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editorial

Dear Readers,

Free Trade - ecological warning lights are flashing!

The recently concluded US Australia Free Trade Agreement poses some important environmental questions. The conventional economist's view is that the FTA will bring a benefit to Australian farmers based on modelling, which suggests that increased competition lifts productivity. However one might question reliance upon modelling studies, when there has been real life experiment in trade liberalisation going on for 20-30 years in most western countries. A recent report by the Canadian National Farmers Union titled the 'Myth of Competition and Efficiency' (available at www.nfu.ca), provides real data to show the result of global competition amongst farmers in the past has been growing more but earning less. In fact Canadian farmers have elevated their productivity impressively over recent decades but net farm income has stagnated. The CNFU argues that the explanation for this curious result is that most farm inputs (fertilisers, pesticides, machinery, fuels and vehicles) and most farm produce distributors are not subject to the same brutal competition. The small band of multinational corporations who deal with the millions of farmers worldwide have taken massive profits over this period of increasing productivity. Farmers see only two futures – get big or get out. Thus they strive for increased production, inevitably using new chemicals and new technology – and even more natural resources such as water, forests and soil. Recent new water diversion projects like the Nathan Dam in Queensland and the Meander Dam in Tasmania are symptoms of the increasing pressure that globalisation exerts upon the environment.

Changes to State Editors

In this issue, our team of State Editors has undergone several changes. The Commonwealth/National Editor, John Ashe and our Queensland Editor, Leanne Bowie, are both moving on, and I would like to take this opportunity to thank them both for their valuable service to the journal. The Commonwealth/National contributions will now be provided by Elizabeth Marsden whilst Queensland developments will now be contributed by Chris McGrath. I am also very pleased to advise that Tom Baxter will take up the role of Tasmanian editor, which has been vacant for some months.

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NELR editors

NATIONAL EDITOR:

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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 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:

Chris McGrath

Barrister-at-Law, Brisbane

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Chris McGrath is a barrister in private practice in Brisbane.

He holds bachelor degrees in Law and Science, a Master of Laws (Environmental Law) and is currently a PhD candidate at the Queensland University of Technology. His research interests concentrate on critical analysis of the environmental legal system, particularly evaluating its effectiveness.

His publications include, *Synopsis of the Queensland Environmental Legal System* (2nd ed, Environmental Law Publishing, Brisbane, 2003), available at <http://www.qccqld.org.au/resources/qld_env_legal.pdf>, which provides an overview of the Queensland environmental legal system.

VICTORIAN EDITOR:

Jennie Slatter

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Jennie Slatter has recently become the Victorian state editor. Jennie holds a Bachelor of Applied Science degree in Environmental Assessment and Management from the University of Newcastle 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

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

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

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

TASMANIAN EDITOR:

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Tom Baxter, BEc/LLB(Hons)(Tas), GradCertLegPrac(Tas), LLM(ANU);

Barrister and Solicitor of the Supreme Court of Tasmania and the High Court of Australia;

After graduating from the University of Tasmania, Tom worked as a lawyer in Hobart from September 1997 to December 1999. From January 2000 to May 2003 he was Legal Officer for the Great Barrier Reef Marine Park Authority, a Commonwealth statutory authority based in Townsville. In June 2003 he returned to Hobart as a Lecturer in Commercial Law at the University of Tasmania. He has been a member of the NELA National Executive since 1997.

WESTERN AUSTRALIAN EDITORS:

Sally Marsh and Lewis McDonald

Sally Marsh

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

Lewis McDonald

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

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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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COAG Signs National Water Initiative Agreement

The Council of Australian Governments (COAG), at its meeting in Canberra on 25 June 2004 agreed to a far-reaching National Water Initiative (NWI) as foreshadowed at the COAG meeting in August 2003 (see *National Environmental Law Review* No 3/2003, 8).

Key features of the NWI are as follows:

- *water access entitlements*—adoption of a water access entitlements regime, providing greater security for water users, including farmers
- *water markets and trading*—institutional and regulatory arrangements to facilitate intra- and inter-state trade in water to be established
- *water planning*—adoption of more sophisticated, transparent and comprehensive water planning processes to deal with key issues such as the major interception of water, the interaction between surface and groundwater systems, and the provision of water to meet environmental outcomes
- *environmental and other public outcomes*—water provided by states and territories to meet agreed environmental and other public benefit outcomes to be given statutory recognition and at least the same degree of security as water for consumptive use
- *overallocation*—water extraction from systems that are currently *overallocated* (ie that have entitlements issued for more than the sustainable use level) or *overused* (ie the consumption of water is more than the sustainable use level) to be adjusted in order to meet environmental and other public outcomes, with substantial progress to be made by 2010
- *risk assignment*—adoption of a risk assignment framework that assigns the risk of future reductions in water availability (see below)
- *interception*—land use changes that have the potential to intercept significant volumes of surface or ground water to be addressed by planning processes for individual water systems, having regard to regional circumstances
- *national standards for water accounting reporting and metering*—water accounting systems in each jurisdiction to be benchmarked, and national standards introduced for accounting systems, reporting formats, water meters and environmental water accounting
- *water efficiency in urban areas*—measures to be taken to improve water use efficiency in urban areas, including: pricing policies to stimulate the efficient use of recycled water and storm water, the introduction of minimum water efficiency standards for household appliances, and mandatory product labelling
- *full-cost recovery pricing*—implementation of full-cost recovery pricing for water in both urban and rural sectors to continue.

The risk assignment framework agreed by COAG for future reductions in water availability provides that:

- reductions arising from natural events such as climate change, drought or bushfire would be borne by water users
- reductions arising from bona fide improvements in knowledge about the capacity of water systems to sustain particular extraction levels would be borne by water users up to 2014
- after 2014, water users would bear this risk for the first 3 per cent reduction in water allocation; states and territories would share the risk with the Australian Government for reductions between 3 and 6 per cent (one-third and two-thirds respectively); states and territories and the Australian Government would share equally the risk of reductions above 6 per cent

- reductions arising from changes in government policy not previously provided for would be borne by governments
- where there is voluntary agreement between relevant state or territory governments and key stakeholders, a different risk assignment model to that describe above may be implemented.

COAG also agreed to establish a National Water Commission (NWC), which will report to COAG. The NWC will assess progress in implementing the NWI and will advise on actions required to better realise the objectives of the NWI Agreement. The NWC will also undertake the 2005 assessment of progress with implementing water reform commitments under the National Competition Policy.

The NWC will be funded by the Australian Government and will comprise seven members with relevant expertise. Four members (including the chair) will be appointed by the Australian Government; the other three will be appointed by state and territory governments.

The implementation of the NWI is to be overseen by the Natural Resource Management Ministerial Council. States and territories will develop detailed implementation plans over the next twelve months.

The commitments in the NWI are set down in the NWI Agreement. Western Australia declined to sign the agreement because it saw no benefit for Western Australia. Tasmania has not signed at this stage but will continue discussions with the Australian Government.

Murray–Darling Basin Agreement

In addition to the NWI Agreement, the member jurisdictions of the Murray–Darling Basin—the Australian Government, New South Wales, Victoria, South Australia and the ACT— signed the Murray–Darling Basin Agreement. This agreement sets out the agreed arrangements for spending \$500 million over five years, on a cost-sharing basis, beginning in 2004–05, to reduce the level of water over-allocation and to achieve specific environmental outcomes in the Murray–Darling Basin. This funding commitment was agreed in principle at the COAG meeting in August 2003 (see *National Environmental Law Review* No 3/2003, 8).

The priority for investment under the MDB agreement is the recovery of water to enable achievement of environmental objectives and outcomes for six significant ecological assets; Barmah-Millewa Forest, Gunbower and Koondrook-Perricoota Forests, Hattah Lakes, Chowilla floodplain (including Lindsay-Wallpolla), the Murray Mouth, Coorong and Lower Lakes, and the River Murray Channel. Water recovery will build up over a five-year period to an estimated average of 500 gigalitres a year—some 4 per cent of the current extraction from the Murray–Darling river system each year.

Apart from the funding in the MDB Agreement, no additional funding for water-related projects was announced at the meeting. However, commentators expect that the Australian Government is likely to enter into bilateral agreements with the states involving significant expenditure in the run-up to the next federal election.

The announcements by COAG have had mixed reactions. Farming interests have welcomed the strengthened property rights in water. Conservationists, however, have criticised the agreements as not going far enough to restore the health of Australia's rivers and for not providing any additional funding beyond that announced last year.

Environment Protection and Heritage Council—Initiatives on Air Quality, Waste, Chemicals and Heritage

At the meeting of the Environment Protection and Heritage Council on 16 April 2004, in Adelaide, Australian and New Zealand Environment and Heritage Ministers, announced a range of measures and initiatives concerning air quality, waste management and recycling, chemicals and heritage.

Air Quality

Council endorsed a National Environment Protection Measure for Air Toxics. The measure includes a guideline and protocols to monitor and report on five air toxics: benzene, polycyclic aromatic hydrocarbons, formaldehyde, toluene and xylenes. These air toxics have been shown to be responsible for a range of health problems, including asthma, respiratory illnesses and cancer.

Current Australian data on these pollutants is very limited, and the new measure will provide improved information for policy makers and the public on air quality issues. It will help to prioritise and evaluate the effectiveness of air quality programs, and will provide a database for future studies of the health risks posed by these pollutants.

Ministers also announced that Council will contribute up to \$300, 000 for a study into the effects of air pollution on children's health in Australian cities. They also endorsed a study into the effects of air pollution on the elderly, with funding to be sought in partnership with key research institutions. Both studies are planned to start later this year. The studies will provide a basis for the review of national ambient air quality standards next year.

Waste Management and Recycling

Electronic waste

Council welcomed a commitment by the TV industry to accept shared responsibility for managing the disposal of used television sets. The industry intends to set up an independent third-party organisation (known as a 'producer responsibility organisation') by the end of 2004 to recycle up to 15, 000 tonnes of used television sets going to landfill each year.

Ministers noted progress in the computer industry, and welcomed a draft product stewardship plan by the industry, including a recycling scheme. Australians currently send some one million computers to landfill each year.

Waste tyres

Council welcomed progress on an industry-led initiative to recycle waste tyres and encouraged continuing discussions between governments and industry. At the request of the tyre industry, Ministers agreed to explore regulatory safety-net options.

Newspaper recycling

Council commended the newsprint industry for achieving ambitious targets, and leading the world in recycling. The Newspaper Industry Waste Reduction Agreement Mid -Term Report shows that newsprint recycling has increased from 28 per cent in 1989 to 73.5 per cent in 2003. This is the highest in the world and very close to the target of 74 per cent by the end of 2005. By recycling newsprint the industry is saving some 200,000 tonnes annually from entering the waste stream.

Packaging Covenant and NEPM

Council recognised the contribution of the National Packaging Covenant and the Used Packaging Materials National Environment Protection Measure (NEPM) in reducing waste at all stages of the packaging supply chain—from raw material through to retailers, consumers and recycling. Recent reviews indicate that the Covenant has been a qualified success and has increased recycling overall, but needs to be strengthened if it is to continue. Ministers released for public consultation a draft variation to the NEPM, which will extend the life of the NEPM as the regulatory safety net underpinning the Covenant for twelve months to 14 July 2005. The interim extension will allow for consultation among stakeholders in order to strengthen the sustainable management of packaging waste.

Controlled Waste

Council released for public consultation a draft variation to the National Environment Protection Measure for the movement of controlled waste between states and territories. Controlled wastes are those that present a hazard in storage, handling and transport. The draft variation recognises the importance of recycling, and will improve existing mechanisms to ensure that controlled wastes are identified, transported and handled in accordance with environmentally sound practices.

Chemicals

Council released the final report of the successful ChemCollect program, an industry-driven program for the collection and disposal of unwanted and deregistered agricultural and veterinary chemicals. Approximately 1700 tonnes of chemicals were collected under the program between 1999 and 2002.

Ministers are also keen to see the industry-driven program ChemClear fully implemented. ChemClear provides for ongoing collection of unwanted registered rural chemicals, which are otherwise non-returnable.

On 19 April 2004 Council launched the National Chemical Information Gateway, an initiative to help householders, schools, small business and the community generally to understand chemicals in the environment. The Gateway is a web portal that pulls together much information already in the public domain into an easy, accessible one-stop shop. The Gateway is a response to community concerns expressed last year that information on chemicals was difficult to find, and reflects Council's view that informed debate on chemical issues is critical to best practice management of chemicals.

Heritage

Council applauded several initiatives that will enable Australian and international visitors to explore heritage places more effectively. The web-based *Heritage Places* and *Travel Routes* will enable travellers to base their itineraries on specific interests such as heritage trails or themes. *Welcome Country* will help to raise travellers, sensitivity and awareness to Indigenous custodianship of Australia.

Council also agreed to release a major report on incentives and other innovative policy tools for conserving Australia's historic heritage. The report, *Making Heritage Happen*, looks at the effectiveness of Australian and international incentives so that all levels of government can promote heritage conservation by positive means rather than by regulation.

Sixth Meeting of Natural Resource Management Ministerial Council

The Natural Resource Management Ministerial Council held its sixth meeting, in Adelaide, on 16 February 2004. The Council is composed of federal, state and territory ministers with responsibility for the environment, natural resources, primary industries and water. The Council:

- held its second annual meeting with the Natural Resource Management Community Forum, which is made up of representatives from regional natural resource management bodies (NRM), Indigenous representatives and representatives from peak national natural resource management-related organisations such as the Australian Landcare Council
- received a report on progress in implementing regional natural resource management through the National Action Plan for Salinity and Water Quality (NAP) and the Natural Heritage Trust, including completion of all regional NRM plans for the NAP in New South Wales, Victoria and South Australia
- received the NAP Annual Report for 2002–2003
- agreed to the publication of the first annual report from CSIRO and the Bureau of Meteorology providing scientific advice on natural resource management, and asked Standing Committee to provide a report on its review of the principal recommendations

- received a presentation on the recent Bush Tender trial in Victoria, which used a price auction mechanism to fund native vegetation and threatened species management on private land
- noted that the Bush Tender trial has revealed that the auction approach delivered 25 per cent more native vegetation than a grants (fixed price) scheme
- agreed to review and update the National Framework for the Management and Monitoring of Australia's Native Vegetation, originally endorsed by Council in 2001
- announced the release of a Review of Salinity Mapping Methods in the Australian Context (including a plain language User Guide and a comprehensive Technical Report), conducted under the auspices of the Australian Academies of Science, and Technological Science and Engineering, involving many eminent Australian salinity scientists
- considered the significant and growing threat posed by invasive species (including weeds, pests and diseases) to Australian agriculture and the environment
- noted that significant achievements have been made in combatting invasive species through stringent border controls and implementation of the National Weeds Strategy
- agreed that there remained a need to develop a robust national framework for a coordinated and strategic approach to preventing significant new invasive species establishing in Australia, and to reducing the impacts of major pests and weeds already present, and noted that Standing Committee will investigate and report on options for a national framework, to be prepared in conjunction with the Primary Industries Standing Committee
- reviewed progress of the Red Imported Fire Ants Eradication Program
- agreed to provide funding for management of four new serious weed incursions in Queensland
- directed the Vertebrate Pests Committee to investigate options for a national approach to eradicate cane toads
- discussed initiatives underway to combat crime in Australian fisheries and waters, including abalone poaching
- endorsed actions, strategies and timeframes of the draft National Biodiversity and Climate Change Action Plan, which will be the first broad framework document to support adaptation to climate change in Australia
- endorsed a National Shark Plan to address shark conservation and management issues
- endorsed its first annual report on implementation of actions to address Indigenous reconciliation by NRM agencies in Australia
- noted the review of insurance for landcare and related programs, and agreed to terms of reference for a Standing Committee review of insurance for NRM groups
- noted progress in development of the National Water Initiative
- received a progress report on a number of case studies into areas of significant natural resource decline, and noted that Standing Committee will develop recommendations for Council, including a national program to address biodiversity decline
- expressed support for a collaborative arrangement between the Wideness Society and South Australia, by agreeing that neighbouring states will share data that will assist South Australia to develop cross-border data sets.

