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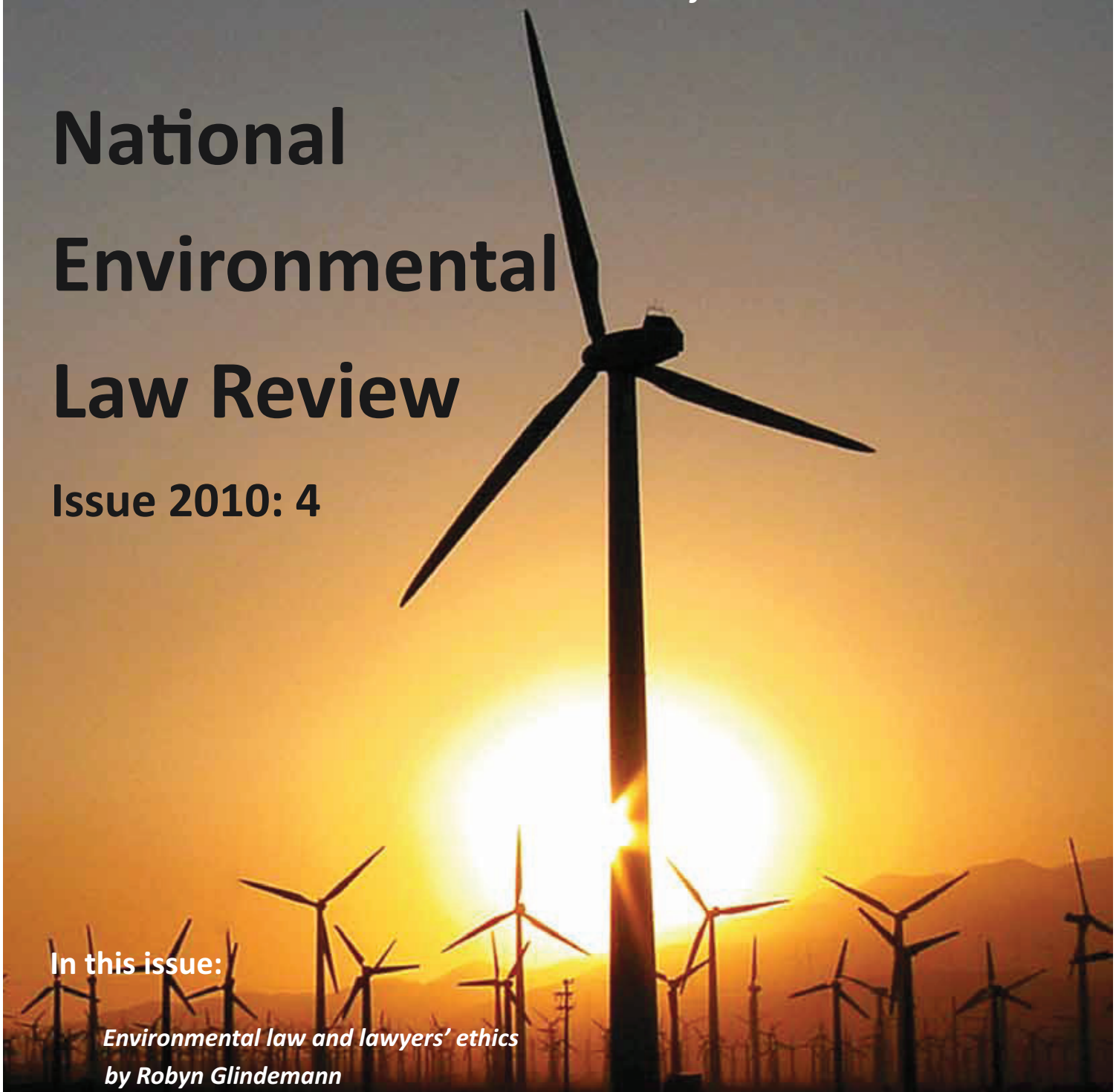

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NELA who we are and what we do

The National Environmental Law Association of Australia

Was established in 1982, following the success of the first Environmental Law Conference in Sydney in 1981 and incorporated in 1989. Since the settling of our constitution in 1987, NELA's primary objective has been to promote the understanding of the role of environmental law in regulating and managing the conservation and usage of the environment. The NELA Secretariat may be contacted as follows:

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The NELA National Executive

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

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AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW (AIAL)

ESSAY PRIZE IN ADMINISTRATIVE LAW 2011

The Australian Institute of Administrative Law (AIAL) was established in 1989. The objects of the Institute include:

(a) to promote knowledge of and interest in administrative law

(b) to publish and encourage the publication of papers, articles and commentaries about administrative law.

To advance these objects, the Institute has resolved to conduct a competition to be called the AIAL Essay Prize in Administrative Law.

A prize of $2,000 will be awarded to the author of an essay displaying original thinking on a topic of the author's choice relating to administrative law.

The competition is open to any interested persons.

Competition rules

1. Entries must be unpublished essays which are the original work of the author. They may be on any topic relating to administrative law.
2. The winning entry is likely to exhibit original ideas on issues of importance in the practice of administrative law or in administrative law theory.
3. Entries should be 6 000 to 8 000 words in length.
4. All entries should be on A4 paper and typed single spaced. The original and two other copies, or an electronic copy, of each essay should be submitted. The name of the author and a short biography should be included on a detachable page. The author's name should not appear on the essay or copies.
5. The winning entry will be determined by the Executive of the AIAL acting on the recommendation of a judging panel appointed by the Executive. The award of the prize shall be in the absolute discretion of the Executive. The Executive may determine not to award the prize in any year.
6. The prize will be $A2,000.
7. The prize is expected to be presented at the Annual Forum of the Institute in Canberra at the Realm Hotel on 21 & 22 July 2011.
8. The winning essay will normally be published by the Institute in the AIAL Forum, the official journal of the AIAL. It is a condition of entry to the competition that the winning essay will not be published elsewhere without the prior approval of the AIAL.
9. Entries should be sent to:
   The Secretary, AIAL, PO Box 3149, BMDC, ACT, 2617, Australia; or
   Linda Crebbin, Executive Member, AIAL at: linda.crebbin@act.gov.au
10. The closing date for entries is **1 May 2011**. Late entries may be accepted.

Further inquiries relating to the competition, including whether an essay is eligible for submission for the prize, may be directed to Linda Crebbin, ACT Civil & Administrative Tribunal, GPO Box 370, Canberra ACT 2601. 6207 1740, linda.crebbin@act.gov.au

INTERNATIONAL

Kathryn Walker

United Nations Framework Convention on Climate Change, Cancun

The 16th Conference of the Parties (COP) 16 to the United Nations Framework Convention on Climate Change (UNFCC) and the 6th Meeting of the Parties to the Kyoto Protocol (CMP6) was held in Cancun Mexico, in early December 2010.

Even before the conference began, participants seemed to have accepted that achieving a global agreement on climate change was highly unlikely. This may come as no surprise to some given that at the 2009 Asia-Pacific summit in Singapore, President Obama and country leaders from China, Japan, Russia, Mexico, Australia and Indonesia agreed to delay a climate agreement to 2010 or even later.

COP16/CMP6 was to focus on a step by step approach, with key aspects such as deforestation high on the agenda. Discussions between business leaders and state leaders were to be promoted as to 'how to achieve a zero carbon energy grid, how to get electric vehicles on the road and what can be done without a legally binding agreement'.

The International Union for the Conservation of Nature and Natural Resources (IUCN) hoped that while negotiations were continuing towards the ultimate objective of a global, legally binding agreement, a balanced package of decisions could be negotiated on reducing emissions from deforestation and forest degradation (REDD–plus), adaptation, technology transfer and capacity building. See: cmsdata.iucn.org and www.cop16.com.

Convention on Biological Diversity, Nagoya

In late October 2010, more than 18 000 people participated in the 10th Convention on Biological Diversity (CBD) COP in Nagoya, Japan.

The Conference adopted various major policy documents, including a review of the implementation of the CBD Programme of Work on Protected Areas (PoWPA).

The meeting resolved to adopt a 10-year Strategic Plan 2011–2020. The vision of the strategy is:

Living in harmony with nature where by 2050, biodiversity is valued, conserved, restored and wisely used, maintaining ecosystem services, sustaining a healthy planet and delivering benefits essential for all people.

- a resource mobilisation strategy to substantially increase levels of official development assistance in support of biodiversity
- a protocol on access to and sharing of the benefits from the use of the genetic resources of the planet.

It was agreed that the Strategic Plan would include 20 headline targets, organized under five strategic goals, including:

- to at least halve, and where feasible bring close to zero the rate natural of habitat loss, including forests
- by 2020 conservation and restoration of 17% of terrestrial and inland water areas and 10% of marine and coastal areas, especially those of particular importance for biodiversity and ecosystem services, through effectively and equitably managed, ecologically representative and well connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscape and seascapes
- restoration of at least 15% of degraded areas
- special efforts to be taken to reduce the pressures faced by coral reefs
- a substantial increase in the level of financial resources for implementing the Convention.

