defined, SD fails to require environmental protection for its own sake fails to address the concerns of the developing world and fails to re-appraise the concept of development.

Notwithstanding the narrow definition of SD provided by the WCED Report, SD supposedly evolved into ESD in the Declaration[16]. At this time, SD was viewed as comprising three core ideas[17]:

- Acceptance of limitations on the exploitation and consumption of many resources;
- Recognition that present generations owe conservation duties to future generations and;
- Necessity to integrate these duties into individual as well as public choices

9 The Rio Declaration on Environment and Development. Hereinafter referred to as the Declaration. Adopted at the UN Conference on Environment and Development (UNCED), Rio de Janeiro, Brazil, 3 June – 14 June 1992.

10 The danger which sustainable development faces is that which self-determination is currently facing. Self-determination has become so controversial, so value-laden and so open to abuse by political forces and claimant groups that it is struggling to cope with the demands placed upon it. If that were not enough, it is pressed into use as the way to resolve the increasing number of ethnic group and minority problems the world faces. If sustainable development is to avoid the same fate, it is the more specific international law principles and rules that lie within the three pillars (International Environmental Law, International Human Rights Law and International Economic Law) that must develop and evolve to meet new challenges and situations: McGoldrick, D. "Sustainable Development and Human Rights: An Integrated Conception" (1996) 45. *The International and Comparative Law Quarterly*, 796 at 803.

11 McGoldrick, D. *Ibid* at 796.

12 Hereinafter referred to as WCED Report.

13 McGoldrick, D *Ibid*, at 796.

14 The Declaration of the UN Conference on the Human Environment. Adopted at the UN Conference on the Human Environment (UNCHE), Stockholm, Sweden, 5 June – 16 June 1972.

15 Adopted by UN General Assembly Resolution 37/7.

16 Tarlock, A.D. "Ideas Without Institutions: The Paradox of Sustainable Development" (2001) 9. *Indiana Journal of Global Legal Studies*, 35 at 38.

17 Wirth, D.A. "The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?" (1995) 29. *Georgia Law Review*, 599 at 606-607.

ESD required a fourth idea[18]:

- Development must take place with far less environmental destruction than has been the case in the past

The first two ideas represent poor attempts at articulating broader SD implications; they are simply a padded-out expression of the WCED Report definition of SD. The third idea is progressive, in that it more closely recognises the need for a change in human behaviour, at all levels, particularly the need to change individual consumer behaviour. The additional, fourth, idea tends towards a need to protect the environment for its own sake, but is expressed in embarrassingly pathetic language. How compelling is a request to act in a less environmentally destructive manner?

Consequently, the Declaration's expression of the relationship between man, his endeavours and the environment is, at best, unclear. Principles 1[19] and 8[20] reinforce human development as the paramount concern, Principle 1 expressly placing the human being at the centre of concerns for SD. This anthropocentric view is made clear through the expression of a human 'entitlement' to a healthy and productive life. Arguably, any entitlement should not be expressed in an adversarial manner to place human endeavour in competition with the natural environment. Rather, the health and productivity of human beings should be attained as a result of, not instead of, a sustained natural environment. Moreover, Principle 8 is deficient in two respects. Firstly, it assumes universal acceptance of the concept of sustainability. As explained previously, this is not a freestanding concept. Secondly and further, sustainability criteria will, arguably, reflect the perspective that human development is paramount, as advocated in Principle 1. Analysis of the joint and several affect of Principles 1 and 8 highlights the need for an informed and revised ESD principle.

The Precautionary Principle and Environmental Impact Assessment

The PP[21] represents the nucleus of a revised ESD principle[22]. By definition it places the environment first. At the most fundamental, the PP dictates that when the environmental impact of proposed activity is scientifically uncertain, the international community must defer to the interests of the environment and, in certain circumstances, actively protect the environment[23]. PP requires that a series of environmental impact assessments (EIA)[24] is undertaken to document and assess the strength of the cause and effect relationship between proposed human activity and the natural environment[25]. Notably, there is scientific concern that a reality gap exists between EIA as a long-term scientific process and EIA, as popularly conceived, as a short-term administrative process whereby statutory requirements promote decision making in a one-off, positive or negative, sense[26]. It is argued that EIA sampling procedures, in an administrative context, lack the opportunity for replication and long-term observation and consequently, represent little more than political

18 Tarlock, A.D. *Ibid* at 38.

19 Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

20 To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.

21 Most interpretations of the precautionary principle include the following components: (a) evidentiary threshold (eg: a threat of serious or irreversible harm), (b) scientific uncertainty, (c) full or partial reversal of the burden of proof and (d) measures taken in response (precautionary measures) Thereby the precautionary principle requires both an assessment of the effects of causal activities and an assessment of response measures. The shifting of the burden of proof, required by a revised ESD principle, will only be attainable if there is broad acceptance and understanding that property rights can no longer be considered absolute rights – they are rights to be exercised in an ecological context: Taylor, P. "Heads in the Sand as the Tide Rises: Environmental Ethics and the Law on Climate Change" (2000/2001) 19. *UCLA Journal of Environmental Law and Policy*, 247 at 254-255, 257.

22 Applying the precautionary principle… is likely to change the focus of adjudicators to concentrating, not so much on the weight of existing evidence but on the limits of scientific knowledge: Bates, G. "Implementing ESD: Editorial" (1994) 11. *Environmental and Planning Law Journal*, 251 at 252.

23 Wyman, L. "Acceptance of the Precautionary Principle – Australian v International Decision-Makers" (2001) 18. *Environmental and Planning Law Journal*, 395 at 395.

24 EIA can be defined as: a component of a planning process by which environmental considerations are integrated into decision-making procedures for activities that may have adverse environmental effects. The principal purpose of EIA is to facilitate informed decision-making through a scrutiny of anticipated environmental effects: Wirth, D.A. *Ibid* at 629.

25 Barton, C. "The Status of the Precautionary Principle in Australia: Its Emergence in Legislation and as a Common Law Doctrine" (1998) 22. *Harvard Environmental Law Review*, 509 at 521.