Federal Budget 2004–05

In the Federal Budget for 2004–2005, handed down on 11 May 2004, the Government announced that total spending on the environment across all portfolios would rise to a record level of about \$2.4 billion—about \$400 million more than estimated expenditure in 2003–2004.

Highlights include the following:

- extending the life of the Natural Heritage Trust to the end of the forward estimates in 2007–08 by the provision of a further \$300 million in 2007–08
- an increase of \$99 million in spending on the Natural Heritage Trust and the National Action Plan for Salinity and Water Quality in 2004–05—an increase from \$364 million in 2003–04 to \$463 million in 2004–05
- provision of \$200 million for the Australian Government's contribution to the *Living Murray Initiative*, previously announced in the 2003–04 Additional Estimates
- an additional \$30.3 million for protection of the Great Barrier Reef, including funding to implement the rezoning plan from 1 July 2004 and for a structural adjustment package for displaced fishers and communities following the new zoning plan; for enforcement and compliance activities; for a Water Quality and Monitoring Program; and for the fight against the invasive Crown Thorns Starfish.
- expenditure of \$89 million over the next two financial years to enhance Australia's patrol and fisheries protection capability in the Southern Ocean
- an increase in climate change funding of \$70 million to \$463 million over the next four years, including an increase of \$19.5 million to \$116.6 million for the Australian Greenhouse Office in 2004–05
- extending the life of the National Landcare Program for two more years, by provision of an additional \$80 million (\$40 million in 2006–07 and 2007–08).

Energy White Paper Released

On 15 June 2004 the Government released its Energy White Paper, *Securing Australia's Energy Future*. The paper sets out proposals for:

- removing the excise on diesel and petrol for off-road use, to be phased in between 2006 and 2013
- linking of fuel excise credits to environmental performance criteria as part of the road user charging arrangements
- a \$500 million Low Emissions Technology Fund to stimulate an expected \$1.5 billion of expenditure on new technologies for reducing greenhouse gas emissions
- \$100 million for the Renewable Energy Development initiative to assist the development of renewable energy technologies with commercial potential
- \$20 million for the Advanced Electricity Storage Technologies program
- \$14 million for the Wind Forecasting Capability program
- \$75 million for Solar Cities trials of solar energy systems in typical urban settings
- a requirement for proponents of large energy resource development projects to demonstrate effective management of their greenhouse gas emissions through membership of the Greenhouse Challenge Program.

The Government has rejected calls for an increase in the Mandatory Renewable Energy Target (MRET), arguing that this was not justified and would raise electricity prices for families and businesses. The Minister for the Environment and Heritage, Dr David Kemp, said that increasing the MRET was not needed either to enable Australia to achieve its Kyoto target or to position itself for longer-term greenhouse gas abatement. Australia, he said, is already one of the few developed countries which is on track to achieve its Kyoto target for greenhouse gas abatement. Dr Kemp said that a five per cent target for compulsory renewable energy purchases would cost \$11.5 billion in lost economic growth.

The MRET is being phased in over the period 2001 to 2001, and requires electricity retailers and other large purchasers of electricity to source an additional 2 per cent of their electricity purchases from renewable or specified waste-product sources by 2010.

The renewable energy industry has criticised the White Paper for providing insufficient support for the industry. Environmental groups have criticised the removal of excise duty and support for fossil fuels. Farmers and miners have welcomed the removal of excise duty.

Federal Court Nuclear Waste Site Decision

In a decision handed down on 24 June 2004 the Full Court of the Federal Court set aside the compulsory acquisition by the Commonwealth of land near Woomera identified as the site for a low-level nuclear waste repository. The Court upheld the South Australian Government's position that there was no justification for the Commonwealth to use, for the first time, a power of urgent land acquisition.

The Commonwealth acquired the land in 2003 after it became aware of moves by the South Australian Government to designate the land as a public park in order to avoid having the repository built there.

The Commonwealth has indicated its intention to appeal against the Federal Court's decision in the High Court.

EPBC Act Developments

Federal Court: Minister for the Environment and Heritage v Greentree (No 2) (with Corrigendum dated 22 June 2004) [2004] FCA 741 (11 June 2004)

In the Federal Court on 11 June 2004 the Hon Justice Sackville found that Moree wheat farmer, Mr Ron Greentree, had contravened s 16(1) of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) by clearing 100 hectares of land on his property. The cleared land is one of four wetlands in the Gwydir region listed under the Ramsar Convention as internationally significant for waterbird habitat and biodiversity conservation. The Minister for the Environment and Heritage brought the action against Mr Greentree after WWF Australia provided information and aerial photographs of the cleared land. Justice Sackville directed the Minister to make further submissions on penalty and costs and in relation to the matter of injunctive relief and possible remediation orders.

See also Case Notes below – 'Court Decisions protects Ramsar wetland'

Seismic Operations and Larger Cetaceans—Public Seminars and Invitation to Comment

The Department of the Environment and Heritage has begun a review of the *Guidelines on the Application of the Environment Protection and Biodiversity Conservation Act to Interactions Between Offshore Seismic Operations and Larger Cetaceans*. The Department is conducting public consultations in relation to draft revised guidelines, including public seminars in Perth and Melbourne in July. Further information is available at the Department's website www.deh.gov.au.

Banned Wildlife and Plant Products Seized in Raids on Complementary Medicine Outlets

The Department of the Environment and Heritage, the Australian Customs Service and the Australian Federal Police have combined in an operation to make one of Australia's largest seizures of endangered wildlife and plant products used in complementary medicine. The raids were carried out on five complementary medicine outlets in Sydney, Melbourne and Brisbane on 18 June 2004. The officers conducting the raids found large quantities of illegal imports derived from endangered species that are prohibited under the EPBC Act. These included products labelled as containing bear bile, tiger bone,

rhinoceros horn and parts from other endangered animals and plants. The products are from species listed under the Convention on International Trade in Endangered Species of Wildlife and Flora (CITES). The growing popularity of complementary medicines has increased the demand for endangered wildlife species traditionally used for medicinal purposes.

Fisheries Legislation Amendments

The *Fisheries Legislation Amendment (Compliance and Deterrence Measures and Other Matters) Act 2004* received assent on 1 April 2004. The Act amends the *Fisheries Administration Act 1991* and the *Fisheries Management Act 1991* in relation to deterrence and compliance regimes to deter foreign fishers from illegally fishing in Australian waters; the Australian Fisheries Management Authority's management of Commonwealth fisheries resources; and ecologically sustainable management of Commonwealth fisheries.

The *Fisheries Legislation Amendment (High Seas Fishing Activities and Other Matters) Act 2004* received assent on 2 April 2004. The Act amends the *Fisheries Administration Act 1991* and the *Fisheries Management Act 1991* to give effect to Australia's obligations under the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas. The Act also amends the *Fisheries Management Act 1991* to strengthen the Australian Fisheries Management Authority's ability to deliver and enforce fisheries management in Commonwealth fisheries.

Industrial Chemicals Legislation Amendments

The Industrial Chemicals (Notification and Assessment) Amendment (Low Regulatory Concern Chemicals) Bill 2004 has passed both houses. The bill amends the *Industrial Chemicals (Notification and Assessment) Act 1989* in relation to: low regulatory concern chemicals, including new permit categories and exemptions, annual reporting and record keeping obligations; administrative processes for some permit renewals. The bill also makes miscellaneous and consequential amendments in relation to: the definition of 'cosmetics'; inclusion of certain material on the Australian Inventory of Chemical Substances; and mandatory company registration for chemical introducers. The bill contains application, saving and transitional provisions.

Northern Oceans Office Opens

The National Oceans Office has opened an office in Cairns and appointed an Oceans Liaison Officer. The officer has been working with government, industry and community stakeholders in Far North Queensland as part of the Australian Government's regional marine planning process in Northern Australia.

Australia's second regional marine plan is being developed in Northern Australia for the waters of Torres Strait, the Gulf of Carpentaria and the eastern Arafura Sea.

The opening of an office in Cairns will provide a regional presence in the area stretching from Torres Strait, Western Cape York and Gulf of Carpentaria to the State Border (including Mornington and Bentinck Island). Another National Oceans Office employee based in Darwin covers the remainder of the Northern Planning Area.

Office of the Gene Technology Regulator—Cost Recovery

The Office of the Gene Technology Regulator (OGTR) provides support to the Gene Technology Regulator in the administration of the *Gene Technology Act 2000* and corresponding state legislation. At the time the Act was passed the Government directed that a full cost recovery regime be introduced for users of OGTR services. In light of an independent review in 2002 which concluded that the fragility of the industry would not support full cost recovery, the Government agreed in 2003 to fund the operation of the gene technology regulatory system for a further two years, allowing time for further consultation with stakeholders.

Acumen Alliance has been engaged by the OGTR to assist in determining the most appropriate cost recovery regime that would be consistent with Government policy and which could be implemented by 1 July 2005. This involves consultation with those who have an interest in cost recovery of OGTR services. Interested individuals and organisations are invited to respond to an electronic survey on this matter, which is available from <http://asr3.com/ogtr>.

Vegetation Clearing Amendments

The most significant change in Queensland environmental law during the last quarter has been the implementation of an election commitment, through major amendments to the *Vegetation Management Act 1999*. The *Vegetation and Other Legislation Amendment Act 2004 (Qld)* commenced 21 May 2004.

A moratorium on vegetation clearing (other than exempt clearing), which had been in place from May 2003, has now been lifted. This re-activates the original framework under the *Integrated Planning Act 1997*, requiring development approval for operational work to clear native vegetation on freehold land (subject to exemptions), while extending the scheme to include non-freehold land. The definition of “native vegetation” has been slightly amended, to exempt “non-woody herbage”, although it is not clear exactly what species this term is intended to cover.

The list of exceptions has expanded overall, although the comparisons are not immediately apparent because the order has changed. For example, the definition for the exception of “essential management” has been expanded. It still includes fire breaks, safety protection, infrastructure maintenance, gardens and orchards, but it will now also include various other fire safety measures (eg, to reduce hazardous fuel load), further specific items of infrastructure and sourcing of construction timber. There is also a major new category of exceptions for “specified activities”, which covers various fire safety measures, electricity lines, State-controlled roads, rail corridors and forestry activities, as well as clearing under a development approval for material change of use or reconfiguration of a lot, where the approval was given after the commencement of the amendments and concurrence has been given under the vegetation management jurisdiction.

Conversely, the exception for “routine management” has been restricted in that fences and roads are now limited to 10m, while other infrastructure is restricted to 2 ha, rather than 5 ha. Another major restriction is that the exception for urban areas now excludes rural residential development.

If none of the exceptions are relevant, a development application for operational work can be lodged, which is restricted to various purposes. The most frequently used item will probably be where the clearing is a natural and ordinary consequence of other assessable development for which a development application was made before 16 May 2003.

There is also a new regime for broadscale applications, ballots and compensation, essentially intended for farmers.

The amending legislation has many oddities and apparently unnecessary drafting complexities. One example is the burying of the most straightforward route to approval, by way of a material change of use or reconfiguration approval subject to concurrence, within the definition of “specified activities”, falling under one of the exemptions to the requirement for operational work approval. Another example is the duplication of the exemption for mining and petroleum activities (particularly in the context that mining and petroleum activities were originally supposed to have been able to rely on a separate overall exemption from the development approval system), contrasted with the express provision for extractive industry to obtain operational work approval (subject to normal exemptions).

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

In summary:

- This legislation repeals and replaces the *Cultural Record (Landscapes Queensland and Queensland Estates Act) 1987 (Qld)*.
- 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 abolishes 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 and Mines to administer the new legislation, and the Land and Resources Tribunal will deal with appeals.

Biodiscovery Bill 2004 (Qld)

This bill, which received its second reading speech 18 May 2004, proposes to give effect to the Convention on Biological Diversity, signed on 5 June 1992 at the Rio de Janeiro Earth Summit, which has previously been ratified by the Commonwealth.

The main objective is to establish the authority for the Queensland Government to regulate the collection of native biological material on all State land and in Queensland waters for the purposes of analysing the molecular, biochemical or genetic information about native biological material for the purpose of commercialising the material (biodiscovery research). This will involve a system for authorising collection of native biological resources for biodiscovery research. The Bill would ensure access by biodiscovery entities to “minimal quantities” (as defined) of native biological resources on State land or in Queensland waters.

According to the Explanatory Memorandum, the Bill does not propose to alter any access rights of landholders.

Geothermal Exploration Act 2004 (Qld)

This new legislation received assent on 31 May 2004. All geothermal energy on or below the surface of any land in the State is declared as the property of the State.

The purposes of the legislation are described as follows:

- (a) *manage access to the State’s geothermal resources for the benefit of all Queenslanders;*
- (b) *encourage and facilitate the efficient and responsible exploration for the State’s geothermal resources;*
- (c) *provide an effective and efficient regulatory system for geothermal exploration;*
- (d) *enhance knowledge of the State’s geothermal resources;*
- (e) *ensure geothermal exploration is carried out in a way that minimises land use conflict;*
- (f) *facilitate constructive consultation with, and appropriate compensation for, persons adversely affected by geothermal exploration;*
- (g) *encourage an appropriate level of competition in geothermal exploration;*
- (h) *encourage responsible land care management in the carrying out of geothermal exploration;*
- (i) *promote the safety of persons involved in geothermal exploration.*

The legislation does not affect the power under the *Mineral Resources Act 1989* to grant or renew a mining tenement over land in the area of a geothermal exploration permit. However, if the mining tenement is a prospecting permit, mineral development licence or exploration permit, an activity can not be carried out under the tenement if—

“(a) carrying out the activity adversely affects the carrying out of geothermal exploration under this Act; and (b) the geothermal exploration has already started.”