The COP adopted the Nagoya Protocol on access to genetic resources and the fair and equitable sharing of benefits arising from their utilization.

It also agreed to text which included recognition of the role of indigenous and local community

conserved areas and committed to establishing effective processes for the full and effective participation of indigenous and local communities in the governance of protected areas. The participation of civil-society organizations, the private sector and stakeholders across the social sectors was also encouraged.

See: http://www.cbd.int/nagoya/outcomes/; www.biodiversity.org; www.europarc.org.

IUCN marine protected area categories

In 2010 the IUCN's World Commission on Protected Areas Marine (WCPA Marine) initiated a process aimed at improving the application of the IUCN's protected area (PA) categories to marine PAs, and provide for more accurate and consistent assignment and reporting of categories.

Draft supplementary guidelines address the regulation of fishing, multiple use areas and zoning issues, vertical zoning and other issues for MPAs and adjoining coastal protection areas.

It is estimated that there are approximately 500 000 MPAs globally, many of which have been assigned to one or more IUCN categories, with many inaccuracies. Another concern is that where PAs cover both land and sea, marine objectives are often not considered when assigning the sites' subcategory.

Comment on the draft guidelines was open until December 2010.

See: www.unep-wcmc.org.

Victory for Orono Campus wetlands

The US Environment Protection Authority (EPA) has ordered the University of Maine to restore wetlands on its campus in Orono, Maine. Over more than 20 years the Orono wetlands had been filled for the construction of roads, parking and buildings. Allegations were made that the University had violated s 404 of the Clean Water Act, which 'prohibits the discharge, dredging and/or fill of material into the waters of the United States (including most wetlands) without a valid permit from the US Army Corp of Engineers'. The actions of the University in filling of the wetlands interrupted the groundwater recharge, caused pollution retention and affected wildlife habitat in a significant manner.

While the University cooperated with the EPA this was nevertheless a victory for wetland protection and restoration, with the EPA ordering the 'removal of approximately two acres of a landfill and snow dump and restoration of the underlying wetland. It also requires restoration of approximately one acre of forested wetland that the University had converted to a livestock paddock. To compensate for some fill that cannot be removed, the University will restore and enhance 3.66 acres of a currently farmed area that includes wetlands and an upland buffer'.

This order is one in a series of orders made by the EPA in the New England area. Others of note include an order that a Vermont Ski Resort restore wetlands and streams that were damaged between 2004 and 2006 during the construction of a golf course, and an order for the restoration of more than 17 acres of freshwater wetlands in Whately, Massachusetts where forest and scrub wetlands were altered during the preparation of land for renewed farm fields. This is a good step forward for restoring wetlands that have been damaged by a failure to appropriately consider and adhere to the regulatory requirements in place for protecting such wetlands.

See: www.yosemite.epa.gov.

Offshore wind energy

Offshore renewable energy projects in the United States (US) are taking positive steps forward following a commitment by the US Government in March 2009 that procedures would be simplified. The Interior Department was given jurisdiction over all offshore wind and solar energy projects, and the Federal Energy Regulatory Commission was given jurisdiction over all wave and tidal current electricity generating projects.

After surviving legal challenges, in August 2010 'Cape Wind' in Massachusetts became the first wind farm in the US. New Jersey also enacted the Offshore Wind Economic Development Act which directs the state's board of public utilities to establish an offshore renewable energy certificate

program which 'calls for a percentage of electricity sold in the state to be from offshore wind energy'. The Act supports development of up to 1 100 megawatts of offshore wind energy and will see the state become 'a leading provider of offshore wind energy in the country'.

Building on the new procedures, in October, New Jersey Governor Jon Corzine said he wanted the state to 'triple the amount of wind power it plans to use by 2020 to 3 000 megawatts'. This would be 13% of the state's total energy.

In November the US Government announced a new project aimed at accelerating the development of clean offshore wind power along the Atlantic Coast. Over the next six months information will be gathered and verified identifying potential wind energy areas to enable a more streamlined process for environmental impact statements prior to approving projects in the area. To date, in addition to the Massachusetts wind farm, farms have also been approved in Rhode Island and Delaware. See: www.enn.com.

Wild tiger summit

The first international wild tiger summit concluded in Saint Petersburg, Russia, on 24 November 2010. A declaration was agreed by the 13 participating heads of state from tiger-range countries aimed at saving the wild tiger from extinction.

The summit was prompted by the alarming decrease in wild tiger populations, estimated to be down from 100 000 to just 3 000 over the last century. The summit hoped to increase wild tiger populations to double existing levels in the next 12 years. The increasing population goal comes with a price tag of nearly $350m. To make the goal achievable, a trust fund is to be established to help raise funds from the international community. Russian Prime Minister Vladimir Putin said 'it is hard to solve the issues of preserving wildlife in these countries…. We should support their governments in order to effectively solve environmental protection issues'. See: en.rian.ru.

Bid to ban lead ammunition

It is estimated that lead poisoning kills between 10 to 20 million birds and other animals each year. In a bid to reduce these deaths the Centre for Biological Diversity, Public Employees for Environmental Responsibility and the Hunters Group Project Gutpile petitioned the US EPA in August 2010 to ban lead ammunition and fishing tackle. The petition was unsuccessful with the EPA claiming it did not have the power to make such a ban under the *Toxic Substances Control Act.*

In mid-November the groups filed an action in the US District Court in Washington against the EPA seeking orders that the EPA 'develop rules to prevent wildlife poisoning from spent lead ammunition and fishing tackle' and a declaration the EPA does have the power to regulate chemical substances, which includes shot and bullets. Jeff Miller from the Centre for Biological Diversity said 'the EPA has the ability to protect America's wildlife from ongoing preventable lead poisoning, but continues to shirk its responsibility'. See: www.wtop.com and www.latimes.com.

FEDERAL

Dr Nicola Durrant

Basin plan guide released for public discussion

The Murray Darling Water Commission released the Guide to the Proposed Basin Plan on 8 October 2010.

The document includes the main elements of the proposed Basin Plan, including the controversial issue of setting sustainable diversion limits. The Guide anticipates the range of reduction in current diversion limits to be between 3 000 GL/y and 4000 GL/y, representing between 22% and 29% reductions.

The Guide was open for public consultation until 17 December 2010.

See: thebasinplan.mdba.gov.au/

On 17 October 2010, the Murray-Darling Basin Authority announced that it will commission an expanded detailed social and economic study into the likely social and economic impacts of the

proposed Basin Plan on local communities. The new study is scheduled to be completed by 15 March 2011.

Australia's Biodiversity Strategy 2010–2030 released

Australia's Biodiversity Conservation Strategy 2010–2030 was released on 27 October 2010. See: www.environment.gov.au/biodiversity/strategy/index.html

The strategy's three priorities are:

- engaging all Australians
- building ecosystem resilience in a changing climate
- getting measurable results.

These are supported by 10 measurable targets for 2015, including:

- achieving a national increase of 600 000km^2 of native habitat managed primarily for biodiversity conservation across terrestrial, aquatic and marine environments
- ensuring that all jurisdictions review relevant legislation, policies and programs to maximise alignment with Australia's Biodiversity Conservation Strategy
- establishing a national long-term biodiversity monitoring and reporting system.

Montara Commission of Inquiry report and government response

On 24 November 2010 the Australian Government released the report of the Montara Commission of Inquiry and the Government's draft response to the report.

The inquiry was set up to investigate the likely causes of the uncontrolled release of oil and gas into the Timor Sea from the Montara wellhead platform on 21 August 2009, on a 'no-blame' basis, and to make recommendations on how to prevent future incidents.

The report contains 100 findings and 105 recommendations. The Government proposes accepting 92, noting 10, and not accepting three of the report's recommendations. The Government has stated that the three recommendations proposed not to be accepted primarily relate to actions and information that are already required by the regulatory regime or are technically inappropriate. The noted recommendations relate to aspects addressed within the regulatory regime or issues which are primarily operational matters for the offshore petroleum industry to address.

Key findings of the inquiry include that:

- the source of the blowout was the result of the primary well control barrier failing. Initial cementing problems were compounded by only one of the two planned secondary well control barriers being installed. The report concluded that PTTEP Australasia (Ashmore Cartier) Pty Ltd (PTTEP AA), an oil and gas production and exploration services company, did not observe sensible oilfield practices at the Montara oilfield
- the Northern Territory Department of Resources (NT DoR) was not a sufficiently diligent regulator, adopting a minimalist approach to its regulatory responsibilities which gave it little chance of discovering PTTEP AA's poor practices
- the existing objective-based regulatory regime is largely sufficient to allow effective monitoring and enforcement by regulators of offshore petroleum-related operations. However the Commissioner recommended that the proposal of the Productivity Commission's Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector to establish a single national offshore petroleum regulator should be pursued. Such an independent regulatory body should have responsibility for well integrity, safety and environmental regulation.