26 Stewart, A. "Scientific Uncertainty, Ecologically Sustainable Development and the Precautionary Principle" (1999) 8. *Griffith Law Review*, 350 at 356.

value judgments – under such circumstances EIA appears conclusive, but may remain inherently uncertain[27].

A number of observations arise from the above concern. Fundamentally, the PP is one of commonsense[28]. The PP acknowledges scientific uncertainty, which is why it was developed. Although the administrative process demands a level of certainty beyond what an EIA can provide, such demands are ostensibly reconcilable with an impetus to increase the store of scientific knowledge regarding the natural environment. The concern that, beyond demanding scientific certainty where it cannot be provided, administrators will resort to broader political criteria in evaluating EIA[29] is not an indictment on the EIA process itself, rather something that cannot be avoided no matter the specifics of EIA assessment. The level of protection against such administrative behaviour in environmental and other, areas has always related to the degree of information available to the people. A broader ESD principle, comprising the PP and EIA procedures, attempts to raise public awareness about environmental issues but cannot prevent flagrant administrative abuse of process without more.

The Declaration fails to clearly articulate the extent to which it requires States to adopt the PP[30]. Alarmingly; the combined effect of Principles 15 [31], 17 [32] and 1 may condone flagrant disregard for the natural environment in the face of scientific uncertainty. Principle 15 is too narrow. It requires the PP only in relation to irreversible damage, rather than whenever the environmental impact of proposed activity is scientifically uncertain. As a matter of interpretation, the express mention of EIA in Principle 17 prevents its application as integral to the PP in Principle 15. The impact of this drafting approach is twofold. Firstly, a determination in accordance with Principle 15, that there exists a threat of serious or irreversible damage, is more likely to be politically value-laden, with no requirement that an EIA occur so as to allow for appropriate scientific consideration. Secondly, Principle 17 merely requires an EIA, but makes no mention of the PP.

Overall, the impact of Principle 15 and 17 is unclear. At best, the PP will only be adopted in extreme circumstances of pending environmental damage and not as a blanket assessment procedure, applied, in the face of scientific uncertainty about environmental impact. At worst, given political pressures or capacity of States, classifications of irreversible damage will never be made. If they are, measures to prevent such damage will likely be limited because it is seen as not cost-effective by local authority. Further, where EIA is undertaken, it is likely to provide little assistance given lack of a follow-up requirement. Finally, in cases where environmental impact is deemed a mere disturbance, or where no competent local authority exists to regulate activity, no element of precaution is likely to be applied.

Element 2 – Equity

It is ultimately necessary, but currently unrealistic, to expect the developing world to assume responsibilities, in respect of the environment, on the same level as the developed world - a history of colonial oppression and economic disparity continues to have contemporary ramifications[33]. Unabated, such inequality will lead to a pre-occupation, on the part of developing nations, at the expense of the environment, with attaining a level of development equal with that of developed nations[34]. A number of points must be borne in mind. Firstly, environmental protection must remain paramount. Secondly, developing nations should have a right to development, however this should not equate to an unbridled

27 *Ibid* at 356.

28 *Ibid* at 364.

29 *Ibid* at 359.

30 Whilst Principle 15 codified a precautionary approach for the first time at the global level, the formulation of the text is less forward-looking than many of its predecessors: Wirth, D.A. *Ibid* at 636-637.

31 In order to protect the environment, the precautionary approach should be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

32 Environmental Impact Assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to the decision of a competent national authority.

33 Mansell, W and Scott, J. "Why Bother About a Right to Development?" (1994) 21. *Journal of Law and Society*, 171 at 172.

34 Ramlogan, R. *Ibid* at 62.

right to exploit natural resources for economic prosperity. Finally, for points one and two to be achieved, the developed world must assume the great proportion of initial responsibility for ensuring long-term economic equality.

Short-term (common but differentiated responsibility)

Principles 5[35], 6[36], 7[37] and 9[38] of the Declaration deal, primarily, with the short-term requirements of establishing economic equality. However, beyond broad recognition of existing economic disparity, the Declaration does little to accept and explain the reasons for such disparity, particularly the incidence of historical economic oppression. Although Principle 7 acknowledges disparate contributions to global environmental degradation and a consequent need to differentiate the responsibilities of States, such acknowledgment appears only to refer to the contemporary setting. Further, despite reference in Principle 9 to the need for capacity building, there is no requirement that technological or financial exchange be undertaken freely as part of the pursuit of economic equality. Consequently, taken together, Principles 7 and 9 inadvertently reinforce long-term economic disparity. That is, failure to accept responsibility for contemporary economic disparity leaves the developing world without closure, whilst it is unrealistic to expect that, without unconditional transfer of initial capital, the developing world could participate in a global exchange of scientific or technological information.

A revised ESD principle requires the unconditional provision of financial and technical assistance, by the developed world, to ensure the developing world has the capacity to assume international environmental responsibilities. The developed world must acknowledge that the requirement of a common but differentiated level of responsibility results from *past* and present use and command, of technological and financial resources. The developed world accepts historical wrongs and offers to assist the developing world in attaining an equal economic status[39]. Thereby, recognising common but differentiated responsibilities, does not equate to a long-term concession enabling the developing world a right to abuse its natural resources[40]. Rather, it is economic assistance in lieu of such a right. Essentially, the developed world is assisting the developing world by returning the benefits of historical environmental plunder[41].

Long-term (a right to development)

In the long-term, although not amounting to a concession for unbridled development, the recognition of common, but differentiated, responsibilities can be reconciled with a right to development. In fact, this right is essential for continued environmental protection. If a long-term right to development is not recognised, the transitionary period of financial and technical assistance will be, conceivably, indefinite. A right to development provides the long-term economic capacity to focus on environmental management, as opposed to short-term realisation of foreign exchange through the exploitation of natural resources[42]. A right to

35 All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world.

36 The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority. International actions in the field of environment and development should also address the interests and needs of all countries.