In a media release on 13 April 2004, the Minister for Natural Resources, Mines and Energy, Stephen Robertson commented that the bill “will provide a timely, effective and efficient regime to allow for the commencement of geothermal exploration in Queensland. It will give industry the certainty to invest in exploration as well as provide a form of tenure and regulatory structure to allow geothermal exploration to commence as soon as possible. The geothermal exploration regime will be part of Queensland’s Cleaner Energy Policy to reduce greenhouse gases by diversifying Queensland’s energy mix towards the greater use of gas and renewable sources.”

In the same media release, the Premier described the legislation as potentially making Queensland the “hot rock capital of Australia”.

Amendments to the Nature Conservation Act 1992 (Qld)

The Nature Conservation Amendment Act 2004 (Qld) received assent 24 June 2004, but had not yet proclaimed at the time of this update.

The Explanatory Memorandum says that the policy objective of the Bill is to make the hierarchy of categories of protected wildlife in the *Nature Conservation Act 1992* (NCA) more consistent with those used by the International Union for the Conservation of Nature (IUCN).

The amending legislation actually derives from an election commitment in 1998 (rather than the most recent election) to implement the IUCN system. The reason for the delay is unexplained, although it appears that extensive consultation was involved.

In summary:

- a new category of protected wildlife, to be known as “Near Threatened” wildlife will be established – this category will replace the existing Rare category over time;
- the names of two NCA wildlife categories will be replaced with names that are consistent with the IUCN terminology i.e. Common” to “Least Concern”; and Presumed Extinct” to “Extinct in the Wild”; and
- the criteria for the categories will be revised so that they are consistent with the IUCN criteria – based on three factors: population size, area of distribution and rate of decline.

No species will change status directly through these amendments. Following commencement of the amending legislation, consequential amendments to the *Nature Conservation Regulation 1994*, the *Nature Conservation (Wildlife) Regulation 1994* and the *Nature Conservation (Protected Plants) Conservation Plan 2000* are being made to ensure consistency with the amendments to the NCA, and species may then be re-classified.

Natural Resources and Other Legislation Amendment Act 2004 (QLD)

This legislation amends a long list of legislation, and received assent on 6 May 2004. The context for this amendment package is that there was already a formal structure for freehold landholders to enter agreements (in the form of *profits a prendre*) relating to “natural resource products” in trees, including carbon sequestration. This Act will enable those provisions to extend to Crown leasehold land, where the land is able to be used for agricultural or timber plantation purposes.

In addition, a minor amendment in the Schedule at last updates the *Mineral Resources Act 1989* so that it refers to the *Integrated Planning Act 1997*, instead of the legislation it repealed - a sign of just how long it takes for mining legislation to catch up with the replacement of planning legislation in Queensland.

Water Policy Principles

The Minister for Natural Resources, Mines and Energy, Stephen Robertson, issued a media release on 11 April, announcing new policy principles for unallocated water. The principles cover:

- (a) *How much of the unallocated water should be released*
- (b) *When a release should occur*
- (c) *The form in which the water should be released*
- (d) *How that water should be released.*

Guidelines for the Safe Use of Recycled Water

The Queensland EPA has issued draft Guidelines for the Safe Use of Recycled Water on 5 April 2004. The EPA describes the purposes of the draft Guidelines as being to encourage and support water recycling that is safe, environmentally sustainable, cost-effective and has the support of local communities. In addition the Guidelines are designed to provide guidance on water recycling that is appropriate to Queensland conditions and to provide a way that other resources can support water recycling. The draft is available on the EPA's website at www.epa.qld.gov.au/register/p01212aa.doc.

VICTORIA

Editor: Jennifer Slatter

Sustainability Fund

The Sustainability Fund (the Fund) has been established to provide a resource to support projects and initiatives that will foster the environmentally sustainable use of our resources and best practices in waste management. The Fund is designed to provide a resource that can be used to help build the capacity of Victorian business, local government, non-government organisations and the broader community to harness opportunities engendered by Victoria's sustainability agenda.

The Fund is jointly administered by the Minister for Environment and the Treasurer and can be accessed for a range of sustainability projects and initiatives. Potential applicants are encouraged to read the [Sustainability Fund Guidelines](#) prior to making a grant application. Expenditure of Fund monies may take the form of grants to a wide range of recipients, including community groups, councils, non-government organisations and businesses. In addition, the Minister and Treasurer may provide funding for strategic projects in line with the purposes of the Fund.

The strategic purposes of the Fund will be defined from time to time by the Minister and Treasurer through a [Priority Statement](#). This statement will provide a targeted focus for fund allocations for the life of the statement and all potential applicants for funding should ensure that their application sits within the boundaries defined by the relevant priority statement.

In addition, an independent advisory panel is being established to make recommendations to the Minister and Treasurer in relation to the application of Fund monies. The Panel will provide advice to the Ministers, ensuring that they have access to appropriate information and independent advice that will enable them to make allocations that will maximise the benefit of the Fund for all Victorians.

If you would like to receive a copy of the Sustainability Fund Guidelines or draft Priority Statement, please contact EPA Victoria on (03) 9695 2813.

For more information about the Sustainability Fund, please contact the Secretariat at:
 Secretariat, Sustainability Fund, EPA Victoria, GPO Box 4395QQ, Melbourne VIC 3001
 Telephone: (03) 9695 2685, Email: sustainability.fund@epa.vic.gov.au

New domestic ballast water management arrangements for Victoria

On 15 April 2004, Environment Minister John Thwaites announced Victorian ports would be the first in Australia to have a domestic ballast water management system. "Victoria is taking a lead on this issue, because we must stop the spread of existing marine pests and prevent new invasions," Mr Thwaites said.

In making the announcement the Minister said, "Marine pests such as the Northern Pacific Seastar are harming the ecosystems of Port Phillip Bay and Corio Bay and threaten industries that rely on our unique marine environment, as well as affecting recreational fishermen and divers."

The new *Waste Management Policy (Ships' Ballast Water)* (available from Craftsman Press - the Victorian Government Gazette printer) will come into force on 1 July 2004, to be administered by EPA Victoria. From this date, ships must not discharge any high-risk ballast water into Victorian State waters. To avoid discharges of high-risk ballast water, ships must either discharge their ballast safely out at sea or keep high risk ballast water on board. All ships will be required to provide EPA with accurate information on the status and risk of any ballast water contained on their ships.

The development of the Policy included extensive consultation with the ports and shipping industry and this work will continue during implementation of the Policy. During May 2004, EPA will be contacting ships, ships agents and ports to ensure that they have all the necessary information and documentation to enable them to manage the risks of ballast water and to comply with the Policy when it comes into force.

The new Waste management policy will complement the arrangements that Australian Quarantine and Inspection Service (AQIS) has in place for international ballast water.

To identify how ships can meet their ballast water obligations set out in the Policy, EPA Victoria developed the *Protocol for Environmental Management - Domestic Ballast Water Management in Victorian State Waters* (available on EPA's website: www.epa.vic.gov.au). The Protocol for Environmental Management (PEM) provides information to assist the shipping industry assess and manage the risks associated with domestic ballast water management.

Victoria, with the cooperation and support of government and industry partners, has already successfully completed a trial of the domestic ballast management system (for both domestic and international ballast) at the Port of Hastings. The domestic ballast aspect of the arrangements trialled at Hastings will now be applied to protect the other Victorian commercial ports, including Port of Melbourne, Port of Portland and Port of Geelong.

For further information about these arrangements, please contact:
Ballast Water Officer, EPA Victoria, GPO Box 4395QQ, Melbourne VIC 3001
Telephone: 03 9695 2547, Email: ballast.water@epa.vic.gov.au

Guideline for Environmental Management: Biosolids Land Application

Biosolids (appropriately treated sewage sludge) can make an important contribution to sustainable environmental management, through the return of organic material, trace elements, moisture and nutrients to our soils. The Guideline for Environmental Management: Biosolids Land Application (available on EPA's website: www.epa.vic.gov.au) enables this beneficial use of biosolids, by providing a management framework that ensures any chemical and microbiological risks are appropriately managed. The drafting of the guideline has been supported by a best practice review of International and Australian biosolids management approaches and broad consultation on proposed guidance in November 2002 and 2000.

Queries and comments on the guideline should be sent to your EPA regional office or:
Project Manager, Biosolids Management Guideline, EPA Victoria, GPO Box 4395QQ, Melbourne, VIC 3001.

Water Management Amendment Act 2004

The *Water Management Amendment Act 2004* (NSW) commenced on 1 July 2004. The amending Act contains substantial changes which were required to implement the new licensing and approvals system for water including amendments relating to:

- the duration and extension of management plans;
- the judicial review of management plans;
- domestic and stock rights and water usage;
- temporary water restrictions;
- wasting water;
- the water access licence register;
- dealings and other matters that must be recorded in the access register;
- the registration of security interests and caveats;
- searching of the access register;
- compensation; and
- the transfer of access licences.

In addition, a new *Water Management (General) Regulation 2004* (NSW) contains various procedural matters including specific exemptions from the need to hold an access licence or an approval in certain circumstances.

The implementation of the 31 water sharing plans and the licensing and approval provisions of the Act on 1 July 2004 could affect water management arrangements which apply to you. From this date water licences, which have previously been an incident of land tenure, have become separate licences held in the Water Access Licence Register administered by the Department of Lands LPI Division on behalf of the Department of Infrastructure, Planning and Natural Resources ("DIPNR"). If land is within an area covered by an operational water sharing plan, the licensing arrangements will now be determined by the new Act.

To determine whether land is within a water sharing plan area, one should review the new DIPNR website at: www.dipnr.nsw.gov.au/water (see attached example), or contact DIPNR directly. If land is outside these areas, it is important to remember that the *Water Act 1912* (NSW) may still apply.

State Environmental Planning Policy (Seniors Living) 2004

State Environmental Planning Policy (Seniors Living) 2004 ("the Seniors SEPP") which was introduced on 31 March 2004 repeals State Environmental Planning Policy No. 5 – Housing for Older People or People with a Disability ("SEPP5"). Savings and Transitional provisions mean that SEPP 5 continues to apply to applications made under that policy before 18 February 2004. After that, the Seniors SEPP applies.

The aims of the Seniors SEPP are consistent with those of SEPP 5, to increase the supply and diversity of housing for seniors and people with disability, make efficient use of existing infrastructure and be of good design. The main difference between the two policies is that the types of development permitted under the Seniors SEPP are clearly identified. The Seniors SEPP permits development for the following purposes:

Residential care facilities – accommodation where there are meal and cleaning services, personal or nursing care services or both and appropriate staffing and equipment to provide that care.

Hostels – accommodation where there are meals, laundering, cleaning and other facilities on a shared basis and at least one staff member on site 24 hours a day to provide management services.

Self contained dwellings – self contained for cooking, sleeping, washing but where those facilities (washing etc) may be provided on a shared basis.

In fill self-care housing – seniors housing on land zoned primarily for urban purposes that consists of 2 or more self contained dwellings with no services.

Serviced self care housing – self contained dwellings where services are provided on site.

Vertical Villages – there are additional provisions for development on land zoned residential or commercial which permit development with a density of 1:1 (expressed as a floor space ratio) provided there are on-site services and 10% of the housing in the development is affordable.

The Seniors SEPP applies to land zoned primarily for urban purposes or land adjoining that zoned primarily for urban purposes and on which development for dwelling houses, residential flat buildings, hospitals and special uses (including churches, convents and educational establishments) is permissible. This is consistent with SEPP 5. However, the only types of housing which are permissible with consent on land adjoining that zoned urban are serviced self care housing, hostels and residential care facilities. Accordingly, self contained dwellings and in fill self-care housing are only permissible on land zoned for urban purposes. In addition, for serviced self care housing to be approved on land adjoining that zoned urban, the consent authority must be satisfied that the residents will have reasonable access to home delivered meals, care and assistance with housework.

The Seniors SEPP specifies that development allowed under it must be for the accommodation of seniors (people aged 55 years and over) and disabled people and their carers, people who live with seniors and disabled people and staff employed to administer and provide services to the seniors and disabled people will occupy the development. The Seniors SEPP requires councils to impose a condition of consent in relation to the occupancy of the development. It will be interesting to see whether this mandatory condition is complied with in the future and how seriously local councils enforce compliance with this condition.

The design of development carried out under the Seniors SEPP is dealt with in great detail. Division 2, Part 3, Chapter 3 deals with the design principles which should be followed eg amenity and streetscape, privacy, solar access, stormwater, crime prevention, accessibility and waste management. Part 4, Chapter 3 sets out the relevant development standards. The standards are very detailed and identify requirements like sizes of car parks, width of doorways, compliance with Australian Standards and requirements for bathrooms.

It will be interesting to see how the Seniors Policy impacts on local development. Although the policy is not radically different to SEPP 5, there are enough changes to suggest that differing interpretations by developers and local councils may result in conflict and we should see some interesting decisions in relation to the Seniors SEPP coming out of the Land & Environment Court in the future.

WESTERN AUSTRALIA

Editor: Sally Marsh and Lewis McDonald

Environmental Harm and Clearing Laws Commence

The remaining sections of the *Environmental Protection Amendment Act 2003* (WA) came into operation on 8 July 2004. The new laws include the offences of serious and material environmental harm, the new clearing regime and the requirements to advertise works approval and licence applications.

The laws were awaiting finalisation of the regulations to support the clearing regime. These have now been finalised and were amended substantially since the draft (which we described in the last NELR). Some new exemptions now apply and significant changes have been made to others. For example, in many cases clearing is now only exempt to the extent that no more than 1 ha is cleared on a property within any financial year. Codes of practice may be prepared in the coming months to replace some of the temporary exemptions that apply under the regulations.

The effect of the transitional provisions relating to the 'Notice of Intent' procedure under the (now repealed) Soil and Land Conservation Act is that any notices of intent to clear that were issued in the 90 days before 8 July 2004 are taken to be applications for clearing permits under the new regime. Further, the commencement of these laws will enable the Department of Environment (DoE) to take enforcement action in respect of any unlawful clearing that occurred since 26 June 2002. Related amendments to the *Country Areas Water Supply (Clearing Licence) Regulations 1981* (WA) also commenced on 8 July 2004.