The Northern Territory Government has moved to address the resourcing capacity of the NT DoR to ensure it is appropriately skilled and informed to administer the Designated Authority regulatory function. The Australian Government has also commenced work with all Designated Authorities to clarify the integrity of wells in their respective

jurisdictions, and to develop a consistent approach to the regulation of Australia's offshore petroleum industry.

Proposed Federal Government response

The Federal Government will extend the functions of the proposed national offshore petroleum safety authority (NOPSA) to include regulation of structural integrity, environment plans and day-to-day operations associated with petroleum activities in Commonwealth waters. The expanded authority– to be named the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) – will regulate safety, integrity and environment plans for minerals extraction and greenhouse gas storage activities in Commonwealth waters. NOPSEMA will be established by 1 January 2012. The Government will also establish a National Offshore Petroleum Titles Administrator (NOPTA) which will primarily deal with title administration and resource management issues.

In the interim, Federal Parliament passed the Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill 2010 on 28 October 2010 to strengthen the role of the NOPSA in relation to structural integrity. The bill also imposed on offshore petroleum titleholders an occupational health and safety duty of care in relation to wells and well-related equipment, and improved NOPSA's inspection and investigation powers in relation to suspected breaches.

The Commission recommended amending the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act) and Offshore Petroleum and Greenhouse Gas Storage (OPGGS) Acts to enshrine in law the polluter pays principle. Under these proposed arrangements companies involved in an incident would be obliged to meet the full costs of monitoring and remediation and penalties should be payable for pollution on a no fault basis. The Commissioner has recommended that this should apply to both prospective and existing operations in Commonwealth waters. The Government intends to accept and implement both recommendations and undertake a review of Commonwealth legislation as it applies to the offshore petroleum sector and the marine environment.

The Government will pass amendments to the OPGGS Act to provide for increased civil penalties in relation to breaches by operators and titleholders. This is expected to be completed during the first half of 2011.

A comprehensive assessment and strengthening of the National Plan has been instigated by the Australian Maritime Safety Authority. This work, to be completed by the end of 2011, will consider Australia's marine oil spill preparedness and response capability and the National Maritime Emergency Response Arrangements. The Government will also implement a framework that provides equitable cost sharing arrangements between the shipping and the offshore petroleum industry relating to preparedness for and response to a future offshore petroleum incident.

The Federal Government is seeking submissions from interested parties in response to the Montara Report until 25 February 2011. This consultation will inform the Government's final response to the Report of the Montara Commission of Inquiry www.ret.gov.au/Department/responses/montara/Pages/MontaraInquiryResponse.aspx

See:www.ret.gov.au/Department/Documents/MIR/montara-ministerial-statement.pdf

See also: www.ret.gov.au/Department/Documents/MIR/response-to-montara-inquiry-report.pdf

Gladstone coal seam projects

On 22 October 2010, the Minister for Sustainability, Environment, Water, Population and Communities (Environment Minister) approved two coal seam gas projects at Gladstone:

- Santos Ltd's Gladstone liquefied natural gas (LNG) project, including coal seam gas production fields, a gas transmission pipeline, an LNG processing plant on Curtis Island, and associated marine facilities
- British Gas and the Queensland Gas Company's Queensland Curtis LNG project including five components are coal seam gas production fields, a gas transmission pipeline, an LNG

processing plant on Curtis Island, associated marine facilities, and shipping activities.

The minister imposed over 300 conditions on each coal seam gas project designed to help protect groundwater-dependent species and minimise other environmental impacts, including requirements to:

- carry out detailed planning and monitoring to protect groundwater resources
- submit management plans for aquifers, groundwater and surface water for approval by the minister
- carry out pilots for aquifer reinjection and ensure that suitable water treatment programs are in place so that any water to be reinjected is of suitable quality
- maintain water pressure above conservative thresholds with agreed measures to re-establish pressure including reinjection or other suitable methods of replacing groundwater
- rehabilitate a large area of land and conservation of other areas in perpetuity
- cooperate with other coal seam gas proponents and the Queensland Water Commission in the development of a regional model for the ongoing assessment of the impacts of this industry on groundwater-related matters.

Prelude LNG project

On 12 November 2010 the Environment Minister approved Shell's Prelude floating LNG facility in the Browse Basin off the coast of Western Australia subject to a number of conditions, including that:

- Shell must develop a satisfactory oil spill contingency plan, to the Government's satisfaction, specifying how it will minimise the risks of oil spills and how it will minimise the environmental impacts in the event of an oil spill
- should such an accident occur, the company is required to pay for any environmental rehabilitation needed
- Shell must develop a satisfactory greenhouse gas strategy, which must be made publicly available, that will detail the measures and offsets it proposes to reduce greenhouse gas emissions

See:www.environment.gov.au/epbc/notices/assessments/2008/4146/approval-decision.pdf

Southern Bluefin tuna listed as conservation dependent

The southern Bluefin tuna has been listed under the category 'conservation dependent'. The effect of this is that fishing can continue under existing arrangements but the species will be subject to a plan of management that includes actions to stop its decline and support its long-term recovery.

Media Release 24 November 2010, see: www.environment.gov.au/minister/burke/2010/mr20101124.html

Wildlife crime crackdown

As part of the INTERPOL-led Operation RAMP, more than 600 operational activities targeting illegal wildlife trade were carried out across Australia leading to the seizure of 36 animals, inspections and search warrants on 67 premises, and a number of arrests.

See: www.environment.gov.au/about/media/dept-mr/dept-mr20101103a.html

Murrumbidgee to Googong pipeline

The ACTEW Murrumbidgee to Googong pipeline has been approved subject to a number of conditions, including that ACTEW provide to the Environment Minister a plan detailing how river flow will be measured and maintained, and a plan detailing how impacts on nationally threatened fish species, including the Murray cod, trout cod, and Macquarie perch, will be minimised.

Media Release 29 October 2010, see: www.environment.gov.au/minister/burke/2010/mr20101029a.html

Nomination to list an ecological community as threatened under the EPBC Act

A nomination to list *Lowland Subtropical Rainforest on Basalt Soils and Alluvium within North Eastern NSW and South Eastern Queensland* as a threatened ecological community under the EPBC Act has been

made.

The public comment period for this nomination closed on 24 December 2010: www.environment.gov.au/biodiversity/threatened/communities/lowland-rainforest.html

National product stewardship legislation consultation paper

Under the *National Waste Policy*: *Less waste, more resources* policy, the Australian Government agreed to develop and enact national legislation to support voluntary, co-regulatory and mandatory product stewardship and extended producer responsibility schemes. A consultation paper on the proposed design of the national product stewardship legislation was open for public consultation until 10 December 2010. Legislation is being drafted for introduction into the Australian Parliament.

According to the consultation paper:

> the Product Stewardship Bill will establish a comprehensive national framework that will enable Australia to more effectively manage the health, safety and environmental impacts of products. It is intended to address the fragmented approach that has characterised product stewardship activity to date and allow for government activities on product stewardship to be strategically targeted and to apply nationally (p 17).

The proposed legislation is intended to:

- reduce the environmental, health and safety impacts of products across the manufacture-supply-consumption chain and at end-of-life, including through:
    - avoiding the generation of waste
    - reducing or eliminating the amount of waste for disposal
    - designing products in a way that reduces or eliminates hazardous substances in products
    - managing waste as a resource
    - ensuring that waste treatment, disposal, recovery and re-use is undertaken in a safe, scientific and environmentally sound manner
- assist in the co-operative implementation of Australia's international responsibilities concerning the environmental, health and safety impacts of products across the manufacture-supply-consumption chain and at end-of-life
- contribute to reductions in greenhouse gas emissions, energy use and water consumption by encouraging responsible management of products across the manufacture-supply-consumption chain and at end-of-life (p 23).

The legislation will provide for accrediting voluntary product stewardship and regulating specified products and industries through either a co-regulatory or mandatory approach (p 19). The legislation and associated instruments will also provide the structure to require appropriate standards of good governance (including transparency) of product stewardship organisations and product stewardship arrangements (p 21).

In the first instance all products must meet two or more of the product criteria which will be contained in the legislation (p 22). These criteria include that:

- they are products or materials in a national market (the Government is considering making this a mandatory criteria for all products)
- the product contains hazardous or toxic substances
- there is the potential, in relation to the product, for increased resource recovery, material conservation, re-use, recycling, or contribution to greenhouse gas reduction, energy or water conservation
- the product places significant economic burdens on jurisdictions (including local government) for end-of-life management
- the consumer is willing to pay for management of the product
- management of the product offers business opportunities that would make a contribution to the economy.

Consideration is also being given to inclusion of an

additional criterion to reflect the role that product stewardship can play in helping Australia meet its international obligations (p 24).

For more information see: www.environment.gov.au/settlements/waste/product-stewardship/consultation/index.html

See also *National Waste Policy: Less Waste, More Resources, Status Report* November 2010 NEPHC: www.nepc.gov.au/taxonomy/term/86

Australian National Audit Office report on the Home Insulation Program

The Australian National Audit Office (ANAO) report on the performance of the Home Insulation Program was released in late September 2010.