37 States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

38 States should cooperate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion, and transfer of technologies, including new and innovative technologies.

39 There will be no, just, environmental order without this appreciation by the developed world. The lofty pronouncements of the west, regarding equity, will gain respect and credibility only if they are followed by deed and action: Hassan, P. "Toward an International Covenant on the Environment and Development" (1993). *Proceedings of the American Society of International Law*, 513 at 522.

40 Therefore developing countries must direct their efforts to development, bearing in mind their priorities and the need to safeguard and improve the environment: Panjabi, R. *Ibid* at 239.

41 Ramlogan, R. *Ibid* at 64.

42 Ramlogan, R. *Ibid* at 7.

development must recognise the evolving appreciation of the interrelations between human rights and the protection of the natural environment[43].

Three broad descriptions of the relations between human rights, including a right to development and environmental protection have been identified[44]. The differing categories stem from disagreement as to whether environmental protection aims to enhance human well-being or whether it has broader goals which subordinate short-term human needs to the overall protection of nature[45]. The categories are as follows:

- Environmental issues belong within human rights discourse, because the ultimate goal of environmental protection is to enhance the quality of human life;
- Human beings and their rights are merely one element of a complex, global ecosystem, which should be preserved for its own sake – under this approach human rights are subsumed under the primary objective of protecting nature as a whole;
- Human rights and environmental protection represent different but overlapping societal values

Shelton suggests that category three best reflects current law and policy[46]. Arguably, although best reflecting current practice, category three wrongly places human endeavour before environmental protection. To suggest that human rights, although impacting on the environment, exist without consideration of it, is misguided. Critically, category two represents the correct way to reconcile competing human and environmental needs. Under category two, human rights that do not impact on the environment will have a separate and distinct existence, however those that do impact, such as the right to development, although not necessarily disregarded, will, necessarily, be restricted accordingly. This means of reconciling competing human and environmental interests maintains the integrity of the environment as of paramount concern.

Given the deficiencies inherent in Principles 7 and 9, it is surprising that Principle 3[47] of the Declaration so forcefully recognises a right to development. Notably, the Declaration does not explore the right to development, beyond its express recognition in Principle 3, except so far as it is implicit in Principle 12[48]. Arguably, given the predominately anthropocentric view of the Declaration, it was perhaps thought unnecessary to intrude upon the jurisprudence of human rights law. However, as a revised ESD principle places the environment first, it is necessary to spell out what such a 'right to development' should encompass in this context.

A right to development has been heralded as the newest and most topical strand of a series of 'self-determination' rights[49]. According to the UN General Assembly Resolution[50] recognising the right to development, such right is an:

> *"…Inalienable human right by virtue of which every person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised"*

43 Ecological Human Rights (EHR) describes human rights that are subject to certain limitations, recognising that individual freedoms are exercised in an environmental context, in addition to a social context. EHR implements an eco-centric ethic, imposing responsibilities and duties upon humanity to take intrinsic values and the interests of the natural community into account when exercising human rights. In this way, ecological limitations qualify the exercise of basic rights and freedoms, such as the right to the free use and enjoyment of property: Taylor, P. *Ibid* at 273. Given the disparity between developed and developing States, the focus of an environmental right has been on rights to development and self-determination. This paper argues that these perspectives are reconcilable.

44 Shelton, D. "Human Rights, Environmental Rights, and the Right to Environment" (1991) 28. *Stanford Journal of International Law*, 103 at 104-105.

45 *Ibid* at 104.

46 *Ibid* at 105.

47 The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

48 States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus.

49 Mansell, W and Scott, J. *Ibid* at 173. Economic self-determination is assured in Article 1 of the twin human rights covenants. However, it has been recognised that the political reality of economic power tied the hands of many States, which were unable to use and develop their own resources as they saw fit. In the early 1970s proposals were put forward for a new international economic order (NIEO). These proposals sought a fundamental restructuring of trade, trans-national corporations, aid and international institutions. The proposed NIEO found expression in UN General Assembly Resolutions 3201 and 3202 of 1 May 1974.

50 41/128 (4 December 1986) – Article 1.

Advocates of the right to development recognise that the very notion of development, as it popularly conceived, has often proved debilitating not only to the environment, but also to humans themselves[51]. This stems from the inherently insatiable needs which the very notion of development imputes and because in an historical sense, since World War II, development, arguably, has solved very few of the problems at which it was directed[52]. Mansell and Scott observe a number of characteristic features of the contemporary notion of development[53]:

- The dominant conception of development contains within it the aim of a monoculture with the market at its heart;
- Ideas of development set out to alleviate problems which were defined as problems by the West;
- So long as 'poverty' is conceived of only as *economic* poverty, then the obvious alleviation is financial – but the idea of poverty is considerably more complicated than a simple shortage of financial resources

Clearly, western development simply equates to economic growth. This prompts short-term physical exploitation of natural resources as a means of attaining developmental status and leads to a failure to realise fundamental human entitlements such as health, education and access to a clean environment[54]. That is, western development perpetuates a vicious cycle, whereby our methods of attaining more lead us hopelessly and inevitably, towards the realisation of less. Development, as economic growth, must yield, almost entirely, to a revised ESD principle – it offends against views of the proper relation between the environment and humans, in Element 1 above and, as discussed below, will offend against a newly proposed economic focus, Element 3. Moreover, Element 2, above, looks to ensuring long-term economic equality – hitherto notions of development represent nothing more than attempts at reinforcing the economic superiority of the developed, western, world.