Controlled Waste Regulations

The *Environmental Protection (Controlled Waste) Regulations 2004* (WA) commenced on 1 July 2004, imposing a new regime on controlled waste generators, carriers and disposal site operators. The regulations repeal the *Environmental Protection (Controlled Waste) Regulations 2001* (WA).

The regulations apply to all liquid wastes and all wastes that are not suitable for disposal at a class I, II or III landfill facility. Specific obligations apply to the disposal of asbestos. Central to the new regulations, the DoE has developed a new internet based waste tracking system which will gather data on the volumes and types of wastes generated, the sources of the waste, the transporter and the disposal location.

Waste generators and holders have several obligations under the regulations. They include:

- to ensure wastes they produce are transported by a carrier who holds the appropriate licences;
- to ensure the container is fit for transporting the waste;
- to describe the nature of the controlled waste to be transported; and
- to keep receipts issued by the carrier or driver for 3 years.

Waste holders may be required to provide information to the DoE about the nature and amount of controlled wastes they hold. The DoE may then require the holder to cause the waste to be disposed of in a particular manner.

Carriers of controlled wastes, drivers of vehicles and the vehicles themselves must be licensed to transport controlled wastes. Carriers and drivers must have a tracking number for controlled wastes they are transporting and have obligations to ensure wastes are transported safely and in a manner that will prevent spillage or other discharge. Carriers and drivers must ensure the waste generator and the disposal site operator are given the waste tracking number and the waste tracking form. Drivers may only dispose of the controlled waste at the place specified on the tracking form or otherwise approved by the DoE. Failure to do so is prescribed to be pollution under the *Environmental Protection Act 1986* (WA).

Offences under the regulations carry a penalty of \$5,000.

Other Legislative Changes

Briefly, other new Acts, Bills and Regulations include:

- the *Dangerous Goods Safety Act 2004* (WA) was assented to on 10/06/2004. This Act establishes a new regime for the regulation of dangerous goods in WA and replaces the previous legislation, including the *Dangerous Goods (Transport) Act 1998* (WA) and the *Explosives and Dangerous Goods Act 1961* (WA);
- the *Reserves (National Parks, Conservation Parks and Nature Reserves) Bill 2004* (WA) was introduced to the Legislative Assembly. The bill aims to create 9 new National Parks in WA's south-west forests and make other changes to National Parks;
- the *Environmental Protection Amendment Regulations 2004* (WA), which amend the *Environmental Protection Regulations 1987* (WA) commenced. The amendments relate to licenses and licence fees for waste discharge; and
- the *Planning and Development (Consequential and Transitional Provisions) Bill 2004* (WA) was introduced to Parliament. The bill aims to consolidate planning legislation in WA into a single Act.

New Planning Bulletins – Wind farms and Acid Sulfate Soils

The Western Australian Planning Commission (WAPC) has released two new planning bulletins which relate to environmental issues. Planning Bulletin Number 64 provides advice and guidance on issues to be taken into account in planning issues that relate to acid sulfate soils. It will require site assessments to

determine whether and to what extent acid sulfate soils are present and an acid sulfate soil management plan to identify impacts and demonstrate how they will be managed.

Planning Bulletin Number 67 relates to wind farm developments. It was released in May 2004 and replaces Draft Bulletin Number 59. The bulletin describes matters that should be taken account when assessing wind farm development applications and notes that those issues should be balanced against the benefits of wind energy. In assessing a development application, the WAPC is likely to require a site analysis, a wind farm design statement and an impact assessment which describes how the relevant impacts will be managed.

The bulletins are available on the WAPC's website at: <http://www.wapc.wa.gov.au/cgi-bin/index.cgi?page=/publications/policies/Policies.htm>

New EPA Guidance Statements

The Environmental Protection Authority (EPA) has released the following final guidance statements:

- Assessment of Aboriginal Heritage;
- Separation Distances Between Industrial and Sensitive Land Uses;
- Benthic Primary Producer Habitat Protection for Western Australia's Marine Environment;
- Terrestrial Flora and Vegetation Surveys for Environmental Impact Assessment in Western Australia; and
- Terrestrial Fauna Surveys for Environmental Impact Assessment in Western Australia.

The statements are available on the EPA's website at:
<http://www.epa.wa.gov.au/template.asp?ID=14&area=EIA&Cat=Guidance+Statements>

Appeals to Environmental Conditions

The Minister for Environment has issued a media statement which indicates she has requested amendments to the *Environmental Protection Act 1986* (WA) to be drafted to enable third parties to appeal EPA advice and recommendations to the Minister on changes to environmental conditions.

Cleaner Production Statement Action Plan

The DoE has released its Cleaner Production Statement Action Plan which outlines the cleaner production initiatives the DoE is undertaking. These include incorporating cleaner production initiatives into policies, office practices, the licensing and regulatory regime, environmental impact assessment and Pt IV approvals. The report is available at: http://www.environ.wa.gov.au/downloads/2661_CPAP_2005.pdf

Brickwork licence condition appeals

On 24 May 2004, the Environment Minister determined various appeals relating to Metro Brick's and Midland Brick's licence conditions for their Perth operations. The appeals were by the two brickwork operators and Hazelmere Progress Association and related to emissions limits, pollution control equipment, testing requirements, term of licences, monitoring methods, reporting methods, modelling estimates, and stormwater drainage.

The Department of Environment (DoE) reviewed the licence conditions for brickwork operators following the release of the Brickworks Licensing Policy (the **Policy**) in October 2003. The Policy arose from a 6 month review of the environmental impact of brickworks in the Swan Valley, which concluded that "overall, there is a need to change the way in which the brickworks industry is regulated, with a focus on significantly reducing emissions and improving emission monitoring". The Policy requires emissions of

Hydrogen Chloride and Sulphur Dioxide from the brickworks to be reduced. The Policy and a summary of the review are available at: http://www.environ.wa.gov.au/downloads/1893_SVBrickworks_0310.pdf

As a result, new licence conditions were imposed on brickwork operators in the Swan Valley. The brickworks operators appealed against amendments to their licences on a number of grounds, including that certain amendments were unreasonable or unworkable.

The Minister's determinations of the appeals varied for Midland Brick and Metro Brick and included a requirement for an expanded monitoring program for emissions at certain sites, and a request for the DoE to work with the brickworks operators to investigate and develop such a program. The Minister's determination requires the development of an expanded program to involve stakeholder consultation, particularly in relation to the location of ambient monitors and the reporting of data.

The Swan Valley Regional Reference Group, which is being implemented by the DoE, will assist in the development and implementation of this expanded monitoring program.

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CALM Prosecutions Policy

A review has been conducted of the Department of Conservation and Land Management's prosecution policy. The Minister stated that the review did not find major flaws in the existing policy, but has resulted in the establishment of a prosecutions advisory panel to consider public interest issues. The findings of the review are available at: http://www.naturebase.net/prosecutions_review_report.pdf

New Access Rules for Renewable Energy Generators

New access rules have come into operation which will provide more opportunities for renewable energy to be sold on to the Western Australian electricity grid. The rules will assist to make renewable energy projects more financially viable by reducing balancing costs. Typically, the balancing costs for renewable energy generators are higher due to the variability of their power supply. They are charged heavily when they need back-up power from Western Power and are paid less when they sell excess power in to the grid. The new rules seek to equalise these charges.

Funding to improve project approvals

The Minister for State Development, Clive Brown has announced \$3.9 million in new funding to strengthen the approvals process for new industrial and resources projects, including some funding to the Environmental Protection Authority. An interagency group will be established to implement policies to improve the approvals system. It will implement the Scoping Framework for Project Development Approvals which has been developed as a result of key recommendations from the Keating Review (available at <http://www.premier.wa.gov.au/main.cfm?MinId=01&Section=0110>).

Conservation Lands Tax Exemption

As of 1 July 2004, the *Revenue Laws Amendment and Repeal Act 2004* (WA) amended the *Land Tax Assessment Act 2002* (WA) to provide that land used solely or principally for the conservation of native vegetation, and the subject of a conservation covenant, is exempt from land tax. The land tax exemption is aimed at encouraging, by way of financial incentive, private landowners to commit to preserving and managing environmentally important areas of native bushland.

To be eligible for the exemption, the land must be the subject of a permanent conservation covenant that restricts or prohibits certain activities on the land that could degrade the environmental value of the land and, if possible, is registered on the title to the land. The conservation covenant must be approved by, or entered into under a program approved by, the Minister for Environment and Heritage. This encompasses

conservation covenants administered by the Department of Conservation and Land Management and the National Trust of Australia (WA), which cover lands of high nature conservation value, and involve stewardship of the land to ensure appropriate management in the long-term.

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Emergency Listing of Burrup Rock Art Precinct

On 1 January 2004, amendments to the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) created a new regime for protection of places with heritage value to Australia. The “heritage value” of a place includes the natural and cultural environment of the place, having aesthetic, historic, scientific or social significance, or other significance for current and future generations of Australians. The Act provides for both ordinary and emergency listing procedures for places nominated that have national heritage values.

Earlier this year, pursuant to the emergency listing procedure, the National Trust of Australia nominated the Dampier Rock Art Precinct as a national heritage place, the national heritage values of which were under threat of destruction. The Precinct included the Burrup Peninsula, an important industrial area.

The Minister for Environment and Heritage had 10 days in which to decide whether to accept the nomination and include the Precinct on the National Heritage List, or to reject the nomination on the grounds that it was frivolous, vexatious and not made in good faith. However the nomination was withdrawn before the 10 day period expired.

If the Precinct and its national heritage values had been included on the National Heritage List, they would have been considered a matter of national environmental significance under the Act. Generally, it is an offence to undertake an activity for the purpose of interstate or international trade, that may have a significant impact on the national heritage values of a listed place, without prior approval of the Minister.

Clare Wood
clare.wood@bdw.com

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. Registration forms will be available shortly.

SOUTH AUSTRALIA

Editor: Will Webster

Natural Resource Management Bill Passed By Parliament

The *Natural Resource Management Bill* was passed by the Upper House of State Parliament on 1st July 2004. The new Natural Resource Management structure, which will replace an existing system of more than 70 Boards, will manage collectively, issues relating to water, pest plants and animals, and soil conservation.

case notes

Conservationists Win Nathan Dam Appeal

By Larissa Waters, Solicitor, Environmental Defenders Office (Qld) Inc.

The Full Federal Court of Australia on 30 July 2004 has unanimously dismissed the appeal by the Commonwealth Minister for the Environment and Heritage in the Nathan Dam case. The implications of this landmark case are wide-ranging and will be felt across Australia as we see more thorough Commonwealth environmental impact assessment of developments referred under the EPBC Act.

What was the case about?

The case was primarily concerned with whether the impacts on the Great Barrier Reef from agriculture (and associated chemical application and run-off) which would be facilitated by the dam should be considered an impact of the dam itself. Within that context, the case boiled down to the interpretation of section 75 of the EPBC Act, which requires the Minister to consider “all adverse impacts” an action is likely to have.

What did the Full Court say?

The Full Court found that “all adverse impacts” were not confined to direct physical impacts but included indirect impacts and effects “*which are sufficiently close to the action to allow it to be said, without straining the language, that they are, or would be, the consequences of the action on the protected matter*”.

The Court clarified that even if the consequences of an action were beyond the *control* of a developer (such as actions by other parties), if they were within the developer’s *contemplation* (such as farmers using water from a dam) the Minister must treat them as impacts of the developer’s proposed action.

The Full Court’s judgement *Minister for the Environment and Heritage v Queensland Conservation Council Inc. and WWF Australia* [2004] FCAFC 190 (30 July 2004) is available online from www.austlii.edu.au/au/cases/cth/FCAFC/2004/190.html.

What does this mean for the proposed Nathan Dam, and other developments generally?

The Minister’s original decision that the EPBC Act did not require him to consider downstream pollution by irrigators as an impact of the construction and operation of the dam was wrong - those impacts are relevant.

If the Minister agrees with a report by the Great Barrier Reef Marine Park Authority (which found that the impacts on the Reef from irrigation practices enabled by the Nathan Dam will be significant), the proponent for the dam will have to assess the dam’s impact on the World Heritage Values of the Great Barrier Reef as part of its environmental assessment process.

After reading that assessment document the Minister can still approve the dam, even if there are likely to be adverse significant impacts on the Reef. So although the case will not stop the dam, it will require a proper, broad consideration of the actual impacts of the dam.

The case is important because it establishes the principle that a broad inquiry into the impacts of proposed actions is required. This decision can be expected to make consultants and developers work a lot harder before they submit a proposal for assessment. This means better, more thorough Commonwealth environmental impact assessment!

At its heart, the decision is just common sense – you can’t assess the impacts of a big project without looking at what it is being built for.

The Minister has until 27 August 2004 to seek special leave to appeal the Full Court’s decision to the High Court of Australia.

For more information, contact Jo Bragg or Larissa Waters at EDO Qld on (07) 3210 0275

Court decision protects Ramsar wetland

by Chris McGrath, Barrister

In *Minister for the Environment & Heritage v Greentree (No 2)* [2004] FCA 741 (11 June 2004) the federal environment Minister sought an injunction, pecuniary penalty and remediation order under sections 475 and 481 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) against wheat farmers who had cleared part of the Gwydir Ramsar wetland in northern NSW, on a property known as "Windella", and then ploughed and sown a wheat crop in the wetland. The court had earlier granted an interim injunction in the case restraining the respondent wheat farmers from cultivating the land.¹ The area in question was located on private land owned by the respondent farmers in freehold (the previous owner had voluntarily agreed to the land being included in the listing of the Ramsar wetland in 1999 and the respondents had purchased the land in 2002 knowing of the listing).

After rejecting legal arguments made by the farmers that the listing of the Ramsar wetland in question was invalid and that the clearing, ploughing and cultivation of wheat were existing lawful uses, Sackville J considered the impacts of the farmers' actions and concluded at [199] that:

"Once it is accepted that the Windella Ramsar site retained attributes as a wetland immediately before the actions ... took place, the conclusion seems to me inevitable that those activities had a significant impact on the ecological character of the site. The simple fact is that the entire site, other than a narrow strip ... was cleared and ploughed and later sown with wheat. In essence ... the site has been 'sterilised'. Perhaps the sterilisation was not complete since ... even in its cleared state an inundation of the site would allow a range of native wetland plants to re-establish themselves over time, at least if they did not have to compete with crops. But by the time the interlocutory injunction was granted, the Windella Ramsar site was not recognisable as an area of wetland with native vegetation and fauna."

While indicating that he would grant the injunction, Sackville J did not make final orders when delivering the decision but allowed the parties to make submissions on the form of the injunction, level of civil penalty and remediation that should be ordered. Once the final orders are made an appeal appears likely.