The report concludes that:

- the program's administration problems were, to a very large extent, caused by an absence of effective governance by the department during the program's design and early implementation...the Green Loans program required greater oversight than the department's business-as usual activities, but, this did not occur (p 18)
- day-to-day program management responsibility was assigned to sub-executive level officers who had little program delivery experience (p 18)
- the program's visibility to the department's senior executives was poor (p 18)
- the former minister received incomplete, inaccurate and untimely briefings on program design features and implementation progress, challenges and risks (p 18).

The department has publicly accepted the findings in that report.

See: www.environment.gov.au/anao-reports.html.

Climate change committees and roundtable discussions

The Prime Minister announced in September 2010 the establishment of the Multi-Party Climate Change Committee. The Committee has been established to investigate options for implementing a carbon price and help build consensus on how Australia will tackle climate change. It held its second meeting on 10 November 2010.

The Prime Minister chairs the Committee, with the Minister for Climate Change and Energy Efficiency serving as the Deputy Chair. Australian Greens Senator Christine Milne is the co-Deputy Chair. The other Committee members are Senator Bob Brown (Australian Greens), Mr Tony Windsor MP (Independent) and Mr Rob Oakeshott MP (Independent). The Committee is advised by a panel of four independent experts – Professor Ross Garnaut, Professor Will Steffen, Mr Rod Sims and Ms Patricia Faulkner.

Two roundtables for the business community and the non-government sectors have also been established. Roundtable discussions will focus on the introduction of a carbon price into the economy, particularly the need to give businesses certainty to invest in low-pollution technologies, and may also cover a range of other climate change measures.

The first business and non-government organisation (NGO) roundtables were held on 26 November 2010.

The Prime Minister has indicated that a decision on the way forward will be made in 2011.

Domestic Offsets Integrity Committee

An expert panel to assess proposed methods for developing and selling carbon credits was announced by the Federal Government on 27 October 2010. The members of the Committee are:

- Mr Duncan McGregor (Chair)
- Prof Rob Fowler
- Dr J Mark Dangerfield
- Professor Annette Cowie
- Dr Brian Keating
- Ms Shayleen Thompson

See:www.climatechange.gov.au/minister/greg-combet/2010/media-releases/October/mr20101027.aspx

Carbon farming initiative consultation

On 22 November 2010 the Federal Minister for Climate Change and Energy Efficiency announced the release of a proposed framework to allow farmers, foresters and landholders to generate carbon credits under the Carbon Farming Initiative (CFI). This includes the generation of both Kyoto compliant and non-Kyoto units.

Potential eligible abatement activities include:

- reforestation and revegetation
- reduced methane emissions from livestock
- reduced fertiliser emissions
- manure management
- reduced emissions or increased sequestration in agricultural soils (soil carbon)
- savanna fire management
- avoided deforestation
- burning of stubble/crop residue
- reduced emissions from rice cultivation
- reduced emissions from landfill waste deposited before 1 July 2011.

The consultation paper adopts the majority of provisions developed for use in reforestation projects and eligible domestic offsets under the former carbon pollution reduction scheme (CPRS). This includes requirements for additionality, permanence (in this case 100 years) and independent expert verification. Public consultation is open until 21 January 2011.

See:www.climatechange.gov.au/government/submissions/cfi.aspx

Garnaut Climate Change Review – update

Professor Garnaut will update significant elements of his 2008 *Climate Change Review*. Terms of reference were released on 16 November 2010 and include consideration of:

- international developments on climate change mitigation efforts
- developments in climate change science, and understanding of climate change impacts
- previous proposals to develop a carbon price in Australia, and the ensuing public debate
- domestic and international emissions trends
- changes in low emissions technology costs and availability
- the potential for abatement within the land sector
- developments in the Australian electricity market.

The final report is expected to be published by 31 May 2011.

See: www.climatechange.gov.au/en/media/whats-new/garnaut-update.aspx

Global study of emission reduction policies

The Federal Government announced on 16 November 2010 that the Productivity Commission would undertake a study of emission and energy-reduction policies in key international economies to help inform the Government's plan to introduce a carbon price in Australia.

The Government has stated that the study will determine the effective carbon price of a range of policies including carbon taxes and emissions trading schemes as well as those where the price is less transparent, such as renewable energy targets and subsidies for low-emission technologies.

The Productivity Commission is expected to report to the Government by the end of May 2011.

See: www.climatechange.gov.au/en/media/whats-new/emission-reduction-policies.aspx

Prime Minister's Task Group on Energy Efficiency Report released

On 8 October 2010 the Government released the *Prime Minister's Task Group on Energy Efficiency* report.

The Report provides advice on policy options to strengthen Australia's response to climate change and reduce pressure on the energy costs for all Australians. The findings of the Report are intended to complement improvements in energy efficiency that the Government is making through the National Energy Efficiency Strategy and other

energy efficiency programs.

The Government has stated that the recommendations of this report will also be considered as part of the Government's *Energy White Paper* process.

See: www.climatechange.gov.au/en/media/whats-new/prime-minister-task-group-energy-efficiency-report.aspx

Program for energy efficient buildings launched

The Commercial Building Disclosure Program commenced on 1 November 2011.

Under the program, from 1 November 2010, most sellers or lessors of office space of 2 000 metres^2 or more will be required to obtain and disclose an up-to-date energy efficiency rating. Certain exceptions and exemptions apply.

There is a transition period for the first year of the program where a valid National Australian Built Environment Rating System (NABERS) can be disclosed.

From 1 November 2011 a full Building Energy Efficiency Certificate (BEEC) will be required to be disclosed.

BEECs are valid for 12 months, must be publicly accessible on the online Building Energy Efficiency Register, and include:

- a NABERS Energy star rating for the building
- an assessment of tenancy lighting in the area of the building that is being sold or leased
- general energy efficiency guidance.

The NABERS Energy star rating must also be included in any advertisement for the sale, lease or sublease of the office space.

See: www.cbd.gov.au/

Draft renewable energy target regulations

The Government released public exposure drafts of the:

- Renewable Energy (Electricity) Amendment Regulations
- Renewable Energy (Electricity) Amendment (Transitional Provisions) Amendment Regulations.

The Government has also released a commentary paper to explain the technical detail of the draft regulations.

Public consultation on the draft Renewable Energy Target regulations took place between 10 October and 29 October 2010.

See: www.climatechange.gov.au/government/submissions/renewable-energy-target/consultation-ret-regulations.aspx

Reduction in solar credits

The Government has announced that support for household solar installations will begin to be phased out a year earlier than previously planned. The phase out of the Solar Credits multiplier will be brought forward by one year, from:

- 5 to 4 on 1 July 2011
- 4 to 3 on 1 July 2012
- 3 to 2 on 1 July 2013
- 2 to 1 from 1 July 2014

The reasons for this reduction provided by the Government include that:

- the cost to install solar panels has reduced substantially since the Solar Credits mechanism was first announced in December 2008, driven by a strong economy, a high dollar and falling technology costs
- demand for solar installations has increased rapidly, as the out-of-pocket cost to households has dropped and generous State and Territory feed-in tariffs have provided additional support to households

See: www.climatechange.gov.au/en/media/whats-new/amendments-to-solar-credits.aspx

National Greenhouse Gas Inventory

The latest Quarterly *National Greenhouse Gas Inventory report* has been released and provides estimates and trends in Australia's greenhouse gas emissions up to the June quarter of 2010.

See: www.climatechange.gov.au/climate-change/emissions.aspx

Climate change adaptation

National climate change forum

The report *Developing a national coastal adaptation*

agenda, was released 23 November 2010 and identifies the national priorities for preparing our coasts for climate change that were discussed at the National Climate Change Forum in February 2010.

See:www.climatechange.gov.au/~/media/publications/adaptation/developing-national-coastal-adaptation-agenda.ashx

Government response to coastal zone climate change impacts report

The report of the inquiry *Managing our Coastal Zone in a Changing Climate: the time to act is now* was tabled in the Parliament on 26 October 2009. The House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts held the inquiry.

The Australian Government's response to the inquiry recommendations was released in November 2010, accepting 9 of 47 recommendations. The Government supports the major theme of the report – the need for national leadership – and intends to work with state and territory governments, and local governments through the Australian Local Government Association, to develop a national coastal adaptation agenda, including:

- investigating the barriers to the effective operation of insurance markets in the coastal zone under a changing climate and related issues (rec 19)
- considering the adoption of a nationally consistent sea-level rise planning benchmark including agreement across jurisdictions of a common methodology for developing a sea-level rise planning benchmark (rec 21)
- updating building regulations and to increase the resilience of the Building Code of Australia to climate change (rec 22)

The Government also recognises the importance of addressing knowledge gaps in relation to legal issues and climate change impacts on the coastal zone, including the clarification of legal liability issues. The Government has stated that it will engage with the legal profession and research bodies as appropriate on legal issues associated with climate change impacts in the coastal zone. Where there are national implications cutting across jurisdictional boundaries, the Australian Government will seek the agreement of the states and territories and ALGA to pursue these issues under a COAG work agenda.