A revised ESD equates development with empowerment of peoples[55]. Redefining a right to development in this way reconciles it with the fundamental objective of environmental protection. It requires development be concerned with:

> *"Confirming the possibility of cultural diversity, with the valuing of 'local' knowledge, with the husbanding of resources for the future as well as the present, with the reduction of unnecessary mortality and the security of the means of life itself[56]"*

Development, as empowerment, looks to ensuring substantive change. This requires developed States to do more than, ostensibly, provide financial aid. It focuses on the act of 'giving' and the conditions attached[57]. It heeds the following observations of a UN study[58] into the international aspects of a right to development:

> *"One of the great dangers in development policy lies in the tendency to give the more material aspects of growth an overriding and disproportionate emphasis. The end may be forgotten with means. Human rights may be exchanged and human beings seen only as instruments of production, rather than as free entities for whose welfare and cultural advance the increased production is intended[59]"*

Achieving economic equality demands, short-term, inequitable treatment. Critically, in the long-term, although a right to development is justified, it must, initially, proceed within an equity framework and ultimately defers to a broader environmental protection objective. There is little doubt the developed world bears historical responsibility for the problem of environmental degradation, but, unless both short and

51 Mansell, W and Scott, J. *Ibid* at 182.

52 *Ibid* at 180.

53 *Ibid* at 181.

54 *Ibid* at 186.

55 *Ibid* at 183.

56 *Ibid* at 183.

57 *Ibid* at 190.

58 UN Study on the international aspects of the right to development (1979). Presented to the Commission on Human Rights (UN Doc E/CN 4/1334).

59 UN Doc E/3447/Rev. 1, Para. 19.

long-term equitable considerations are addressed, this contribution may be overshadowed by unrestrained industrialisation among developing States in the first half of the twenty-first century[60].

Element 3 – Economy

A revised ESD principle must address the broader relationship between the natural environment and human need for development and economic growth, as expressed in Principle 4[61] of the Declaration. More than simply requiring that EIA be undertaken in order to prevent otherwise excessive developmental practice, developmental practice itself needs to be redefined to incorporate environmental concerns. This paper has urged a fundamental rethinking of the way humans perceive their relations with the natural environment. Human attitude toward consumption and development is the ultimate determinant upon which the longevity of the natural environment depends. *Prima facie*, Principle 16[62] is the most critical of all Declaration Principles. Beyond a precautionary approach to development, beyond the short-term need to establish equality between developed and developing States, Principle 16 urges the critical rethinking of the international economic order required by a revised ESD principle. However, Principle 16 must be informed by evolving economic thinking if it is to have real impact.

A conventional macroeconomic process presumes an unlimited supply of material inputs and an infinite natural capacity to absorb waste outputs[63]. In this way, standard macroeconomics utilises assumptions, about the relationship between human and ecological activity, which lack a sound scientific basis[64]. As an alternative, ecological economics (EE)[65] is a new strand of economic thinking that recognises that economic activity is and should be, limited by the constraints of the ecosystem[66]. Although Principle 16 requires the internalising of environmental costs, it fails to clearly articulate why this internalisation is necessary – that is, the environment is a scarce resource that must constrain the traditional economic process. Without this appreciation, economic players with the capacity to conceive marginal benefits of pollution as exceeding their marginal costs of polluting will continue developing unabated.

Ecological economists (EEs) and a revised ESD principle, require the identification of an optimum-scale economy as the objective of macroeconomic policy instruments[67] such as the Declaration. EEs have been especially critical of the concept of SD, defined by the WCED Report and utilised by the Declaration[68]. As argued, SD is little more than an unarticulated political mantra that, because of the disagreement over its interpretation, can and has been, co-opted by just about any group with an interest in the environment/development debate[69]. The insertion of Principle 16, without more, assumes that by simply identifying and apportioning environmental costs, any development undertaken will, necessarily, be sustainable. In this way, Principle 16 facilitates a user-pays system that avoids answering the ultimate question of how much the economic subsystem can grow before it places an unsustainable burden on the natural ecosystem.[70]

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60 Ramlogan, R. *Ibid* at 75.

61 In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

62 National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

63 Kysar, D.A. "Sustainability, Distribution, and the Macroeconomic Analysis of Law" (2001) 43. *Boston College Law Review*, 1 at 1.

64 *Ibid* at 1.

65 *Ibid* at 9-16. The discipline's modern origins can be traced to three landmark articles from the late 1960s and early 1970s – (a) "The Economics of the Coming Spaceship Earth" (1966:Kenneth Boulding): *In a spaceship, one cannot ignore the by-products of production and consumption. A shift is required to the quality of economic activity from the quantity of economic activity*. (b) "The Tragedy of the Commons" (1968: Garrett Hardin): *Economists can only continue their self-imposed disciplinary isolation at the cost of ecological health and perhaps human survival*. (c) "The Entropy Law and the Economic Problem" (Nicholas Georgescu-Roegan): *Demonstrated a common sense view that resources are limited, because their use necessarily entails their dissipation. Therefore, rather than an isolated exchange loop capable of perpetual expansion, the economic process is fixed to a base of materials that is subject to identifiable constraint.*

66 Kysar, D.A. *Ibid* at 1.

67 *Ibid* at 25.

68 *Ibid* at 24.

69 *Ibid* at 24.

70 *Ibid* at 22.

Agreeably, identifying an optimum level for economic development, *vis-à-vis* the natural environment, is a task of monstrous proportions – something that is perhaps unattainable. However, scientific theory and empirical evidence make it clear that it is erroneous to continue to view the macroeconomic market as an isolated system having no impact upon the natural environment[71]. If traditional macroeconomic theories are continually utilised it is certain that demands on natural resources will be allowed to outstrip the capacity of the natural environment to provide, whilst the corresponding proliferation of waste product will undoubtedly overwhelm the natural environment's absorption capacity. Moreover, it is not a complete answer to suggest that the advent of man-made materials will be sufficient to supplement the under-abundance of natural resources – this may be a short-term solution, but does little more than shift the natural strain to a differing combination of natural resource and fails to appreciate that man-made materials must find their origins in, some level of, natural resource. In short, the material scales of current economic development and consumption levels will, ultimately, exceed the carrying capacity of the earth[72].