This decision represents a milestone for federal environmental law in Australia. While the federal government won the constitutional power to directly regulate land management issues in the States in the 1983 Tasmanian dam dispute, this is the first court case where it has used its constitutional powers to directly regulate private land management in a State.²

The case is significant in terms of the operation of the EPBC Act, particularly regarding the application of the existing lawful use provisions in sections 43A and 43B. It is only the second civil action by the Minister under the EPBC Act.³

1 *Minister for the Environment & Heritage v Greentree* [2003] FCA 857 (8 August 2003).

2 Of course, the federal government has used indirect means such as fiscal powers and export licences to regulate land management issues within the States for decades (see, for example, *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1) and regulation of offshore fisheries and marine protected areas by the federal government is common (see, for example, *Olbers v Commonwealth of Australia* (No 4) [2004] FCA 229).

3 In *Minister for the Environment & Heritage v Wilson* [2004] FCA 4 (16 January 2004), a pecuniary penalty of \$12,000 was awarded against a shark fisherman who set a net in the Great Australian Bight Marine Park (a Commonwealth reserve) in contravention of section 354(1) of the EPBC Act.

Wastetek Pty Ltd – Queensland prosecution for contravention of an environmental licence condition

By Alan Girle, Environmental Protection Agency, Queensland

On 10 May 2004, Wastetek Pty Ltd was convicted and fined \$50,000 in its absence. The company was also ordered to pay a total of \$13,275 in compensation. The company had appeared on an earlier occasion, but for reasons unknown had decided not to appear on the 10th. Wastetek Pty Ltd has not attempted to reopen the matter, seek a rehearing or appeal.

Wastetek Pty Ltd was charged with contravening a condition of its environmental authority to transport liquid waste. The offence related to an incident on 22 November 2003. The company was transporting effluent by tanker from a chicken processing factory in Cleveland to Swanbank for disposal. At the point of loading, employees of the company had been told not to fill the tanker beyond 70% capacity as the effluent expanded in transit. The tanker was filled to 90% of capacity. The tanker driver was then told, *“I think you should unload some of this waste as the tanker is too full.”* This did not happen. Whilst in transit the effluent started to expand and notwithstanding pressure seals on the tanker, it started to spray out of the rear of the tanker as it was driving along. Liquid sprayed along at least 2 kilometres of the Ipswich Motorway, making the road greasy and causing vehicles to lose traction. Over a distance of 100 metres near Goodna, there were five traffic accidents involving eight vehicles. People were injured, cars were damaged and traffic was banked up for miles. Fifteen police officers were required to manage the situation.

In sentencing the company the magistrate said, *“There was no significant, from the evidence, checks or fail-safe mechanisms on the transport that would give rise to a warning that there was a leakage occurring. The fact is that, had it not been for the actions of other motorists, the spillage would have continued for a much longer period”.*

The magistrate noted during submissions that the risk of ecological harm from a spill of 200 litres on the motorway was small and had there been a greater risk of ecological harm, it was clear that the magistrate would have imposed a higher penalty.

Harvey -v- The Rural City Of Murray Bridge (2004) SAERDC 32 (19th April 2004)

Contributed by Will Webster, South Australia

The defendant Council pleaded guilty to a single charge of breach of a condition of a licence held by it pursuant to the *Environment Protection Act 1993*. The licence authorised the operation of a land fill waste depot, and the relevant condition provided that the licensee must ensure that:-

- No litter escapes from the boundaries of the depot;
- In the event of litter escaping from the depot, then the licensee must immediately collect such litter;
- All litter within the depot must not be visible from properties or transport corridors outside the boundaries of the depot;
- All litter is to be collected and disposed of as often as is necessary to maintain the grounds within the depot and the fences free of litter.

The offences occurred in the period 1st January 2002 to 23rd April 2003, and 9th June 2003 to 19th June 2003, when the defendant Council's land fill allowed litter escape, and litter visibility at the site. Whilst the depot was operated by a contractor on behalf of the Council, Her Honour Judge Trenorden stressed that the defendant Council should have been supervising the contractor to ensure that the Council, as the licensee, was not in breach of the conditions of the licence.

In mitigation of sentence, the Council submitted that, amongst other things, the significant cases of litter escape occurred as a result of “exceptionally windy conditions”, however in sentencing, Her Honour was mindful that on occasion, litter had escaped the depot and entered adjoining farming properties reaching as far as 2.5 kilometres from the depot. There was potential for contamination of crops by plastic bag and other litter and consequently the potential impact upon neighbouring farmers had serious repercussions. Her Honour regarded the offence as “serious”. With that said, Her Honour described the breach as neither “flagrant or deliberate”. It occurred more “as a result of very poor management, lack of supervision and a failure to communicate the seriousness of compliance with licence conditions to the defendant’s contractor”. Her Honour fined the Council in the amount of \$31,996.00, taking in to account the (late) plea of guilty and other mitigating factors.

Harvey -v- Kangaroo Island Council (2004) SAERDC 63 (19th August 2004)

Contributed by Will Webster, South Australia

The defendant Council pleaded guilty to 7 counts under the *Environment Protection Act 1993*, for breaches of conditions of an environmental authorisation between August 2002 and July 2003. The Council, which operates three waste depots within the area of Kangaroo Island, (and amongst other things):-

- Stored waste, oil and batteries above ground in an area that did not have an impervious base; and
- Stored waste, oil and batteries above ground in an area that was neither bounded nor graded to a common sump; and
- Stored waste, oil and batteries above ground in an area that was neither fully enclosed nor roofed.

The Council also failed to provide to the Environment Protection Authority (EPA), timely updated management plans, and ground water monitoring programs for the relevant period, failed to ensure that all exposed waste at the depot was covered with appropriate fill, and allowed litter to escape from the boundaries of the relevant depot without being immediately collected.

Whilst there was no evidence of contamination of soil or underground water, Presiding Judge, Her Honour Judge Trenorden commented that:-

“The holder of an environment authorisation has an obligation to the community not to breach the trust placed in it by virtue of being granted an authorisation to carry out activities which could result in pollution of the environment”.

The offences were compounded by the failure of the Council to respond to numerous requests for information, and in two cases, the imposition of an Environmental Protection Order, by the EPA.

Her Honour recorded convictions against the Council on each of the 7 counts raised. Whilst Her Honour had regard to the Council’s guilty pleas, she considered several of the counts as “quite serious”, particularly in that the Council “was operating the Kingscote Waste Depot in the absence of any ground water monitoring program, and both the Kingscote and Parndana Waste Depots were each being operated in a manner, the nature and detail which was not known to the EPA”. Her Honour ultimately was minded to apply the “totality principle”, that is to impose one sentence reflecting the total criminality and culpability of the defendant, and noted that none of the offences were committed wilfully. It is noteworthy that Her Honour rejected the “faint” suggestion that in determining the penalty, she should have regard to the less than adequate performance of the then Chief Executive Officer, who had since left the Council. Her Honour commented that (by Section 127(1)(a) of the *Environment Protection Act*), the acts of the (then) CEO as an employee of the Council were imputed to the Council. Ultimately, the Judge imposed a sentence by way of fine in the amount of \$75,000.00 by way of penalty, together with \$1,570.67 for costs incurred by the EPA.

Each of the above decisions reinforce the importance of complying with conditions imposed upon environmental licences, and other regulatory instruments. Both cases contain reference to the importance of deterrent elements of sentences of this kind. It is also noteworthy that both cases relate to relatively

small rural Councils, with modest budgets of which waste management comprises a substantial slice. Arguments regarding difficulty to comply with “harsh” licence conditions, are disregarded as arguments properly raised by way of appeal when the conditions are originally imposed, rather than by an attempt to rely on equitable notions after an offence has occurred.

Jovia Pty Ltd v the Shire of Augusta-Margaret River [2003] WATPAT 146

Contributed by Sandy Boulter, West Australia

Catchwords: Town Planning and Development Act 1928 (WA), section 10 direction - appeal

Facts

Jovia Pty Ltd, a landowner, was granted conditional development approval for the construction of a new dam on land zoned *Rural* under the applicable town planning scheme in the Shire of Augusta-Margaret River (the Approval). One of the conditions of the Approval was that the dam must be *generally in accordance* with the approved plan.

The 1.58 hectare dam was subsequently constructed. Council undertook a site inspection of the dam following a complaint by a neighbour that the dam had been constructed within the required setback from the neighbour’s boundary and that the dam was larger than that approved by Council.

The Shire issued a written direction, as authorised by section 10(6) of the *Town Planning and Development Act 1928* (the Act), to the landowner requiring the dam wall to be moved to comply with the setback requirements on the approved plan. The Shire did not require the size of the dam to be reduced, notwithstanding the fact that the increased size of the dam was also a breach of the conditional planning approval.

The landowner (the Appellant) appealed to the Town Planning Appeals Tribunal (TPAT) against the imposition of the section 10 written direction, as of right, under section 10 AA(1) of the Act.

Some procedural errors in the original drafting of a section 10 written direction were overcome prior to the hearing of the appeal but the resolution of these procedural errors required the time and patience of the TPAT, and both parties. Obtaining a section 10 precedent for such notices, from a qualified legal practitioner practicing in the area, is strongly recommended.

Statutory Framework

Compliance with the conditions of a development approval can be enforced through the powers given to local government under section 10 of the Act. Section 10 was amended on 18 April 2003. This appeal tested the ambit of the amended section 10 provisions, the ambit of the appeal provisions of the Act and, accordingly, the powers of local government to enforce planning approval conditions. There is no power for retrospective approval under the applicable town planning scheme.

Decision

The TPAT held as follows:

The Respondent Shire was not required to justify the reasonableness of the section 10 written direction to comply with the planning condition, rejecting the Appellant’s argument that ...

not open on a hearing of an appeal in respect of a section 10 direction to embark upon the exercise proposed by the respondent: Jovia Pty Ltd v the Shire of Augusta-Margaret River [2003] WATPAT 146 (Jovia Decision), at para. 47.

It had not been clear to the Respondent Shire, prior to the hearing, whether or not the reasonableness of the section 10 written direction was required to be established. Accordingly the Shire presented evidence to the Tribunal in support of the reasonableness of the written direction.

A section 10AA(1) appeal power is a different appeal power from an appeal against the planning condition or a refusal under Part V of the Act. Accordingly, an appeal against a section 10 Notice cannot operate as a *stalking horse* to appeal against the merits of the planning condition, which Council seeks to enforce: at para. 34.

The only issue at large on an appeal against a section 10 Notice is whether or not the development has been undertaken in accordance with the approval, the relevant condition and the applicable town planning scheme. Policy issues are not material.

The potential expense to the Appellant of compliance with the section 10 Notice was not within the scope of the TPAT deliberations, given the non-compliance was the consequence of the Appellant's own actions.

Conclusion

The *Jovia Decision* reveals that the ambit of the appeal right against a section 10 written direction under the Act is narrow. Accordingly, the Section 10 written direction is a tool that local government should not be afraid to use. It simply rests on the following questions:

1. What does the condition require?
2. Has it been breached?

While this case is helpful to clarify the ambit of the section 10 enforcement tool, it is a salutary lesson in the importance of the clear and unambiguous wording of the conditions of approval and the proper wording of the section 10 written direction.

Addendum: Drafting Conditions

One of the issues facing the TPAT was whether or not building the dam within the setback was or was not *generally in accordance* with the terms of the conditional approval. This decision, and the difficulties and costs of defending the appeal, shows very clearly why the term, *generally in accordance* with is a phrase that should be used in planning conditions with extreme caution, if at all. The TPAT held that:

Had the conditions of approval been expressed more directly that undoubtedly would have been the end of the matter: Jovia Decision, at para. 61.

The framing ... of the relevant condition in such loose terms necessarily gives rise to further argument: Jovia Decision, at para. 62.

Carbon rights - development of the legal framework for a trading market*

By Andrew Thompson and Rob Campbell-Watt⁴

Australia does not have a regulated market for trading in carbon rights. However, some Australian companies have been involved in significant international trades involving carbon rights in recent years⁵ fuelling speculation about the market's potential. Australian Government policy encourages these developments and other greenhouse gas abatement initiatives,⁶ although there is no National trading scheme proposed at this stage. In the interim, individual States have implemented legislation that provides for recognition of carbon rights. Western Australia is the most recent State to take steps towards the development of a trading market with the coming into force of carbon rights legislation.⁷

This article overviews developments in international law relating to carbon rights; the Australian Government's position and reviews the development of legislation by the States, particularly Western Australia. The article is an introduction for those contemplating an investment in carbon rights.

International Context

The international context of carbon rights is a major consideration for companies considering entering the emissions trading market in its current form. The development of carbon rights dates back to the *United Nations Framework Convention on Climate Change (UNFCCC)*,⁸ which is a framework convention that Australia has ratified. It documents broad agreement among all of the parties on the need to address climate change and is an overarching statement of strategic aims and methods for dealing with climate change.

Article 2 contains the objective of the UNFCCC, requiring Parties to achieve 'stabilisation of GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.'

Article 4(1) places certain information and data collecting requirements on all parties. Article 4(2) of the UNFCCC subjects Annex I⁹ countries to new requirements, including most notably the obligation to adopt national policies and take corresponding measures to mitigate climate change, by limiting anthropogenic (made by human) emissions of greenhouse gases and protecting and enhancing greenhouse gas sinks and reservoirs. This requirement to adopt a national policy is not tied legally to any specific target, but Article 4(2)(d) requires that developed countries (such as Australia) provide detailed information on their policies as well as on their emissions 'with the aim of returning individually or jointly to their 1990 levels'.¹⁰

The detail of binding commitments and targets are subject to subsequent negotiations and agreement through protocols to the Convention.

* " 2004

4 Partner and Solicitor, Minter Ellison Lawyers, Perth

5 David Jones, *The Kyoto Protocol, Carbon Sinks and Integrated Environmental Regulation: an Australian Perspective* (2002) 19 EPLJ 109 at 113.

6 Australian Greenhouse Office, the National Greenhouse Strategy (1998), <http://www.greenhouse.gov.au/pubs/ngs/ngs.html> and Australian Greenhouse Office, *Australian firms and the market-based mechanisms of the Kyoto Protocol*, (2003), <http://www.greenhouse.gov.au/international/kyoto/mechanisms.html>

7 The *Carbon Rights Act 2003* was proclaimed on 23 March 2004

8 Opened for signature 4 June 1992, 31 ILM 849 (entered into force 21 March 1994)

9 Annex I to the UNFCCC includes all industrialised country Parties, some of which, including the Russian Federation, Poland and Romania, are marked as 'countries that are undergoing the process of transition to a market economy. Annex II to the UNFCCC contains a list of 'industrialised country Parties except those from the former Soviet bloc in a process of economic transition.' Non-Annex I Parties, Annex I Parties such as Australia and Annex II Parties have different commitments under the UNFCCC.