See:www.climatechange.gov.au/~/media/publications/adaptation/HoR-managing-coastal-zone.ashx

AUSTRALIAN CAPITAL TERRITORY

Kirsten Miller

Review of Nature Conservation Act

The ACT Government has recently released a discussion paper on the review of the ACT's *Nature Conservation Act 1980*. The Nature Conservation Act is the ACT's primary legislation aimed at protecting biodiversity in the ACT.

The Nature Conservation Act provides a framework for protecting native fauna and flora through a process of identifying and listing vulnerable or endangered species or communities or threatening processes. The Act creates a number of offences which relate to the impact on animals and plants.

In addition the Act seeks to protect biodiversity through restricting activities in wilderness areas, national parks or nature reserves, known as 'reserved areas'. Reserved areas are established under the Territory Plan and the Nature Conservation Act restricts the activities, for example building, camping, clearing native vegetation, which can be undertaken in these areas. The Act also provides a licensing system for the Conservator to allow certain licensed activities.

The Act also provides for management agreements to be set up where an agency, such as a water or electricity utility, is conducting activities on public land or unleased land, with the aim of setting out standards or conditions for avoiding or minimizing conflict with land management objectives for the land.

The Government has indicated that it is timely to review the Act so that 'it reflects more recent

conservation initiatives, which focus on ecosystem resilience and connectivity'.

The discussion paper can be downloaded from the Department of the Environment, Climate Change, Energy and Water website http://www.environment.act.gov.au/

Submission are due by 18 February 2011.

ACT Bans Plastic Bags

The ACT Government has recently passed legislation to ban retailers from supplying customers with plastic bags made from polyethylene. The Plastic Shopping Bags Ban Act is designed to restrict the supply of plastic shopping bags. The prohibition does not apply to biodegradable bags, barrier bags of the type dispensed from a roll to hold perishable items such as fruit or the heavier retail bags used in clothing stores.

The legislation will take effect from 1 July 2011 with a four month transitional period. During this time, any retailer who provides the regulated plastic bags must also supply alternatives and display signs informing customers of the new ban. No light-weight plastic bags will be able to be supplied after 1 November 2011.

The bill is available at:

http://www.legislation.act.gov.au/b/db_39968/default.asp

Public Consultation on the Future of Canberra

The ACT Government has recently concluded public consultation on how Canberra should look in 2030. The consultation has focused on a range of environmental and other themes including population, environmental sustainability, water, transport, and land use and planning.

The aim of the consultation, Time to Talk – Canberra 2030, is to inform future policy development and to help plan Canberra's future.

More information is available at www.canberra2030.org.au.

Namadgi National Park Management Plan Released

A management plan for Namadgi National Park has been released. Namadgi National Park is the largest conservation reserve in the ACT covering 46% of the Territory.

An interim arrangement for the cooperative management of Namadgi National Park with the Ngunnawal Aboriginal community provides for the participation of the Ngunawal people in the management of Namadgi.

The Plan sets out ways to protect the reserve, and sets out activities which are permitted and restricted in certain areas of the park.

The plan allows for certain recreational activities, such as horse riding, mountain biking and orienteering to be undertaken in the Park subject to certain restrictions. It allows areas of the Park to be used for orienteering, rogaining and mountain running events with certain restrictions but it has removed the restriction on the number of participants allowed for events in the park.

The Plan came into effect on 24 September 2010. A copy of the plan is available at http://www.tams.act.gov.au/play/pcl/parks_reserves_and_open_places/national_parks/namadgi_national_park/namadgi_national_park_plan_of_management_2010

NEW SOUTH WALES

Dr Nicholas Brunton

Planning Appeals Legislation Amendment Bill 2010

by Martin Watts, solicitor

The *Planning Appeals Legislation Amendment Bill 2010* (NSW) (the Bill) was introduced to the Legislative Council on 11 November 2010 and was passed with Opposition support on 23 November 2010. It received assent on 29 November 2010.

The Act makes several substantive amendments to the *Land and Environment Court Act 1979* (NSW) (the LEC Act) and the *Environmental Planning and Assessment Act 1979* (NSW) (the EP&A Act), as well as several other consequential amendments. The major amendments can be summarised as follows.

The Act introduces into the LEC Act mandatory conciliation and arbitration provisions in class one proceedings that relate to development applications (DAs), or modifications to development consents for detached single dwellings and dual occupancies (including subdivisions), or any other matter that the Court orders, on the application of a party to the proceedings; or on its own motion.

Where these circumstances arise, provisions relating to conciliation conferences will apply, with the following modifications:

- the Court must arrange a conciliation conference between the parties and their representatives, with or without their consent
- if no agreement is reached between the parties the Commissioner presiding must terminate the conference and dispose of the proceedings by holding a hearing, or if the parties consent, determine the matter on the basis of what occurs at the conciliation conference.

The Court or Commissioner is empowered to conclude that the circumstances of the case make it inappropriate to be dealt with by conciliation and arbitration, and may proceed to a full hearing at any time.

Conciliations are to be set down after the first callover and conferences will typically occur on site. Legal representatives are entitled to appear on behalf of parties, and experts will still be afforded a role in the conciliation and arbitration process. Once arbitration occurs, there will be no further right to a merits appeal. Any appeal of the Commissioner's decision at arbitration must be confined strictly to issues of law.

The rationale behind this amendment is the provision of a cost-effective and efficient method of reviewing council decisions on single dwellings and dual occupancies, which statistically make up a clear majority of the DAs that are considered by Councils. The Court will set a benchmark of 90 days for resolving 95% of matters. The proposed independent planning arbitrator provisions, that were introduced in 2008 but which have never commenced, will be repealed.

The second reading speech also foreshadows the introduction of a court practice note, to facilitate the implementation and management of the scheme.

It is also proposed that s 97B(2) of the EP&A Act will be replaced with a new section that obliges the Court to make a mandatory costs order against an applicant for costs thrown away as a result of the applicant amending the DA or plans during the proceedings.

Appeals under s 97

The statutory limitation period for commencing merit appeals under s 97 of the EP&A Act will be reduced from 12 months back to six months.

Section 97AA will be added to the EP&A Act. This section allows applicants a period of six months to appeal against the decision of a consent authority in relation to the modification of a development consent under ss 96 or 96AA.

Section 97A will also be introduced, providing that a consent authority must, upon the lodging of an appeal under either ss 97, 97AA or 98, give notice of that appeal to:

- an objector (in the case of a DA in respect of which the objector may appeal under s 98)
- the relevant minister or public authority (in the case of a DA in respect of which the concurrence of that minister or public authority is required)
- the relevant approval body (in the case of a DA to carry out integrated development that involves that approval body)
- the joint regional planning panel (JRPP) or the Planning Assessment Commission, where the appeal concerns a determination made by one of those bodies.

Any person given notice under this section has 28 days to apply to the Court to be heard on the appeal as if they were a party to the matter.

Internal review procedures

The internal review rights provided for in s 82A of the EP&A Act will be expanded under the Act. Section 82B will be introduced, which will allow for an applicant to request a review of Council's decision where a development application is

rejected without being determined. Sections 82C and 82D are also being inserted to provide further guidance on the management of review procedures under ss 82A and 82B, and to clarify the effect of decisions made by the reviewing body under these sections.

Review of application to modify a development consent

Sections 96(6)–(7) and 96AA(3)–(4) of the EP&A Act which deal with the deemed refusal period and appeals to the Court will be repealed and replaced. The deemed refusal period will be moved to the regulations.

Section 96AB is being inserted into the EP&A Act. This will allow for an applicant to seek Council's review of their own decision in relation to the modification of a development consent.

It should be noted that several determinations (for example, modification of a complying development certificate, designated developments and integrated developments) will not be subject to review by Council under s 96AB.

The Bill was introduced by the Government and was supported by the Opposition. It has recently just passed and is now awaiting assent.

Local Government Amendment (Environmental Upgrade Agreements) Bill 2010

by Ashleigh Egan, solicitor

The Local Government Amendment (Environmental Upgrade Agreements) Bill 2010 (EUA Bill) seeks to amend the *Local Government Act 1993* (NSW) to make provision for environmental upgrade agreements (EUAs).

The legislation is intended to allow businesses to access capital to implement larger projects over a timeframe that may be longer than many businesses' usual investment timeframe. Longer term loans at lower interest rates can be provided because the loan becomes a charge fixed to the land, rather than to the building owners' businesses.

The scheme may provide a split incentive to landlords and tenants. Currently, in most circumstances, a building owner makes the decisions about implementing energy efficiency upgrades but the tenants often receive the most benefits through lower power bills etc.