Consequently, society's challenge must be to limit economic activity, rather than expand it[73]. This challenge requires, as discussed in the long-term objectives of Element 2, a focus on achieving human development rather than mere economic growth. As EEs identify, ignoring any ecological limits to growth, there is little reason to suppose that increases in the sheer magnitude of the human economy are always desirable from the perspective of social welfare[74]. Thereby, development can be achieved by focusing on quality rather than quantity, human entitlements rather than unquestioning consumption. If economic growth indicators such as Gross National Product are to remain relevant, their criteria must be realigned with fundamental areas of human endeavour, rather than simple income expenditure[75]. At the very least, the economic refocus required by a revised ESD principle looks to affording the natural environment a greater, temporal, opportunity to regenerate. That is, if humans view the attainment of basic entitlements and the qualitative appraisal of development, as essential, the impact of consumption and waste upon the natural environment will be reduced.

The World Summit – Concluding Comments

The Johannesburg Declaration differs to those adopted at UNCHE and later at UNCED. The Johannesburg Declaration reaffirms its commitment to SD, recognises its political origins and outlines perceived challenges facing mankind's effort to ensure environmental protection. As such, the Declaration Principles' continue to represent the broad understandings and aspirations of the international community in respect of environmental issues – hence the focus of this paper.

Arguably, notwithstanding specific outcomes, not the subject of this paper, the Johannesburg Summit did little to advance broader understanding of the issues of the environmental debate. The very fact that no significant redrafting of the Declaration took place evidences the stagnate nature of environmental discourse given current concerns surrounding political instability in Iraq and broader concern about the proliferation of international acts of terrorism. Although the World Summit undoubtedly focused international attention, in did so for all the wrong reasons. As stated by the Secretary-General of the World Summit, Nitin Desai;

> *"The primary focus that we have is to find mutual interest, but some participants are taking positions solely on the basis of national interest… I am convinced it is impossible to get global agreement on critical issues of sustainable development if we pursue it on the basis of identifying what is in the national interest of each country [76]"*

Evidencing this statement, the United States of America (US) and Australia continued to adopt a stubborn line on greenhouse gas emissions by refusing to ratify the Kyoto Protocol, whilst Zimbabwe President

71 *Ibid* at 19.

72 *Ibid* at 25.

73 *Ibid* at 27-28.

74 *Ibid* at 29.

75 *Ibid* at 31.

76 Peatling, S. "Australia, US urged to be less selfish". *The Age Newspaper*, Friday, August 30, 2002 at 10.

Robert Mugabe continued to voice his disapproval at western interference in Zimbabwe's current political crisis[77]. *Inter alia*, the attitudes of the US, Australia and Zimbabwe indicate continued international failure to appreciate the universal and interrelated nature of environmental problems and the worsening divide between the developed and developing world. The developed world continues to deny historical economic oppression and the developing world continues to assert the existence of a misguided right to exploit their natural resources.

Nevertheless, despite a number of recognised idiosyncrasies surrounding the environmental debate[78], this paper, in accordance with a proposed, revised, ESD principle, believes that, given the flexible nature of the international legal system, sufficient legal and political tools do exist to advance the long-term, international, protection of the natural environment. Declarations such as the twenty-seven principles expressed at UNCED do not purport to be hard-law instruments regulating specific environmental matters and regions. Instead, given the incremental process by which international law is developed, the Declaration is critical as representing a conceptual framework against which specific international, regional and national environmental law can be developed and implemented[79].

As the Declaration represents the common understanding and aspirations of the international community, it must be continually scrutinised to have contemporary relevance akin to the UN Charter and various human rights covenants. The fundamental criticism of the principles of the Declaration and indeed broader environmental understanding is the anthropocentric focus taken. This paper looks to using a revised ESD principle as a means of altering this international mindset on environmental matters. A revised ESD principle looks to what are considered the three broader considerations of environmental protection, but stresses that above all else, the environment must come first. Critically, this view is not irreconcilable with basic human rights and needs, but rather, requires humans to reappraise issues such as human equality and the need for human development. This paper argues that once a change in the international mindset is achieved, workable solutions to interrelated international problems, satisfactory to both the developed and developing world, will present themselves.

77 *Ibid* at 10.

78 Ramalogan, R. *Ibid* at 1.

79 Today, all evidence points to the likelihood that the formulation of 'soft-law' will proliferate more rapidly than the negotiation of formal international agreement: Ramlogan, R. *Ibid* at 4.

Directors' duties and sustainability: are you being true and fair?

By Sean Lucy & Megan Utter of Phillips Fox, Lawyers*

This article was previously published in the February 2004 edition of *Keeping Good Companies*, the Journal of Chartered Secretaries, Australia. The authors would like to point out that since then the importance of climate change to investors has been further emphasised in the US – the American Electric Power Company and Cinergy Corporation have both bowed to shareholder pressure to publicly report on their greenhouse gas emissions, and the business impact of potential federal and state regulation.

In the wake of recent major accounting scandals and corporate failures, spectacularly characterised by the collapse of Enron, Ansett, HIH and others, corporate governance is a hot topic for investors, regulators and companies alike. Regulatory bodies all over the world have leapt to address the apparent failure of current disclosure requirements with a wide range of legislative reforms and stringent new reporting requirements. Key examples include:

- The *US Sarbanes-Oxley Act*, and Financial Accounting Standards Board's proposed binding disclosure requirements about companies' intangible assets;
- the impending UK *Companies Bill*; and
- Australia's *CLERP (Audit Reform and Corporate Disclosure) Bill* (Cth).

At the same time, the need to deliver sustainable environmental, social and financial performance is emerging as a key concern for businesses and their shareholders, creating a host of new risks & opportunities.

The OECD estimates that the global market for environmental goods and services was worth US $550 billion in 2003, and projects that it will grow at 3-5% annually in developed countries, and at 8-12% in developing countries/economies in transition.[1] This bullish outlook is bolstered by the growing number of venture capitalists that identify the sustainability sector as one of three key growth opportunities (the other two being biotech and IT). In the view of one such investor, SAM Private Equity, the sustainability sector has the potential to generate a range of technologies that will produce disruptive changes in global industries, leading to outsized returns.[2]

This possibility of disruptive change is what presents the risk - if the venture capitalists are right, then existing businesses may suffer big losses as their industries are rapidly transformed. In light of the recent experience of the changes that the IT revolution brought with it, it does not take much imagination to see how sustainability technologies might well do the same.