10 Hunter, Salzman & Zaelke, *International Environmental Law and Policy, 2nd Edition*, Foundation Press New York, 2002 at 619.

The Kyoto Protocol

A carbon right (also known as a carbon sequestration right) is a term used to describe the rights that were created as a response to emission reduction market mechanisms referred to in the Kyoto Protocol. The Kyoto Protocol was adopted on 11 December 1997 but is not yet in force. Australia signed the Kyoto Protocol in 1998,¹¹ but this only constitutes an agreement in principle. Australia is not legally bound to ratify the Protocol.

The Kyoto Protocol will commence 90 days after 55 State Parties to the UNFCCC deposit ratification, acceptance or approval instruments (that is, implementing laws in their own countries). A further condition is that these 55 State Parties must include Annex I countries (essentially these are 'developed' or 'industrialised' countries) that accounted for at least 55% of the total reported CO₂ emitted by those parties in 1990. Recent media reports suggest that the Russian Federation has announced a decision to ratify the Kyoto Protocol, subject to approval by the Russian parliament.¹² Should this occur, it would be sufficient to bring the Protocol into force. If Australia has not ratified the Kyoto Protocol when it comes into force, Australia will not be bound by its rules. However, Australian businesses could participate in market mechanisms under the Kyoto Protocol, subject to those rules. This is discussed in more detail below.

Carbon rights rely on the concept of 'carbon sinks,' being a part of natural carbon cycles. In other words, the use of land may either be a carbon 'sink' or 'source' of greenhouse emissions. The Kyoto Protocol gives rise to commercial opportunities in the development of carbon sinks. Article 3.3 of the Kyoto Protocol states that participating countries can use 'net changes in greenhouse emissions from sources and removals by sinks' in meeting their commitments under the Protocol. Sink activities are limited to afforestation, reforestation and deforestation since 1990. The net changes must be verifiable. This is coupled with the requirement to report emissions annually to the Climate Change Secretariat, established under the UNFCCC, so that each Party's compliance with its targets and obligations may be identified.

Accounting and valuation of carbon rights

The actual emissions covered by the Kyoto Protocol extend beyond carbon dioxide (CO₂) to cover Methane (CH₄), Nitrous Oxide (N₂O), Hydrofluorocarbons (HFCs), Perfluorocarbons (PFCs) and Sulphur hexafluoride (SF₆). For reporting purposes, all emissions are converted to CO₂ equivalents (**CO₂-e**). Carbon dioxide represents by far the greatest volume of gas in terms of world emissions and is the relevant greenhouse gas when speaking of forests acting as 'carbon sinks'. However, some of the other gases are much more powerful in terms of their ability to contribute to the greenhouse effect (known as their 'global warming potential' or 'GWP').¹³

Article 5 of the Kyoto Protocol requires Parties to have emission estimation methodologies in place by 2007 at the latest. The Australian Greenhouse Office has taken up the challenge of developing a methodology for estimating carbon in forests.¹⁴ Once the methodology has been developed, the Inter-Governmental Panel on Climate Change (IPCC) must accept it.¹⁵ The IPCC has issued guidelines for national greenhouse gas inventories, which in regard to forests adopts a 'stock-change' approach. This involves measuring carbon stocks at the beginning and end of a specific time period to determine the net sequestration that has occurred over the period. For example, if Australia decides to ratify the Kyoto Protocol, net sequestration or emissions will need to be calculated for the period from 2008 to 2012, being the first Commitment Period. It may involve estimating carbon stocks at the beginning of 2008, at the end of 2012 and subtracting the 2008 stocks from the 2012 stocks.

To determine the net change in carbon stocks resulting from establishing a new forest, it is important to establish the net planted area. Also, if the purpose of the project is to sell rights to the carbon sequestered,

11 L Horn, *The Kyoto Protocol: Australia's Commitment and Compliance*, (2001) UNSW Law Journal 24(2) at 583

12 Refer ENDS Environment Daily report, Issue 1672, dated Monday 24 May 2004

13 For example, methane has around 21 times the GWP of carbon dioxide and HFCs range from 1,300 to 11,700 times carbon dioxide's GWP. One tonne of methane is equal to approximately 21 tonnes CO₂e.

14 Greenhouse Notes – Project – Level Carbon Accounting in Forests

15 The IPCC is an assembly of over 2,000 scientists that is responsible for most of the international research on climate change and is associated with many of the technical specifications developed under the UNFCCC and its protocol

then the initial condition (baseline) of the forest will need to be established. Methods for determining the net area and conducting an initial site condition assessment must be provided for in the measurement procedures for carbon accounting. In relation to carbon trades it is important to be able to estimate how much carbon will be sequestered by the forest over time.

An International Standard known as ISO 14064 is currently being developed. This is intended to provide an international standard for greenhouse gas accounting and verification that is consistent with the Kyoto Protocol and subsequent rulings by the Conferences of the Parties.

Carbon rights trading

For the holder of carbon rights, a major consideration will be the commercial opportunities for their trade. Various Articles of the Kyoto Protocol would allow for credits gained from sink activities to be earned and traded amongst Parties in seeking to reach their reduction targets.

Article 17 enables emissions trading as the least cost strategy to reduce global emissions and states that 'Parties included in Annex B may participate in emissions trading for the purposes of fulfilling their commitments under Article 3 of the Protocol.' Article 17 mandates that this trading shall be supplementary 'to domestic actions for the purpose of meeting quantified emission limitation or reduction commitments under that Article.' Each Party is to receive an initial allocation of emission permits equal to its emissions reduction target. Parties would then be allowed to buy and sell these permits according to the most cost effective way of meeting the Annex B target. Annex B to the Kyoto Protocol contains a list of emission limitation and reduction commitments for countries that are included in Annex I to the UNFCCC. Each State Party would have the option of taking abatement action at home or purchasing extra permits from State Parties that reduce their emissions below their target, which creates a surplus of permits that can be sold on the international market.

Also significant is the likely fungibility of emission units between the flexibility mechanisms under the Kyoto Protocol. In other words, emission permits under Article 17 would be interchangeable with credits earned under Clean Development Mechanisms and Joint Implementation mechanisms under Articles 6 and 12 of the Protocol. The significant difference between certain credits known as 'Removal Units,' that are created for sink credits, and other emissions permits, is that they can not be banked beyond the first commitment period in the Kyoto Protocol (2008-2012).

European Union Emissions Trading Scheme

A European Union (EU) Emissions Trading Scheme model has been proposed that should be closely monitored because it:

may prove to be an effective trial for the operation of the Kyoto Protocol mechanisms, and should be compared to other trading schemes;¹⁶ is likely to stimulate further interest by other State Parties to the UNFCCC, including Australia; and provides commercial opportunities for Australian corporations, as explained below.

The EU Emissions Trading Scheme requires that EU member state governments are required to set an emission cap for all 'installations' covered by the scheme, and issue an emissions trading permit. Each installation will be allocated allowances for the relevant Commitment Period. The number of allowances will be set down in a National Allocation Plan. The allowances equal to the total emissions must then be surrendered. These are then retired.

The Council of Ministers and European Parliament have reportedly agreed on the text for an EU Kyoto Protocol 'Linking Directive'.¹⁷ The law will set out the rules for purchase of emission credits bought abroad by corporations participating in the EU Emissions Trading Scheme.

¹⁶ Including the United States Climate Stewardship legislation which was expected to be introduced into the Congress on 30 March 2004.

¹⁷ ENDS Environment Daily - Wednesday 7 April 2004, Issue 1645 referring to the 'Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC' establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol's 'project mechanisms.'

The Linking Directive would enable EU member states to decide whether and how to limit the number of credits that can be bought abroad by investing in the Joint Implementation and Clean Development Mechanisms under the Kyoto Protocol. These mechanisms can only be used to supplement domestic action, as under the Kyoto Protocol.

Australian businesses will be restricted in their ability to use credits from land-use projects, such as reforestation, to meet their emission targets. However, these restrictions could be removed if scientific uncertainties surrounding the sinks are resolved by 2006.

Whilst not expressly agreed, corporations participating in regional schemes in places like Australia may be able to purchase EU market credits, even though Australia has not ratified the Protocol. A condition of this participation would be that the Protocol has entered into force.¹⁸

New Zealand

New Zealand ratified the Kyoto Protocol on 19 December 2002 and has introduced a series of projects to reduce emissions.¹⁹ One interesting initiative is the public auction of four million carbon credits to support emission reducing projects in 2003. The New Zealand government has recently²⁰ announced that it will make another six million carbon credits available later this year through a similar tender process.

Australian Context

Current policy regarding ratification

The Australian Government's position, as repeatedly stated by the Prime Minister and Minister for Environment and Heritage, is that 'despite signing and agreeing to the terms of the Kyoto Protocol, Australia will not ratify the Protocol because it is not in Australia's interests to do so.'²¹ One of the key reasons given is that the Kyoto Protocol does not provide an effective framework in response to climate change. This is an internationally unpopular position. It is clear that there is a large body of international support for the Kyoto Protocol, particularly amongst developed nations in the EU.

In terms of actual emissions since 1990, an Australian trend analysis of greenhouse indicators between 1990 and 2002²² suggests that the Australian stationary energy and transport subsectors increased their emissions across the period. However, overall emissions had increased at a rate of only 0.1% per annum and emissions per capita and per dollar of GDP had declined across the period.

Domestically, the Australian Labor Party and the Australian Greens Party are actively campaigning for Australian ratification of the Kyoto Protocol. For example, a ratification bill was presented to the House of Representatives,²³ reportedly with the support of the Senate.

Opportunities for international participation by Australian corporations

There is some scope for Parties to purchase permits from 'legal entities' of non-Kyoto Protocol Parties. This is the key issue for Australian corporations that intend to participate in international trades prior to, or in the absence of, Australian ratification of the Kyoto Protocol.

Kyoto Parties may authorise legal entities, such as organisations and individuals, to participate in specific activities within the Kyoto system, although responsibility for meeting Kyoto targets rests with the State Parties, not with legal entities they have authorised.

18 Ibid

19 refer <http://www.climatechange.govt.nz/resources/info-sheets/policy-in-brief.pdf>

20 refer <http://www.energyreview.net/storyview.asp?StoryID=25311>

21 Trevor M Power, "Issues and opportunities for Australia under the Kyoto Protocol," (2003) 20 EPLJ 459 at 466. This position was confirmed in April this year by Federal Environment Minister, the Honourable David Kemp, refer <http://www.theage.com.au/articles/2004/04/13/1081838720955.html>

22 Refer <http://www.greenhouse.gov.au/inventory/2002/index.html> dated 26 May 2004.

23 Media release "Senate says 'ratify Kyoto'" for Bob Brown, Australian Greens Senator for Tasmania, 1 April 2004

There are no rules in the Marrakesh Accords²⁴ governing the nature of legal entities, or the contractual arrangements that may underlie their participation in the mechanisms. The Marrakesh Accords do not prevent Parties from authorising corporations from any foreign jurisdiction to participate as legal entities.²⁵ However, the rules are subject to modification prior to finalisation of the 'in force' Kyoto Protocol rules.

Corporations may wish to participate as legal entities, which would require the authorisation of a Kyoto Party. Alternatively, corporations may wish to become involved through a contractual arrangement with a Kyoto Party or an authorised legal entity and so may not require formal authorisation. The Australian Government considers that this alternative option arises from the lack of distinction between corporations from State Parties and non-State Parties to the Kyoto Protocol in the Marrakesh Accords. It is unclear whether this distinction can be revised by the Kyoto Parties prior to the coming into force of the Kyoto Protocol.

The Australian Government proposes that it is conceivable that corporations that did not hold an account in a registry may be able effectively to own and trade in emissions through contractual arrangements with an account-holding legal entity or Kyoto State Party.

Action by State Governments Within Australia

The State and Territory Governments have been proactive in passing legislation which establishes a system that is akin to the system in place for property rights and enables carbon rights to be traded independently of the land to which they attach.²⁶ These rights enable unregulated trading of carbon rights and are the first steps towards a regulated trading market. Relevant examples covered in this paper are New South Wales and Western Australia.

New South Wales

In New South Wales, the *Carbon Rights Legislation Amendment Act 1998* (NSW) amended the *Conveyancing Act 1919* (NSW) to include carbon sequestration rights within the definition of 'forestry rights,' being a category of legal rights known as 'profits a prendre'. Section 87A now recognises as a separate legal right, any right to the legal or commercial benefits flowing from carbon stored in existing or future trees on a piece of land, conferred after 1990.²⁷ This legislation was obviously drafted to be consistent with the Kyoto Protocol.

In a further development, New South Wales has also taken the step of introducing a Greenhouse Gas Abatement Scheme.²⁸ Abatement Certificate providers in the scheme can include those who are carrying out low-emission generation, demand side abatement (energy efficiency) programs, carbon sequestration in forests and reduction of greenhouse gas emissions from a range of non-electricity related industrial processes by large electricity users.

Western Australia

In Western Australia the *Carbon Rights Act 2003* (WA), *Tree Plantation Agreements Act 2003* (WA) and relevant amending legislation commenced on 23 March 2004. Under this new legislation, carbon right interests in land, carbon covenant interests in land and plantation interests in land are created by the registration against the land title of an instrument, in the approved form, under the *Transfer of Land Act 1893*. The relevant instruments have been created and are anticipated to be in use in the near future.

A carbon right under this legislation is intended to create legal certainty as to the nature of the right. Only one carbon right can be registered on title to land at any particular time.

²⁴ The Kyoto Protocol implementation rules were largely settled in November 2001 through the Marrakech Accords (developed out of Conference of the Parties (COP) number 7 (COP 7)). These rules are subject to modification.

²⁵ Australian Greenhouse Office, Federal Government, "Australian firms and the market-based mechanisms of the Kyoto Protocol", 2003.

²⁶ Above n8 at 472.

²⁷ Id at 473

²⁸ refer <http://www.greenhousegas.nsw.gov.au/>.

A carbon covenant under the *Carbon Rights Act* is intended to ensure continuation of the trees or other land-based resources that underlie the carbon sequestration under the registered carbon right. A carbon covenant will affect landowners and others who have an interest in that land (e.g. holders of a lease, mortgage, profit a prendre etc) who agree to give a covenant in favour of the holder of the carbon right.

A plantation interest is an ownership interest in trees that is separate from the land.

There is no current proposal for a State based trading system in Western Australia. However the State has developed the State Greenhouse Strategy (Consultation Draft) dated December 2003. One of the stated aims is to ensure that the State's industry and public would be able to contribute to reducing global greenhouse emissions and be able to effectively respond to any opportunities and challenges generated by the greenhouse effect. The Draft Strategy proposes a series of actions to promote nationally consistent carbon rights legislation and more accurate and efficient carbon accounting for plantations.