EUAs can overcome this through lease provisions that provide for proportional pass-through of local council rates and changes. This will mean that tenants may pay a smaller power bill but also pay a contribution to repaying the costs of the upgrade works.

To protect the tenant, the EUA Bill provides that the amount recoverable by the lessor as a contribution must not exceed a reasonable estimate of the cost savings to be made by the lessee, as a consequence of the environmental upgrade works provided for by the EUA.

The scheme aims to complement Commonwealth measures such as measures under the *Building Energy Efficiency Disclosure Act 2010* (Cth) and the commencement of additional tax benefits for building owners who upgrade their building's environmental performance from 1 July 2011.

EUAs facilitate the funding of environmental upgrades of commercial buildings with the aim of improving energy efficiency in the building sector.

This Bill was passed on 29 November 2010 and is now awaiting assent.

VICTORIA

Barnaby McIlrath & Wayne Gumley

The Traditional Owner Settlement Act 2010 (Vic)

The *Traditional Owner Settlement Act 2010* was passed on 14 September 2010 and came into force 23 September. It introduces a process to resolve native title in respect of Crown land in Victoria under a mediation framework.

The first agreement signed under the Act brought to an end a 13-year native title court battle. The $12m agreement between the Gunaikurnai people and the Victorian and federal governments was signed at Knob Reserve in Stratford. It formally recognises the Gunaikurnai as traditional owners

in Gippsland, granting them land rights to an area extending from west Gippsland near Warragul, east to the Snowy River, and north to the Great Dividing Range. It also includes 200 metres of sea-country and provides for joint-management of 10 parks and reserves. Attorney-General Rob Hulls said the landmark agreement entitled the Gunaikurnai to a range of economic and other opportunities, and that the:

> agreement goes some way to addressing the years of dispossession experienced by Victorian indigenous people over time and is a significant step in the delivery of land justice for traditional owners in Victoria.

See: http://www.heraldsun.com.au/news/victoria/gunaikurnai-aboriginal-win-landmark-native-title-rights-in-gippsland/story-e6frf7kx-1225942381244

Transport Integration Act 2010 (Vic)

The *Transport Integration Act 2010 (*Vic) was passed on 2 March 2010 and commenced 1 July 2010. It created a new framework for the provision of an integrated and sustainable transport system in Victoria to contribute to an inclusive, prosperous and environmentally responsible State. The Act introduces a suite of objectives and decision making based on the principles of ecologically sustainable development. 'Transport bodies' and 'interface bodies', as defined, must have regard to the objectives and principles of the Act where their decisions may have a material effect on the operation of the transport system.

See: http://www.transport.vic.gov.au/legislation

Environment Effects Act inquiry lapses

The Victorian Parliament's Environment and Natural Resources Committee – one of its Joint Investigatory Committees – was due to report on the effectiveness of Victoria's environmental impact assessment process by 5 October 2010. No public statement has been made as to why the report was not tabled before Parliament was prorogued for the state election, causing the inquiry reference to lapse.

See: http://www.parliament.vic.gov.au/enrc/

EPA regulatory matters

Following the events at the Cranbourne landfill which leaked landfill gas through the Brookland Greens Estate, the Victorian EPA has published a revised policy on best practice management of landfills known as the Landfill Best Practice Environmental Management (BPEM) Guidelines.

Standards for buffer distances, landfill design, construction, gas management, rehabilitation and community engagement have been updated. EPA is currently developing guidance on landfill gas monitoring for release in 2011 and continues to work with wider Victorian government on buffer issues.

See: http://epayoursay.com.au/lfbpem

In June 2010 Victoria's Environment Protection Authority (EPA) cancelled Mobil Refining Australia Pty Ltd's accredited licence for its Altona plant. This means that Mobil will no longer be entitled to a reduced licence fee and will be required to apply for works approvals in certain circumstances.

See:www.epa.vic.gov.au/publications/epanews/news_briefs.asp

The Auditor-General's Report into EPA Management of Hazardous Waste: the EPA website records the release of this report, which is highly critical of the EPA's performance in managing hazardous waste. The EPA states that it is implementing most of the recommendations in the report and is changing the way it works.

See:www.epa.vic.gov.au/publications/epanews/news_briefs.asp

Former Government's Climate Change White Paper Implementation Plan

The Implementation Plan for the Bracks Government's White Paper was released in October 2010. The *Climate Change Act 2010* has not yet been proclaimed. The Baillieu-led opposition did not oppose the legislation.

Under the plan, the EPA's expanded regulatory powers were to be used to introduce an emissions intensity standard for new power stations of 0.8 tonnes of carbon dioxide equivalent per megawatt hour. This would effectively prevent the construction of any new power stations based on conventional brown coal technologies. Emissions from existing brown coal-fired electricity generators may be regulated if agreement on a phase-down cannot be negotiated and a national carbon price is not in place. Other policy options addressed include the

setting of a greenhouse gas 'trigger' for large emitters, enabling the regulation of greenhouse gases as part of licensing and works approvals. This investigative process was to be led by the Department of Premier and Cabinet.

Amendments to the *Environment Protection Act 1970* (Vic) do not in themselves introduce any new requirements for business and industry. Any proposed changes to regulations or statutory policies under the EPA's new head of power are required by law to be subject to a full public consultation and impact assessment process and be independently examined by the Victorian Competition and Efficiency Commission.

The Government will also engage stakeholders in developing any regulations to ensure they are effective and targeted. The Government will establish an Industry Advisory Group under the Premier's Leadership Forum to advise on appropriate models to drive best practice approaches and technology in Victoria's highest emitting general industry and commercial sites. The Advisory Group will be chaired by an eminent businessperson or high level advisor to business, and members will include peak bodies and leading industry organisations.

See:http://www.premier.vic.gov.au/climate-change/12499-the-implementation-plan.html

TASMANIA

Jess Feehely

Tasmanian Charter of Rights may include a right to environmental sustainability

In October 2010 the Tasmanian Government released a directions paper on a proposed model for a legislated charter of rights, following the examples set by Victoria and the ACT. The proposed charter goes beyond the civil and political rights adopted in other Australian charters and includes a range of social, cultural and economic rights.

In 2006–07 the Tasmanian Law Reform Institute undertook an extensive research and consultation project regarding the need for a Tasmanian charter of rights. Over 350 submissions were received and the resulting report, *A Charter of Rights for Tasmania*, included strong recommendations in favour of a Charter of Rights. The Law Reform Institute specifically recommended that the charter include 'the right to a safe environment and to the protection of the environment from pollution and ecological degradation.'

The discussion paper also seeks feedback from the public regarding a number of the rights being considered, including the right to have the environment protected for present and future generations through reasonable legislative and other measures. Such a right would be consistent with the current objectives of the relevant planning and environmental legislation in Tasmania and the rights advanced by charters in other jurisdictions such as South Africa and Norway.

The government proposes to replace the Office of the Anti-Discrimination Commissioner with a Human Rights Commission to conduct education activities, receive complaints, enquire into whether programme and service delivery is consistent with the Charter and ask the Supreme Court to determine whether legislation meets standards set by the Charter.

Comments can be made on the directions paper until 14 January 2011.

See:www.justice.tas.gov.au/corporateinfo/projects/human_rights_charter.

Forests Statement of Principles signed

On 14 October 2010, a number of conservation and forest industry groups in Tasmania signed an historic statement of principles aimed at resolving the conflict over forests, protecting native forests and developing a strong, sustainable timber industry. Signatories include Timber Communities Australia, the Construction, Forestry, Mining and Energy Union (CFMEU), Forest Industries Association of Tasmania, Environment Tasmania, Australian Conservation foundation (ACF) and the Wilderness Society.

The 'Tasmanian Forests Statement of Principles' is an in-principle agreement on a range of issues, including:

- sustainable wood supply, based on agreed minimum quantities, and an ongoing supply of specialty timbers
- immediate protection of high conservation value forests on public land identified by the environmental NGOs, by way of a moratorium phased in over three months. While the boundaries of high conservation areas have yet to be finalised, initial indications are that this could include more than 600 000 hectares of additional reserves, including the Tarkine rainforest, Great Western Tiers, Blue Tier and the Upper Florentine Valley
- support for plantation certification and transition of the commodity forest industry out of public native forests into sustainable plantations
- independent, scientific landscape conservation and integrated catchment management programmes, and associated reform of laws and policies governing resource management in Tasmania
- only plantation residues to be used as biomass for Renewable Energy Certificates
- Forestry Tasmania to seek FSC certification.

Most controversially, the Statement of Principles includes support for 'a range of plantation based timber processing facilities, including a pulp mill.' Conservation signatories have denied that the principles amount to support for the proposed Gunns Pulp Mill at Bells Bay, emphasising that any proposed mill must be based on a new and transparent public consultation process. However, a number of groups in the region of the Bells Bay mill have refused to endorse the Statement of Principles.

The Statement commits the parties to seek Tasmanian and Federal Government support for the development of a plan to deliver the Principles and a stakeholder-led implementation process with a finalised full agreement within 12 months. The Tasmanian Premier has met with the Prime Minister and Environment Minister to discuss potential funding and governance models.