So far these two developments - the renewed focus on corporate governance, and the growing interest in sustainability - have largely been proceeding along separate lines. However, it is increasingly apparent that they are in fact closely linked. This linkage becomes clear when considering the requirements that the *Corporations Act 2001* (**Act**) imposes on directors in relation to decision making and reporting - in particular, directors' obligations to diligently and carefully exercise their powers,[3] and to report annually on the company's financial and operational performance.[4]

The requirement that directors diligently and carefully exercise their powers is set out in s180 of the Act. This provision provides that directors and officers must exercise their powers and discharge their duties

* The authors gratefully acknowledge the research assistance of David Andrewartha. Sean Lucy is Senior Associate and Megan Utter a Solicitor with the Melbourne office of Phillips Fox.*

1 Dr Kenneth Ruffing (Deputy Director, Environment Directorate OECD), "Trade, Investment & Global Environmental Markets", presentation to Enviroseries 2003: Financing Sustainable Development Conference (Hong Kong Convention & Exhibition Centre, 10 September 2003)

2 Bruno Derungs (Principal, SAM Private Equity), "Creating Sustainable Value", presentation to Enviroseries 2003: Financing Sustainable Development Conference (Hong Kong Convention & Exhibition Centre, 10 September 2003)

3 Section 180 of the Act.

4 Part 2M.3 of the Act.

with the degree of care and diligence that a reasonable person would in the same circumstances. This duty is discharged in relation to business judgements that are made:

- in good faith for a proper purpose;
- in the absence of any conflict of interest;
- on an informed basis (to the extent reasonably believed to be appropriate); and
- in a rational belief that the judgment is in the best interests of the corporation.

Part 2M.3 of the Act deals with reporting requirements. There are two main reports that must be completed each year - a financial report and a directors' report (which deals with operational matters). The content of both of these reports are tightly controlled by detailed provisions in the Act. Of these provisions, particularly relevant are the requirements that the financial reports present a "true and fair view"[5], and that the directors' report addresses "any matter or circumstance…that has significantly affected or may significantly affect" the company's operations, results or state of affairs in future years.[6]

Directors that fail to comply with these requirements may be liable for a civil penalties of up to $200,000.[7] In the case of the reporting obligations, breaches that occur dishonestly constitute an offence that attracts a penalty of up to $220,000 and 5 years imprisonment.[8]

In order for directors to meet these obligations, it is necessary that they give careful consideration to their company's current sustainability performance, and what might be expected of it in the future. However, before examining this point in detail, it is perhaps useful to briefly review what sustainability is, and what it means for business today.

The concept of sustainability has been defined in many different ways, most of these definitions stem from the term "sustainable development", which was perhaps best defined by the World Commission on Environment and Development in *Our Common Future*:[9]

> *"Development that meets the needs of the present without compromising the ability of future generations to meet their own needs."*

In the corporate context, sustainability refers to initiatives that acknowledge this principle as a worthy goal, and seek to better align business practices with it. The growing acceptance of this as an objective, and the challenge of finding ways to incorporate such principles into business practice while achieving solid financial performance, is what creates the opportunities & risks discussed above.

Fund mangers are starting to pick up on this trend, and see value in measuring the sustainability performance of the businesses they invest in. This interest has led to the development of the Dow Jones Global Sustainability Index (**DJGSI**), which tracks the performance of sustainability leaders in all sectors. The DJGSI has consistently outperformed the Dow Jones Global Index since its inception in 1998,[10] suggesting that sustainability performance is a good metric for overall performance. In the Australian context, the Mays Report[11] reaches a similar conclusion - finding that sustainability performance can be a useful measure of managerial talent.

At a more general level, there is a growing acceptance that the intangible aspects of a company's business, such as sustainability performance make up the bulk of the value of a company. Examples of recent work in this area include:

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5 Section 295 of the Act.

6 Section 299 (1)(d) of the Act (This obligation is set to become more onerous in the case of listed public companies as a result of CLERP 9. The current draft of the *CLERP (Audit Reform and Corporate Disclosure) Bill* proposes a new s299A of the Act which would require (inter alia) that the directors' report for a listed public company include sufficient material to enable an assessment of the entity's business strategies and its prospects for future financial years.)

7 Section 1317G of the Act.

8 Section 344 of the Act.

9 World Commission on Environment and Development, *Our Common Future: Australian Edition*, Oxford University Press, Melbourne 1990, p8.

10 Performance statistics for the DJGSI are available at www.sustainability-indexes.com/htmle/news/monthlyupdates.html

11 Shaun Mays, *Corporate Sustainability - An Investor Perspective*, Canberra, Australian Government (Department of Environment & Heritage), 2003.

- A 2001 Brookings Institution study which concludes that roughly 85% of a company's true market value cannot be explained by traditional financial analysis;[12]
- Research by Deloitte, CSR Europe and Euronext which concluded that:
  - 80% of fund managers and analysts believe that the management of social and environmental risks has a positive impact on a company's market value in the long-term; and
  - 52% of fund managers and analysts believe that social and environmental performance will become a significant aspect of mainstream investment decisions within the next three years;[13] and
- Data presented by KMPG to a 2003 United Nations Environment Program Finance Initiatives meeting that showed that between 1996 and 2000 "10% of Fortune 1000 companies lost over 25% of their value within a one-month period", and that "in only 6% of [these] cases was the loss attributed to financial issues."[14]

With this in mind, institutional investors and fiduciaries are turning to a new breed of market analyst that offers assessment and comparison of environmental, social and governance performance of companies. As yet it is not clear which of the many competing approaches will ultimately be adopted as standard. However, this may not be a bad thing, as Robert Hahn and others have argued (in the wash up of the Enron scandal) that "policymakers should encourage experimentation in disclosure of a variety of non-financial indicators to better enable investors and analysts to ascertain the source and nature of intangible assets."[15]