Relevantly, the Draft Strategy proposes to develop a State greenhouse gas inventory system and Government controlled Abatement Fund. One of the potential benefits of the new legislation is the ability of the State Government to use the carbon rights to report on the level of carbon sequestration on affected land.

The significance of the legislation for Western Australian businesses is that Western Australia has an economy that is highly dependent on resources and energy based industry, which contribute to greenhouse gas emissions. Some industries are particularly interested in how a greenhouse emission allocation by the Australian or State Government would be managed and the type of investment that should be made to reduce or offset their greenhouse gas emissions.

Introduction

The purpose of this paper is to explain recent developments in the evolution of statutory tools for environmental protection in Victoria.

In particular the paper will focus upon the recent expansion of the range and scope of statutory tools whereby the traditional command and control tools are supplemented by several new generation tools that adopt a more co-operative and holistic approach.

1. Traditional Tools: Prescribed Controls for Point Sources

Victoria's current environment protection framework was established over 30 years ago with the introduction of the *Environment Protection Act 1970* (the Act).

The Act was the first piece of comprehensive environment protection legislation in the world. It was developed at a time when Victoria's air, water and land were suffering as a result of sprawling industrialisation, and a lack of coordinated environmental controls.

The centrepiece of the Act was the establishment of the Environment Protection Authority (the EPA), which was (and still is) responsible for co-ordinating responses to pollution and waste discharge in Victoria.

The initial focus of the Act was to control the industrial pollution sources responsible for much of the 'gross' pollution being experienced at the time. It did so by licensing almost every industrial 'point source' discharge of pollution and waste in the state – a massive undertaking.

Over time, the number and types of polluting discharge points which the Act requires to be licensed has been reduced. This is perhaps a reflection of the success of the Act and the new statutory tools (such as works approvals – in 1984) which have been introduced.

Until recently (and with some notable exceptions such as Environment Improvement plans - see below), the statutory tools provided by the Act have largely reflected a command and control approach to environmental protection which has also been effected through a strong regulatory enforcement regime. However, today's society and much of the way it pollutes its environment is very different to that which prompted the passing of the Act in 1970. Much of the pollution with which society is concerned today is caused by the manner in which we go about our daily lives and is often caused by the cumulative effect of many diffuse sources rather than the traditional heavy industry with a discharge pipe or smokestack.

Importantly, it has also been recognised that there has traditionally been limited opportunity for local community involvement in the regulation of local industry. Environment Improvement Plans (EIPs) were introduced in 1989 in an early attempt to improve community involvement in resolving some of the environmental problems that directly affect them.

2. Environment Improvement Plans: Gaining Community Input

An EIP is a comprehensive action plan, developed by a company in consultation with the EPA and the local community, to address a company's environmental performance at its site of operation.

EIPs were the first statutory tool to explicitly recognise the legitimate role of the community and provide an avenue for community participation in evaluating the environmental performance of a site.³⁰ As such, although they remain focussed on "end of pipe" issues, they represent one of the first steps away from the traditional strict regulatory approach of the Act towards the promotion of corporate environmental responsibility.

²⁹ Joanna Cary and Henry Jackson are members of the Office of the Solicitor to EPA Victoria. Wayne Gumley is a Senior Lecturer at the Faculty of Business and Economics at Monash University. This paper was presented at the National Environmental Law Association Annual Conference, held at Broken Hill NSW on 23-24 October 2003.

³⁰ See section 31C of the Act.

Whilst EIPs are largely voluntary agreements, the EPA can require a company to develop an EIP as a licence condition and this is often required as a necessary step in the process of obtaining accredited licensee status.³¹

EIPs have been well accepted by industry, with over 50 EIPs now in place, and they have been instrumental in achieving a marked improvement in the quality of the environment in pollution hotspots like the Latrobe Valley and the industrial inner-western suburbs of Melbourne.

One recent example of a successful EIP that was developed in order to gain accredited licensee status, is the plan established for the Maryvale Paper Mill, which is a large and complex pulp and paper making plant located about 150km south-east of Melbourne, in the Latrobe Valley. The Maryvale Mill has a wide range of environmental impacts and a long history of issues with the local community, particularly due to an unpleasant sulphurous odour that can be produced during the paper making process.

One of the main outcomes of the endorsed EIP is the establishment of a community consultation process operated through a Community Environmental Consultative Committee with representatives from the community and local government as well as the company and the EPA.

Under the framework of its EIP the company has held regular community meetings that have identified a range of significant environmental aspects. Those aspects of most concern to the committee have been prioritised and a range of remedial actions implemented. These actions have resulted in substantial improvements to odour problems, and also produced many other benefits such as greatly improved water conservation and waste treatment processes.

3. Neighbourhood Environment Improvement Plans: Tackling Diffuse Source Issues in the Community

Neighbourhood Environment Improvement Plans ('NEIPs') were introduced into the Act in 2001 and seek to build on the successful EIP concept for industrial sites by providing communities with a flexible consultative tool to address local environmental problems or issues, such as neighbourhood air quality, unwanted noise and local water problems. They are *not* intended to cover industrial pollution from a single industry or source.

In a similar way to EIPs, NEIPs are voluntary statutory agreements –but the Act provides the EPA with the capacity to direct that a NEIP be developed.³²

NEIPs provide an avenue for the development of community based partnerships which can pull together economic, social and environmental considerations. They typically involve a wide range of individuals, municipalities, water authorities, businesses and community based organisations, which all have an important role to play in resolving broad-scale or diffuse source pollution. NEIPs are founded in community agreement and participation and can provide a direct response to community priorities for environmental improvements.

The result of the extensive consultation between the various parties to a NEIP is a binding agreement between the various parties that is given statutory status by the Act. Importantly, responsible authorities (local councils) must have regard to the NEIP when exercising their powers, functions and duties in relation to the relevant segment of the environment.

A number of pilot NEIPs are currently under development. One example is the Anglesea NEIP, which involves a coastal town in the Surf Coast Shire about 100km to the south west of Melbourne. This community has a long history of interest in environmental issues including air quality, a large influx of summer visitors (together with associated stresses on infrastructure and environment), and restrictions on township expansion due to a protected zone of coastal heathland. The Surf Coast Shire operates as the sponsor for this plan and has provided a Community Development Officer to oversee its development.

The Anglesea NEIP proposal was developed through listening posts at local shopping centres, information sessions, presentations at various forums and workshops. A draft proposal was endorsed in January 2003 and was enhanced throughout 2003.

31 See section 26A of the Act.

32 See Division 1B of Part III of the Act, especially sections 19AE, 19AF, 19AG, 19AH & 19AI.

The NEIP sets out fundamental procedures such as who will do what, when and with what resources and identifies the NEIP objectives which include the building of community capacity, protecting ecological values and identifying the community's EcoFootprint.

One important focus is on reduction of household consumption, which is provided for by a range of incentives, education and adaptation of Government services. Importantly, the involvement of the community in the NEIPs development has had several interesting spin-offs, including the creation of community groups formed by and from those involved in the NEIP process including transport initiatives and the establishment of local community vegetable gardens.

The introduction of NEIPs into the Act recognises the need for a mechanism to provide a broader, more holistic approach to environmental sustainability at the community level. A similar approach was also recently taken by the addition of a new statutory tool for dealing with industry.

4. Sustainability Covenants: A More Holistic Approach for Industry

It is now well accepted that the quest for sustainable development requires business operators to consider the full range of environmental impacts throughout the entire supply chain of an enterprise.

This approach is not limited to the 'smokestack' sector but also applies equally to areas not traditionally the subject of environmental regulation such as service providers and financiers. The sustainability principle requires all sectors of business to adopt better strategies to deal with fundamental environmental problems such as depletion of natural resources, ecological impact of everyday activities, biodiversity loss and climate change.

Sustainability Covenants were introduced into the Act in 2002 to encourage business and industry sectors to adopt a more sustainable approach to their business.

Sustainability covenants are voluntary statutory agreements whereby the EPA and a covenant partner (such as a public authority, a company, group of companies, industry sector or supply chain) can explore creative ways of improving resource use efficiency and reducing the ecological impact of products and services. As with EIPs and NEIPs, sustainability covenants foster the role of EPA as a sophisticated regulator by balancing regulatory and facilitative functions.

Whilst sustainability covenants are voluntary agreements, signatories are subject to a statutory framework that provides the EPA with powers to require companies to take action to assess and improve environmental performance.³³

At the time of writing, there have been three Sustainability Covenants entered into by the EPA. VicSuper Pty Ltd (one of Victoria's largest public offer superannuation funds) signed the first sustainability covenant in May 2003.

Whilst the financial services sector has not been traditionally seen as having major environmental impacts, VicSuper has recognised that the financial services sector can have a very strong influence on the environmental outcomes of the wide range of businesses and industries that utilise financial and investment services.

The terms of the VicSuper Sustainability Covenant make a general commitment for the Fund to apply sustainability as its central operating principle to govern the economic, social and environmental performance of its investments. A number of more specific commitments are also included to ensure successful performance in these three areas. Some of the specific commitments made by VicSuper are:

- To integrate sustainability principles into its investment options and administration as well as its policies and supplier contracts;
- To conduct regular internal and external sustainability reporting;
- To provide regular and relevant stakeholder communication and education;

³³ See Division 1A of Part IX of the Act, especially sections 49AC, 49AD, 49AF, 49AG, 49AH & 49AM.

- To provide avenues for the provision of information on corporate sustainability practices to the broader community;
- To reduce solid waste to land fill and increase recycling rates;

In partnering the covenant, the EPA also undertakes certain commitments, which are:

- To publicise the leadership of VicSuper and reinforce the positive benefits of the covenant;
- To continue to support the superannuation industry as it increasingly incorporates sustainability techniques;
- To assist the sustainability staff working within VicSuper;
- To increase awareness within government and other organisations of the leadership that VicSuper is showing; and
- To coordinate and promote the United Nations Environment Program Finance Initiative (UNEP FI) program.

Other sustainability covenants have recently been entered into with the Plastics and Chemicals Industry Association (PACIA), which represents Australia's fourth largest manufacturing sector and with City West Water, a Victorian urban water retailer. This latest covenant provides for City West Water and EPA Victoria to work together to develop environmental sustainability learning that the whole water industry can benefit from. A significant aspect of this covenant is the intention to form alliances both within and outside the Victorian water industry to bring innovative sustainability ideas to life.

These are just the first few of a huge variety of companies and organisations that have expressed an interest in the sustainability covenant model and the EPA is working towards many further agreements in the near future.

6. Alternative Sentencing Laws: Providing More Flexible Penalty Options

Since its inception, the Act has criminalized certain environmental acts and omissions. The Act also provides statutory maximum penalties for those offences, which vary according to the seriousness of the offence.

In the last four years, the Act has been significantly amended to remedy what was seen as an increasingly inappropriate penalty regime – one that hadn't really changed since the 1970s.

In 2000, most offences under the Act were changed in status from summary to indictable together with significant penalty increases – maximum penalties for pollution offences were increased from \$20,000 to \$240,000. Additionally, the *Environmental Protection (Enforcement and Penalties) Act 2000 (Vic)* Bill also introduced the option for alternative non-financial penalties.

The alternative penalties are contained in section 67AC of the Act, which gives courts the power to order an offender to do one or more of the following (in addition to or instead of any other penalty):

- publicise the offence, its consequences and the penalties imposed or orders made (eg. through a newspaper advertisement);
- notify one or more people or classes of people (eg. shareholders in an annual report);
- carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit; or
- carry out a specified environmental audit of relevant activities.

Since the introduction of s.67AC, the Magistrates Courts (which remain the forum for almost all prosecutions under the Act) have seen the significant merits of the alternative sentencing provisions and have embraced the opportunity to use their expanded powers - there have been approximately twelve s.67AC orders annually since the Courts commenced handing down alternative sentences.

In the first case in which a s.67AC order was made, the defendant company, Terminals Pty Ltd, pleaded guilty to an air pollution offence arising from an acrylate spill at a chemical storage facility at Coode Island in Melbourne's industrial west. The Court convicted the company and ordered it to undertake an ambient air monitoring program at three EPA approved locations to assist detection of future emissions. The Magistrate also ordered the company to pay \$5000 to a project to enhance the environment in the local community, with workers exposed to the odours to have input in the choice of project.

A recent s.67AC order was handed down by the Sunshine Magistrates' Court on 27 February 2004. Bentley Chemplax Pty Ltd was found guilty of water pollution as a result of a discharge of at least 23,000 litres of white oil into the Maribyrnong River. Pursuant to s.67AC of the Act, the Court ordered it to pay \$25,000 to the Museums Board of Victoria for the installation of integrated photovoltaic cells at the Scienceworks Museum and \$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. The company was also required to publish a notice publicising the offence and the courts' orders in the Age, the Herald Sun, the Financial Review, the Williamstown Advertiser, on its website and in its Annual Report.

These two cases illustrate some of the substantial benefits provided by the new range of alternative penalties. It is well accepted that fines often provide little or inadequate deterrence to larger corporations as they can be consumed as a cost of doing business or simply be passed on to customers. Section 67AC orders, on the other hand, are more likely to act as a far more meaningful deterrent particularly when adverse publicity and notification orders are made, requiring a company to widely publicise its wrongdoing amongst the broader community. Importantly, there is also the capacity to direct that benefits flow to the victims of pollution incidents through funding of projects which improve the local community in which the offence occurred.

7. Conclusions

Victoria's environmental regulatory tools have evolved over the last three decades, with the pace of development reaching new heights in the last five years. The Act now has several new regulatory approaches and tools that are innovative, flexible and creative. However, the new tools are not a panacea to the State's complex environmental problems and a combined carrot and stick approach needs to be maintained. By having a multipurpose toolbox with a combined reactive and proactive approach, the State's environmental watchdog is well placed to encourage not only regulatory compliance but to find longer term solutions to our environmental problems.

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The South Australian Sustainable Development Bill 2004

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[Note - This article has been previously published in Local Government Manager Magazine.]

The Draft Sustainable Development Bill 2004 was released in February 2004 for public consultation. These amendments have enormous significance for local government in its role as a planning Authority. Of particular interest are the proposed changes to Development Assessment Panels. The proposed amendments seek to establish consistency with respect to the composition of Council DAPs and seek to emphasise the role of the DAP as being 'development assessment' rather than policy making.

Membership

It is proposed that a DAP will consist of 7 members who will be appointed by the council, subject to terms and conditions.