See:www.premier.tas.gov.au/hot_topics/tasmanian_forest_industry_-_principles_of_agreement

Environment Minister rejects development proposal at Ralphs Bay

The Federal Environment Minister formally refused to grant approval under the EPBC Act for the proposed canal estate development at Ralphs Bay on 29 October 2010 (see NELR 2010: 2&3). The development, which was refused by the Tasmanian government earlier this year, was referred to the Minister on the basis of its potential impacts on threatened species, migratory species and the nearby Ramsar wetland.

WESTERN AUSTRALIA

Ainsley Reid and Joe Freeman

Conservation Legislation Amendment Bill 2010

The Conservation Legislation Amendment Bill 2010 (Bill) was introduced to the Legislative Council and read for a second time on 17 November 2010. The purpose of the Bill is to amend the *Conservation and Land Management Act 1984* (WA) (the CALM Act) and the *Wildlife Conservation Act 1950* (WA). Changes proposed by the Bill include replacement of the provisions for the voluntary land management agreements which presently do not enable joint management of lands by the Department of Environment and Conservation's chief executive officer and other parties. The Bill will correct this deficiency and if enacted, will enable the joint management of land through joint management agreements. It will also recognise agreements already in place under the Burrup and Maitland Industrial Estates Agreement of 2003, the Ord final agreement of 2005 and the Yawuru agreement for Broome signed on 25 February 2010.

The Bill will also provide formal recognition of the importance of land and waters to the culture and heritage of Aboriginal people through a new management planning objective that will apply to

all lands subject to the CALM Act.

Forestry Management Plan 2004–2013 – mid-term audit

The WA EPA has released its report and advice to the Minister for Environment on the Mid-term Audit of Performance Report on the implementation of the Forest Management Plan 2004–2013 (FMP). The mid-term audit prepared by the Conservation Commission of Western Australia provides the EPA with advice as to whether the management of land to which the Plan applies has been undertaken in accordance with the FMP.

EPA Chairman Paul Vogel said that the EPA had recommended no changes to the current FMP, however work on a new FMP should start now. The EPA has provided a comprehensive list of issues for consideration during the preparation of a new plan, with climate change and governance critical matters to be addressed.

Mr Vogel said that another key component of the FMP was the establishment of new conservation reserves, but that only 67% of the land category changes required for the creation of the conservation reserves had occurred. Mr Vogel acknowledged that the creation of reserves was an important matter for the community and many submissions expressed concern and disappointment on this crucial issue. Mr Vogel said the designation of Fauna Habitat Zones was a key initiative of the FMP and it was a concern that the final guidelines for the selection of those zones were yet to be completed.

See:http://www.epa.wa.gov.au/EPADocLib/Rep%201362%20FMP%20audit%202710%20.pdf

Kimberley and Pilbara receive $1m conservation boost

The WA Minister for the Environment, the Hon. Donna Faragher MLC, has announced a $1m state government investment into priority nature conservation projects in the Kimberley and Pilbara regions, including $750 000 for the continuation of the State Cane Toad Initiative.

The projects are part of a $3.75m targeted investment by the Department of Environment and Conservation (DEC) in 2010–11 to implement projects for the conservation of WA's native plants, animals and ecosystems.

While highlighting the unique nature of flora and fauna in the Kimberley and Pilbara, the minister identified the cane toad as one of the major threats to the region's biodiversity. The $750 000 allocated to the Cane Toad Strategy for Western Australia 2009–10 will help achieve the strategy's three goals:

- to maximise understanding of cane toads, their impacts and management options
- to minimise the impact of cane toads
- to discover and implement long-term management solutions for the control of cane toads.

This funding will complement the $1.2m (over four years) in WA government funding allocated to the Kimberley Toad Busters.

In the Pilbara, projects will focus on pest animal control, including completion of the construction of a fence on the southern boundary of the Cane River-Mt Minnie Conservation Park, as part of a boarder program to reduce the impact of pest animals in the area.

See:http://www.dec.wa.gov.au/content/view/6188/1560/

WA Government endorses $370m desalination plant

Premier Colin Barnett has announced that the Burrup Peninsula near Karratha will be the site of a $370m seawater desalination plant. The WA Water Corporation will manage the development of the desalination plant which is expected to be commissioned in three years as a new source of drinking water for the West Pilbara. It is intended to support residential and small commercial growth in Karratha, Dampier, Roebourne, Wickham and Port Samson. Major industrial operators are expected to source and fund their own water supplies. The WA Government recently called for expressions of interest from parties interested in supplying six

gigalitres of drinking water for the medium term future.

See: http://www.watercorporation.com.au/_files/InfrastructureProjects/Pilbara_Industry_Briefing_Nov_15.PPT.pdf

Kimberley Wilderness Parks

The WA Government has announced the formation of the Kimberley Wilderness Parks, including the state's largest interconnected system of marine and terrestrial parks covering more than 3.5m hectares, an area of land more than half the size of Tasmania. Created under the Kimberley Science and Conservation Strategy, Premier Colin Barnett said the new parks would include four new marine parks, a new national park and additional conservation reserves.

The Kimberley Wilderness Parks will contain more than half of the known terrestrial bird and animal species found throughout the Kimberley and will protect a range of marine and terrestrial animals including rare and endangered turtles, Humpback and Minke whales, rock wallabies and Northern Quolls.

The WA Environment Minister also released the indicative management plan for the proposed Camden Sound Marine Park, the establishment of which the Government committed to in 2009. The current proposal for the Camden Sound Marine Park is almost twice the size of the proposal originally envisaged by the Government and would protect the largest Humpback whale nursery in the southern hemisphere.

The indicative management plan for the Camden Sound Marine Park is open for consultation comment until 1 February 2001, with management plans for the North Kimberley Marine Parks to be made available for public comment next year. Mrs Faragher said that consultation with the community would be an important part of the planning process for the Camden Sound Marine Park particularly because the park will be multiple use, allowing for the needs of the fishing, pearling, aquaculture, resources and tourism sectors.

Recreational fishing will be allowed in marine park waters, with the exception of sanctuary zones, and commercial fishing will be allowed to continue except within sanctuary zones and wilderness fishing zones. Trawling will be excluded from the whale protection zone.

Together with the North Kimberley Marine Parks, the Camden Sound Marine Park will be managed as the Great Kimberley Marine Park, which will cover more than 17% of WA waters, making it Australia's second largest coastal marine park behind the Great Barrier Reef Marine Park.

The Government will release further initiatives under the Kimberley Science and Conservation Strategy over the coming months. More information is available at www.dec.wa.gov.au/kimberleywildernessparks

QUEENSLAND

Patrick Vuleta

State Planning Policy 4/10 – Healthy Waters

In October 2010 the Queensland Government published *State Planning Policy 4/10–Healthy Waters (SPP 4/10)*, to commence 28 February 2011. State planning policies guide the creation of local government planning instruments. If a planning instrument does not reflect a state planning policy, the policy will override the instrument.

SPP 4/10 is based on *Environmental Protection (Water) Policy 2009* (EP Water), a subordinate law under the *Environmental Protection Act 1994 (Qld).* EP Water specifies environmental values for waterways within Queensland. *SPP 4/10* seeks to achieve these values by bringing their consideration into the development assessment process.

SPP 4/10 will apply to development applications for urban developments of at least six residential lots and more than 2500m^2. It will also apply to development applications for a material change of use, reconfiguration of a lot or operational works

involving waste water discharge.

SPP 4/10 will be implemented at first by a development assessment code. This code seeks to minimise adverse impacts on the quality of urban stormwater, minimise point source waste water discharge, and maintain water quality in artificial waterways such as urban lakes. The Queensland Government expects local planning schemes will be updated with equivalent provisions, but where these do not provide at least equal protection to water quality, the code in *SPP 4/10* will prevail.

SPP 4/10 does not apply to small-scale development such as single lots or dwellings. Building regulations and the Queensland Development Code continue to address the impacts of these developments.

State Planning Policy 5/10 – Air, Noise and Hazardous Materials

The Queensland Government has published *State Planning Policy 5/10–Air, Noise and Hazardous Materials (SPP 5/10). SPP 5/10* aims to ensure planning schemes take into account the location of industrial land uses to reduce adverse impacts on the public, and how industrial land uses will be protected from encroachment by other uses. These issues are currently addressed on a case-by-case basis as they arise for individual development applications. However, the Queensland Government believes planning schemes should provide firmer guidance to decision makers.

SPP 5/10 provides guidance on both preparing planning schemes and assessing development. Planning schemes must ensure that industrial land uses are directed away from sensitive land uses, must protect industry land uses from sensitive land uses, and must ensure that intensive animal industries are directed away from urban areas. Sensitive land uses are those uses with consistent human habitation, such as residential dwellings, offices and child care centres.