One area where this trend is very well developed is that of climate change, an issue which is now widely acknowledged as being the world's major sustainability challenge. The major implication of climate change for investors is that they will increasingly need to be in a position to assess and differentiate between the carbon risk in different companies' operations. This is spelt out in some detail in the first report of the Carbon Disclosure Project (**CDP**),[16] which was established by 35 institutional investors (representing more than US $4 trillion in assets). The report summarises the results of responses to a survey sent by the CDP to the UK Financial Times 'FT500' regarding their understanding of and response to the risks presented to their business by climate change.[17]

The work of the CDP has sparked a number of similar projects, one of which is a recently released report on the impact of climate change on the automotive industry, *Changing Drivers*.[18] This report explores how carbon constraints in global automotive markets may affect value creation in 10 leading automotive companies between now and 2015. It translates an analysis of predicted costs of meeting new standards, and opportunities to capitalize on carbon constraints to enhance competitiveness, into changes in forecast Earnings Before Interest and Tax (**EBIT**) for each company. The report concludes that Toyota is best placed to capitalise on the coming carbon constraints, with a predicted 8% EBIT gain by 2015, and General Motors and Ford are worst positioned, with predicted EBIT decreases of 7% and 10% (respectively) over the same period.

Material like the CDP's first report and *Changing Drivers* provide a very tangible example of the implications that sustainability holds for investors and directors alike. In essence, they show that how a company responds to sustainability in the short term is likely to effect its financial performance in the long term.

12 Baruch Lev, *Intangibles: Management, Measurement and Reporting*, Washington DC, Brookings Institution, 2001.

13 CSR Europe, Deloitte and Euronext, *Investing in Responsible Business*, November 2003 (available from http://www.csreurope.org)

14 Commission for Environmental Cooperation & United Nations Environment Program Finance Initiatives, *Environmental Disclosures in Financial Statements: New Developments and Emerging Issues,* April 2003, p12 (available from http://unepfi.net/natf/materiality_cec_unepfi_nyc280203.pdf)

15 George Benston, Michael Bromwich, Robert Litan and Alfred Wafenhofer, *Following the Money: the Enron Failure and the State of Corporate Disclosure*, AEI-Brookings Joint Centre for Regulatory Studies, Washington DC, 2003.

16 Innovest Strategic Value Advisors, Carbon Finance and the Global Equity Markets, 2003 (available from http://www.cdproject.net)

17 The Carbon Disclosure Project (now representing 87 institutional investors with combined assets of US $9 trillion) sent a second survey to the FT500 on 1 November 2003, and intends to publish the results in May 2004.

18 Duncan Austin, Niki Rosinski, Amanda Sauer, Colin le Duc, *Changing Drivers: the Impact of Climate Change on Competitiveness and Value Creation in the Automotive Industry*, Washington DC, World Resources Institute and Sustainable Asset Management, 2003.

Compliance with the Act's decision making and reporting obligations in this context can be difficult, particularly given the current lack of knowledge about sustainability within companies. In respect of major decision making, it is likely that many boards would contain at least one member who would be unable to demonstrate that they had properly informed themselves in respect of the sustainability implications of some decisions that they have made in the past year.

Similar problems arise in relation to reporting. What material must be included to ensure that a financial report presents a "true and fair view", and that a directors' report identifies matters that "may significantly affect" operations is a difficult question. This difficulty is compounded by the fact these provisions have seldom been litigated.[19] However, as the body of evidence grows that sustainability performance and other intangible factors form the bulk of the value of a company, the more comprehensively these issues will need to be treated in the reports.

Directors of companies that are not in a position to determine the level of disclosure that is required, run the risk of breaching of the Act. Indeed, it is at least arguable that without a strong understanding of the intangible aspects of the company's operations, the directors cannot properly reach a conclusion about this question. It is likely that many boards contain at least one director who is currently in this position.

In the climate change context, the stakes are high. The CDP report concludes that, "[a]t the company level, an analysis of corporate 'carbon beta' – the metric for company risk exposure - implies that future threats to shareholder value differ significantly. Companies and industry sectors vary widely in their degree of risk exposure and the sophistication of risk management capabilities developed in response." [20]

The CEO of Innovest Strategic Value Advisors (authors of the CDP report), has noted elsewhere that: [21]

> *"Our own company's research has demonstrated that, in some high-impact sectors, even under highly conservative scenarios, as much as 45% of earning and 35% of total market capitalisation are at risk from the potential financial consequences of climate change."*

In the event that such risks crystallise for a particular company, it would be surprising if investors did not look closely at the level of disclosure made by the directors in previous reports, and ask some difficult questions about decision making processes. Whether litigation would follow is difficult to predict, particularly given the untested nature of the legislative provisions, however it is difficult to see how the careers of those involved would survive. With this in mind, current directors would do well to start educating themselves about sustainability issues, and ensuring that the companies they are involved with do the same.

19 The Act provides some guidance regarding "true and fair view" in s297 (which provides that this obligation must be met concurrently with the requirement in s296 to comply with accounting standards) and includes a note stating that where "compliance with the accounting standards would not give a true and fair view, additional information must be included in the notes to the financial statements".

20 The report goes on set out a number of examples in a table, reproduced below:

Autos	FT500 auto manufacturers vary by a factor of 35x in terms of reported CO2 emissions per vehicle sold/produced.
Electric Utilities	In the U.S. estimated total costs of reducing GHG emissions intensity by 10% range from over $1.7 to below $0.2 per MWh.
Oil & Gas	Total costs of reducing 2001 CO2e emissions by 10%, assuming a uniform 20_/t marginal abatement cost, range between 0.7% and 5.1% of"01 Net Income.
Banks	GHG-induced loan impairment of 10% could reduce share prices by up to 29%for banks without adequate carbon risk management.
Rail	In the U.S. a drought-induced reduction in agricultural commodity shipments of 5% would depress revenues by between 7.5% and 10.5% of net income.