The presiding member will have specialist qualifications (urban and regional planning, building, environmental management or a related discipline) and be 'independent' (not a member or officer of the council). 3 members will be elected members or officers of the council, and 3 will be independent specialist members with specified expertise in:

- urban or regional development, commerce, industry or building safety;
- environmental conservation or natural resource management; and
- community facilities or urban design.

Council will have the role of appointing the members but must consult with the Minister before doing so. The council will be required to seek to ensure as far as practicable that the Panel consists of equal numbers of men and women (note that equality will not be achievable as seven is not sensibly divided by two!).

The council can determine the members' term of office, but it cannot exceed three years. The members of the DAP will appoint their own Deputy Presiding Member.

Functions

The role of a council DAP is currently described as being one to exercise or perform, or to assist the council to exercise or perform, its development assessment functions. Currently, there is no obligation on a council to delegate those powers and functions to its DAP. Under the Bill a Council will be required to delegate its powers as a relevant authority with respect to determining whether or not to grant development plan consent to its Development Assessment Panel or a person occupying a particular office or position. A council will be able to make a series of delegations according to classes of development and may vary them from time to time, but the crucial change is that *the council itself is unable to act in its own right in a matter that is subject to delegation.*

A DAP will be able to sub delegate its powers. This will not affect the power of the DAP or person making the sub-delegation to act in any matter.

The DAP will provide advice and reports to the council on trends, issues and other matters relating to planning or development that have arisen through its assessment of applications and it can perform other functions assigned to it by the council. Consistent with the 'split' in roles and functions of council and DAP, a DAP will not be able to advise council on matters of policy.

Conduct of Members

DAP members will be required to observe a code of conduct prepared by the Minister (or her delegate). A DAP member who contravenes the code may be removed from office by council. The independent members of a DAP will also be required to disclose their financial interests in accordance with Schedule 2 to ensure that decision making is transparent.

Currently, non-compliance with the conflict of interest provisions constitutes a ground for the council to remove a member; however there is no other remedy available in the Act. The Bill proposes to extend the complaint provisions in Part 1 of Chapter 13 of the Local Government Act 1999 to apply to DAP members. Those provisions allow for a complaint to be made to the District Court in relation to a member acting in a situation where he or she has a conflict of interest. The District Court may impose a wide range of sanctions if the complaint is proved including a fine, reprimand, suspension from office for 2 months, disqualification from membership of the Panel or training. A person can still make a complaint to the Ombudsman.

Exclusion of the Public

Consistent with the focus as transparent decision making, the situations in which a DAP may exclude the public from attendance is to be changed.

The council will only be able to exclude the public on grounds that it would cause the disclosure of confidential commercial information of a confidential nature which might prejudice the commercial position of the person supplying it or confer a commercial advantage, if, on balance, the disclosure would be "contrary to the public interest".

Advice from persons providing specialist professional advice, for example a planner, architect, engineer is no longer to be considered in confidence unless that advice relates to actual or likely litigation.

The exclusion of confidential information provided by public officials must also be, on balance, contrary to the public interest.

Appointment of public officer

Each DAP will be required to appoint a public officer who is not a member of the Panel. The functions of the public officer will include ensuring the proper investigation of complaints about the conduct of a member.

Impacts

The Bill has quite profound implications for council in terms of local representation in decision making. In particular, for those councils at which the DAP is comprised solely or largely of elected members.

The amendments have significant cost implications for council in funding the service of four independent members with relevant expertise.

Drag Queen Races In Dupont Circle: The Highs And Lows That Come With Exploring A Different Career Path

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The Seeds

I remember vividly the events that first triggered my interest in environmental issues. I had been going through a period of disillusionment with my law studies. Like many other students, I began my prestigious law degree with high hopes of the course, and of myself. I anticipated challenging discussions about justice, morality and about social and political values. So when confronted with the reality of my law course – with its strong emphasis on black-letter law – I became more than a little frustrated. Learning “rules” of cases and applying these to hypothetical situations did not come naturally to me. I had the distinct sense that adapting my thinking to the legal model was like trying to fit a square peg into a round hole. As I grew in confidence, however, I began to focus less on my own deficiencies and more on those of the law course. I would sit in class, listening to the volley of legal terms and rules being thrown around by students and wonder why we were not talking about the broader social and political issues underlying the law. These omissions bothered me greatly. I felt that, by being trained to take for granted the implicit assumptions in the cases (and the underlying economic agendas), I was being inculcated with a set of ideas and values, many of which were inconsistent with my own.

Finding that many of my questions were not being asked, let alone answered, I began to look outside my law studies for material that took a more holistic approach. I looked to the media but as I rifled through the mainstream newspapers I noticed again what a small slice of the totality of life was reflected in its pages. “Why,” I wondered, “was there a Business section, an Education section, an extensive television guide, even a weekly section on food, but not an Environment section?” It was right around this time that I stumbled upon a book by David Suzuki called “The Sacred Balance”. Suzuki discusses the place of environmental and other non-economic concerns within society, outlines the importance of a healthy natural environment and explains how this is being endangered by human actions. Suzuki’s ideas resonated with me. They seemed to provide the holistic approach I had been seeking.

Upon finishing the book, I became gripped by a sense that I had found my calling in the environmental field. At that time my law studies made sense to me; I saw law as a tool I could use to further environmental objectives. But ‘the environment’ provided me with more than just career direction. Environmental issues – and the idea of working to solve these issues – answered a kind of existential question for me. As a result, I immersed myself in the area with a passionate, almost religious zeal. I began to read books in the field, sought out opportunities to do volunteer work at environmental organisations and took subjects at university related to environmental topics. These experiences not only taught me a lot of content, but, importantly, they got me thinking about how I could work most effectively to address environmental issues. In particular, I became more aware of the connection between social and environmental issues and conscious of the need to address these social issues in order to achieve solutions to environmental problems. I also became conscious of the role of various ideologies in the environmental domain. I began to question not only the ideologies of the ‘anti-environment’ sectors, but those of the environmental movement as well. I saw weaknesses in my own approach. I realised that coming from an egocentric position – where I was going to save the world! - my good intentions could lead to more harm than good. One ideology was potentially as dangerous as any other. Consequently, my views and approach changed somewhat. Whilst I still have my own biases, I became wary of approaches that were overly driven by ideology and became conscious of the need for an open-minded approach and work that was well informed and balanced.

Despite my new insights, I still did not know how I could translate all this into a career where I could work in the way I wanted. The mainstream career advice at university was not much help. The focus was on obtaining Article of Clerkships at corporate firms – an idea I found uninspiring – and the scope of “alternative careers” promoted was limited to legal aid or government jobs. In order to get a sense of what other options were available to me – and whether or not I wanted to pursue them - I decided to seek out an internship at an organisation that I thought I would want to work at in the future. I looked for an organisation that took a multi-disciplinary approach to environmental issues, that produced work that was well researched and balanced, and that had an international focus. After researching a significant number of organisations I came across the Center for International Environmental Law (CIEL), an organisation that fit my objectives perfectly. I applied to their internship program and was accepted.

More About The Center For International Environmental Law (CIEL)

CIEL is a small non-government organisation, based in Washington D.C. and Geneva. It focuses on international and comparative law issues in a broad range of areas, including international trade, climate change, biodiversity, toxic chemicals and human rights. A strong component of the work at CIEL is policy research, publication, advice and advocacy. CIEL undertakes cutting edge, innovative work in these areas, analysing the most recent developments in international law and providing new ideas and approaches that help shape future developments. CIEL also engages in a host of other activities such as providing training to government officials relating to environmental law and supporting other environmental organisations, particularly in the developing world.

Finance: A Key Challenge

Internships at organisations like CIEL provide a good means to gain experience and a foothold in what is a competitive field. However, most people face a significant challenge in taking up these opportunities: money. My experience was no different. CIEL, like many other organisations, did not offer any funding for interns. I therefore faced the daunting prospect of having to support myself in the U.S. for five months without pay—a task that seemed particularly challenging given the low value of the Aussie dollar at that time. So I went in search of funding. After doing some research and making inquiries I was soon confronted by the dearth of funding opportunities available to undergraduate students. Unlike in the USA, where it seemed that many universities and private foundations offered undergraduate students assistance in pursuing internship opportunities, in Australia funding seemed almost exclusively reserved for graduate students. However, it was not all a lost cause. Eventually, I found out about a number of small grants for which I could apply. I also made some ad hoc applications for funding to a number of organisations. This took quite a degree of hard work and persistence and not all my applications were successful. But in the end, my efforts paid off - I was able to obtain funding from two different institutions for my internship. This, together with my own savings, was enough to fund my trip.

The internship

Having secured money for my trip, I embarked upon the excruciatingly long journey to the US with a mixture of trepidation and excitement. Despite trawling through the CIEL website and speaking to my supervisor on the phone I did not *really* have a concrete idea of what I would be doing. So I was pleasantly surprised to find myself being given challenging work and a high degree of autonomy right from the beginning. One of the first projects I was given related to international fisheries law. I was asked to research and write about the current legal framework regulating the international harvest and trade of toothfish and discuss the legal implications of a proposal to list toothfish in the Convention on International Trade in Endangered Species of Wild Flora and Fauna. The project was initially intended to take only six weeks but in fact it took up the majority of my time at CIEL.

At first I found the task extremely daunting. The paper went far beyond anything I had attempted before, both in terms of the complexity and scope of the issues, and I had almost no prior knowledge in the area that I could rely on. In fact, the project provided me with a fantastic learning opportunity. I learned through problem-solving and simple trial and error, how to research efficiently and to plan my time. I also grappled with the challenge of analysing novel legal issues that had not been discussed before. This was a quantum leap in difficulty from my work at university, where I was often dealing with issues that had already been subject to a great deal of analysis. After this experience I had a new appreciation for the hard intellectual work done by certain academics, policy writers and others who are trailblazers in their field.

My second project took me from the depths of the Antarctic Ocean, above ground to the issue of land tenure. It was a project relating to native title that I undertook for CIEL's Law and Communities Program. The program focuses heavily on the issue of land tenure policy and community based property rights in developing countries. My role was to look at the origins of native title in a number of common law countries, the aim being to determine whether any of the principles that emerged could be applied to support recognition of land rights in developing countries. The project involved tracing back the history of common law in the former British colonies and looking at basic principles of international and property law. It also required me to gain an understanding of the serious problem of land rights in developing countries. One of

the most challenging, but fascinating aspects of this task was to re-read judicial decisions in search of the mostly hidden or unstated answers as to why native title was recognized.

In addition to these projects I was also involved in a host of other activities. I attended meetings and conference at other NGOs, institutes and organisations like the World Bank. I also did small tasks here and there – reviewing the CIEL website on persistent organic pollutants, editing articles and researching points of international law.

I found there were both enjoyable as well as frustrating aspects to my work at CIEL. On the plus side it was wonderful to be working in an organisation where many of the staff were doing work “outside the box”. For the first time, I was in a work context where people looked *outside* the legal system and analysed not simply the legal rules, but the role of law, the values it promotes and who it works for. I also greatly enjoyed working at an organisation where the values and priorities espoused were consistent with my own. For once I could be honest about my views and opinions at work without having to fear of the consequences. Finally, I found the staff at CIEL a wonderful group of people – bright, hardworking and dynamic. They really made an effort to include me in the organisation. This allowed me to gain a greater understanding of various challenges involved in running and managing an NGO. And importantly, while staff were professional, there was a strong sense of fun as well. I have fond memories of the cookie making session, the frequent birthday celebrations and many other activities and office antics.

At the same time there were definitely frustrations and challenges. Sometimes the degree of autonomy and lack of guidance was overwhelming. There was a strong academic component to my work and, whilst I enjoyed some elements of this, I often found myself wanting to explore the practical sides of the issues on which I was working. I also found the fact that I could not see the results of my work on the ground, somewhat enervating. On a more general level, being ‘desk-bound’ all day was, at times, slightly maddening and there were the inevitable challenges that arise when working in an NGO - organisations that tend to be under-funded and over-stretched. But, perhaps not surprisingly, experiencing these frustrations has been as useful for me as the positive elements of the internship. Many of the challenges I experienced at CIEL are present at other NGOs – particularly those working in the policy field. Consequently, the internship gave me a greater understanding of where I could benefit and what I would be required to trade-off in working at an organisation like CIEL.

Living in the political capital

Pursuing my own interests independently had implications not only for my career but also for other areas of my life. As anyone who has lived and worked overseas is likely to tell you, the mere fact of living in a different place is often just as exciting as the work. This was certainly the case for me. I found Washington D.C. an intriguing place to live, an odd mix of contradictions and contrasts. For one thing it is home to a highly diverse, educated group of people who come from all over the world to work, study or research at international institutions, universities and research institutes located there. As a result, the city buzzes with intellectual energy – there are always numerous seminars and conferences to go to and talks by international luminaries passing through town. At the same time, Washington D.C. is a poor, racially divided city with a reputation for high levels of crime. Many parts of the city are considered ‘no go’ areas – explaining why the city seemed so much smaller to me then it was in reality – and public services in these areas, such as schools, are notoriously bad.

Living in the relatively safe neighbourhood of Dupont Circle I was largely sheltered from the city’s problems. Dupont Circle is a fairly well to do area of the city, home to many restaurants and bookshops. It is also the hub of the city’s vibrant gay and lesbian community and the location of the annual drag queens in high heels race, an event I was fortunate to see while living there. I lived in a place called International Student House, in the heart of Dupont Circle. The House, formerly an old mansion, is a well-known institution in the city. It houses students, interns and researchers from all over the world who stay anywhere from 1 week to 3 years. It was a fantastic place to live. The house itself was beautiful; many of the old features had been retained including wood panelled walls and antique furniture. And I loved living in a place with such an interesting group of people. With residents from over 42 different countries, the House provided a stimulating environment - there was always much to learn and interesting conversations to be had. Many residents had similar interests to my own and I found many people with whom I could connect. I ended up forming many strong friendship at the House - an unforeseen, wonderful side effect of undertaking an internship.

Future prospects

While I would love to say that since returning to Australia I have been inundated with offers for glamorous, interesting and socially worthy jobs, the reality is that I still remain somewhat unclear about my future career directions. Having decided not to obtain my Articles of Clerkship for the moment, I am in the process of exploring other options. This has provided me with a lot to think about. I have had to work out my own values and separate my own aspirations from what others want for me. I have also had to acknowledge the trade-offs in taking an alternative path and decide where I am prepared to compromise.

In this process of discovery, I have found my internship experience invaluable. Whilst it did not address all my misgivings about law and my uncertainties about my career, it has enabled me to gain greater clarity about what I'm looking for in a job. The internship made me aware that there are opportunities to work outside the conventional path if one puts in the time and effort to find them. Most importantly, the experience has imbued me with greater confidence in my abilities and skills. This has provided me with the courage to pursue and carve out an independent path for myself.

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