21 Dr Matthew Kiernan, "The Perfect Storm: Climate Change and the new fiduciary" (in *0.618*..., UNEP FI, Issue 3, January 2003, p12) (available from http://www.unepfi.net)

Planning in Victoria: a constant state of change

By Denise Turner
Project Manager, Environmental Planning, EPA Victoria [1]

Planning in Victoria seems to be in a period of high activity at the moment. The question I have been asking myself is: "Has there always been this much activity or am I just more aware of developments taking place at the State level?" Either way there's a lot going on so it's a fascinating time to be involved in planning.

This is a brief overview of planning in Victoria, from the legislation and planning schemes, to major new policy documents, and current planning reviews.

Under the *Planning and Environment Act* 1987, Victoria has one of the most open processes of public consultation and third party review rights in Australia.[2] Notice of an application is given unless the responsible authority is satisfied there will be no material detriment caused to any person[3] and objectors have the right of review of a decision by an independent Tribunal.[4]

In recent years, the most significant change to the *Planning and Environment Act* has been the introduction in 1996 of the Victoria Planning Provisions (VPPs).[5] The VPPs provide a template for all planning schemes in Victoria containing State planning policy and a suite of standard planning provisions from which individual schemes are developed.[6] As a state-wide reference document, it provides the framework to ensure a standard layout and consistency of provisions. Individual planning authorities must then incorporate their own local planning policy content which includes their Municipal Strategic Statement and local planning policies. The introduction of the VPP was designed to give a greater policy focus to decision-making.

In October 2002, the Victorian Government released *Melbourne 2030 - planning for sustainable growth* to manage urban growth across Melbourne and the surrounding region to cater for a projected growth of one million people over the next thirty years.[7] The strategy established an urban growth boundary around the existing urban areas of Melbourne to protect the surrounding green wedges, with final changes to this boundary being passed by the Legislative Assembly on 19 November 2003. With the exception of five designated growth areas which will be managed to provide an adequate supply of land, development will be increasingly concentrated in activity centres of various types and sizes within Melbourne. Accompanying the release of the strategy were draft Implementation Plans on six significant topics to provide further detail and guidance to all stakeholders on how the initiatives of *Melbourne 2030* might be implemented.

The strategy advocates sustainable urban growth by providing strong links to environment strategies of Government such as improving air quality, reducing greenhouse gases, sustainable management of water resources, promoting sustainability, reducing the amount of waste generated and encouraging reuse and recycling. In particular, it draws on the role that land-use development, transport and infrastructure planning and investment can play in the achievement of those strategies.

To support this principle of sustainability, in December 2002 as part of a restructure of State Government Departments, the Department of Sustainability and Environment (DSE) was created.[8] This brought together the portfolios of Planning and Environment into one department. This move reflects sustainability

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2. Victorian Department of Sustainability and Environment, *Better Decisions Faster: Opportunities to improve the planning system in Victoria,* Discussion Paper, (2003) p 44

3. *Planning and Environment Act* 1987 (VIC) s.52(1)

4. *Planning and Environment Act* 1987 (VIC) s.82(1)

5. *Planning and Environment Act* 1987 (VIC) s.4A -4J

6. http://www.dse.vic.gov.au/planning/

7. Victorian Department of Infrastructure, *Melbourne 2030 - planning for sustainable growth*, (2002)

8. http://www.dse.vic.gov.au/planning/

as a key policy driver for Victoria and established the Department as the lead agency for environmental sustainability.[9]

The release of *Melbourne 2030* has generated a flurry of activity with preparation beginning on a range of initiatives including growth area plans, activity centre guidelines, green wedge guidelines, planning process reviews and much more. One such review is a discussion paper released in August 2003 entitled *Better Decisions Faster: Opportunities to improve the planning system in Victoria* which addresses the need to update planning processes and in some cases may generate changes to the *Planning and Environment Act* 1987.[10] *Better Decisions Faster* identifies a number of opportunities for improvement within the Victorian planning system in response to recent criticisms regarding long timeframes, poor quality applications and policy confusion. The paper provides a useful and practical discussion on a range of options which could be adopted.

DSE are also exploring options for delivering sustainability through the development approvals process, releasing a paper in September 2003, *Sustainability in the Built Environment Project*.[11] The paper offers an insightful discussion on sustainability and what this means to the implementation of urban sustainability, differentiating between urban growth issues and the environmental performance of the built environment. The paper examines a range of sustainability strategies and regulatory frameworks taking a look at what role the planning and building systems might play in delivering the consistency and certainty required by the development industry. It provides a review of current council practices, industry responses and other approaches for achieving sustainability through development approvals with the aim of producing an integrated sustainability framework for Victoria.

An operational review has also been undertaken of the existing rural zones by a Reference Group appointed by the Minister for Planning. This review culminated in January 2003 with the release of the *Rural Zones Review Discussion Paper*.[12] The rural zones have been criticised for being 'one size fits all' with fundamental questions being asked about the purposes of the zones and what they were intended to deliver. Submissions to the discussion paper closed in July 2003 with the outcome of the review eagerly awaited by all.

Finally, a concurrent process of reform is being undertaken by the Victorian Civil and Administrative Tribunal (VCAT) with Justice Stuart Morris, President announcing on 13 August 2003, that substantial reforms would be made to the tribunal's Planning and Environment List to streamline appeals and ensure timelier decisions.[13]

These are just a few of the key developments and reviews occurring in and around the planning system in Victoria at the moment. As you can see they make for a very thought provoking and challenging time ahead.

9. http://www.dse.vic.gov.au/

10. Victorian Department of Sustainability and Environment, *Better Decisions Faster: Opportunities to improve the planning system in Victoria*, Discussion Paper, (2003) p 1

11. Victorian Department of Sustainability and Environment, *Sustainability in the Built Environment Project*, Discussion Paper, (2003) Ch.1,2

12. Victorian Department of Sustainability and Environment, *Rural Zones Review Reference Group Discussion and Options Paper* (2003)

13. Victorian Civil and Administrative Tribunal, Media Release, 'VCAT President announces reforms to Planning and Environment List', 13 August 2003

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