Existing industrial areas may not be able to meet the objectives of *SPP 5/10* due to their location near sensitive land uses. Where this is the case, planning scheme overlays or precincts must be used to create awareness of potential impacts and of the requirements to manage these impacts.

The development assessment provisions of *SPP 5/10* apply to development applications for sensitive land uses. Development must be designed to protect human health, wellbeing and amenity from the impacts of industry, and development must not compromise existing or future industrial development. *SPP 5/10* contains a model development assessment code, and the Queensland Government expects that local planning schemes will be updated to reflect its provisions.

Climate Change in Queensland: What the Science is Telling Us 2010

The Queensland Climate Change Centre of Excellence has released *Climate Change in Queensland: What the Science is Telling Us 2010.* This is the second edition of the report, the first having been released in 2008.

The report discusses the science on which climate change policies have been based. It also updates estimates of climate change impacts to take into account new studies since the first edition. The first edition was largely based on the reports I*PCC Fourth Assessment Report* (AR4) (IPCC 2007 a–c) and *Climate Change in Australia–Technical Report 2007* (CSIRO & BoM 2007). The second edition notes that while AR4 remains authoritative for Queensland climate change policy, considerable new information has come to light since its publication.

Key scientific findings

The report's key scientific findings support claims that climate change is now occurring at the upper levels of prior predictions:

- sea levels are rising faster than expected and the AR4 estimate of a 026–079 metre sea rise by 2100 may be a significant underestimate
- the last decade (2000–09) was the hottest on record with temperatures 058 degrees Celsius higher than the 1961–1990 average
- Queensland regions can expect increased temperatures of between 10 degrees Celsius and 22 degrees Celsius by 2050

- rainfall is expected to change, with a potential decrease by up to 7% in central Queensland by 2050
- a 3–5% decrease in rainfall in the south-east Queensland region is projected
- more frequent hot days and warm nights with less frequent cold days and cold nights

Human settlements and infrastructure policy recommendations

The report notes that cyclones and flooding will be the main climate change risks for settlements and infrastructure. Therefore, policy should be aimed at:

- improving building codes to strengthen buildings in new cyclone risk areas
- planning decisions and building standards should reflect a building lifespan of up to 200 years
- design and loading codes should be based on a risk assessment process to ensure the potential impacts of climate change are factored into design of buildings and infrastructure
- consideration of impacts on supporting infrastructure services from changing land uses

The report also notes that current data is not accurate enough to plan extensively for impacts of sea level rise, storm surge and flooding. Policy and legislation will need to be regularly reviewed and revised to reflect changing science.

Water policy recommendations

The report warns that water supplies will be adversely affected by climate change. This will be a large problem for Queensland's growing population, especially as most of the population growth is occurring in areas which do not receive the majority of Queensland's rainfall. It recommends that water supplies be diversified to provide an increased capture of rainfall when it occurs.

Terrestrial biodiversity policy recommendations

Climate change will have the greatest impacts on species which are already endangered. Therefore, the report recommends a policy of reducing existing threats to endangered species to give these species a greater chance of adapting to climate change.

Marine biodiversity policy recommendations

As with terrestrial biodiversity, the report recommends steps to reduce existing threats on marine species. However, not enough information is known about the temperature thresholds at which significant marine biodiversity loss will occur. Therefore, the report stresses the need for further research on which to base future policy.

Primary industries policy recommendations

Land clearing has been a significant factor in Australia's recent droughts and changing climate. Climate change will exacerbate what is already occurring, with greater extremes of rainfall and drought events. Policy needs to ensure adequate land cover is maintained in future. In addition, the report recommends greater education of primary producers about the effects of climate change, so that these producers can better adapt to the changing climate.

Health policy recommendations

In addition to heat-related illnesses, climate change will also increase the incidence of disease. Many diseases become more common with increasing temperature. Therefore, the report recommends greater efforts on controlling infectious diseases, supplying vaccines, surveillance of risk factors such as mosquitoes, and better health education.

Emergency management policy recommendations

There is considerable uncertainty about what climate change will mean for extreme weather events. While more research needs to be done, the report recommends as a general policy that community resilience to emergencies be improved.

SOUTH AUSTRALIA

Environment, Resources and Development Court

Quinn & Ors v Regional Council of Goyder & Anor [2010] SAERDC 63

On 24 November 2010 the Environment, Resources and Development Court handed down judgment in the first appeal which has proceeded to hearing in South Australia concerning a proposed wind farm.

The proponent, AGL Energy Ltd, sought development approval to establish a wind farm on land east of the township of Hallett, near Mt Bryan. The proposed wind farm consisted of 38 turbines, access roads, cables, wind monitoring masts, electricity sub-station and other associated infrastructure.

The application was processed as a category 3 development. Numerous representations were received. The Council granted conditional development plan consent to the proposal, and several representors appealed against the Council's decision.

Prior to hearing of the appeal, AGL amended its proposal, including by omitting five turbines. The proposed turbines consisted of an 80m high tower, and 44m long turbine blades, giving an overall height of 124m above ground level.

The subject land was in a Primary Production Zone according to the relevant Development Plan.

The appellants' objection to the proposal related principally to the potential noise impacts of the turbines, and their visual impact including the effect of the proposal on users of the Heysen Trail. [The Heysen Trail is a 1 200 km walking trail from Cape Jervis on the Fleurieu Peninsula to Parachilna Gorge in the Flinders Ranges.]

The Court heard uncontested evidence that the location was very good in terms of efficient generation and supply of electricity, compared with other existing or proposed wind farms around Australia.

On that basis the Court was satisfied that the proposed wind farm would be sited in an 'appropriate location' having regard to Objective 1 and PDC 1 of the Renewable Energy Facilities (REF) of the Development Plan.

Importantly, the Court considered that the REF provisions express a planning policy which encourages the establishment of new wind farms in such areas.

Having established that the location was generally suitable, the Court considered whether the elements of the wind farm, and the wind farm as a whole, were suitable in terms of siting, design and operation.

The Court noted that the site was not in an area of the state where the landscape qualities were so significant that a wind farm would not be appropriate, at all, on visual grounds. The Court indicated that, generally, it would not expect such areas to be zoned Primary Production. Rather, it is more likely that they would have a conservation or heritage focus.

The Court also observed that the policy behind the provisions in the REF of the Development Plan which deal with visual amenity 'must have been set in the knowledge that a wind farm necessarily involves the establishment of very high towers, with very long blades attached to them, in visually prominent locations'. As such, some modification of the landscape 'must occur' for the objectives of the REF to be achieved.

The Court then considered the visual impacts of various elements of the wind farm, including the turbines, substation and access tracks and turbine pads. The Court held that although the landscape would be modified by the introduction of a new element into the landscape, it would retain an open, scenic, rural character as desired in the Zone. The modification of the landscape was therefore permissible in planning terms.

The Court heard expert evidence from two acoustic engineers, as well as anecdotal evidence from people living in proximity to an existing, neighbouring wind farm.

AGL's acoustic engineer was satisfied, on the basis of noise modelling, that the proposed wind farm would sufficiently comply with the relevant environmental noise standards. The acoustic engineer called by the appellants did not

undertake noise modelling but, rather, criticised the relevant noise guidelines and standards for predicting noise levels for wind farms. The Court held that it was not its role to re-write the noise standards. Rather, its role generally was to apply the standards as they exist.

In dealing with the anecdotal evidence, the Court stated that the framers of the Development Plan must have known that even in a sparsely populated rural area there would be residents who would be able to hear the turbines, and that a small percentage of those were likely to be annoyed. Thus, the Court was unable to draw any inferences from the anecdotal evidence in circumstances where the proposal was shown to sufficiently achieve relevant environmental noise standards.

Comment

The Quinn decision provides much anticipated clarification in relation to the interpretation and application of REF provisions in a number of Development Plans.

The decision confirms that the REF provisions encourage the development of wind farms in appropriate locations.

The decision also confirms that zone provisions relating to visual amenity must be viewed in the context of the REF provisions relating to visual amenity, which necessarily assume there will be some modification to the landscape.

The decision also confirms that notwithstanding that the establishment of a wind farm may cause noise nuisance to some people, the REF provisions seek the avoidance or minimisation of excessive noise which, in turn, invites assessment against relevant noise standards.

Peter Psaltis, Partner, Norman Waterhouse Lawyers

Environment, Resources and Development Court (ERD Court)

Sweeny v City of Onkaparinga [2010] SAERDC 65

The decision in Sweeny v City of Onkaparinga from the ERD Court contains some important guidance concerning the determination of residential density.

An appeal was brought against the decision of the Council to refuse a proposal for the construction of two two-storey group dwellings to the rear of an existing dwelling, a car-port in front of the existing dwelling, the removal of four significant trees and related landscaping and driveway works.

The proposed development was located in a policy area which strongly encouraged the retention of very low-density residential development.

The appellant's expert witness examined four areas surrounding the proposed development, and found that area 1 had a rate of 3.5 dwellings per hectare, area 2 had a rate of 6.1 dwellings per hectare, area 3 (which included the subject land) had a rate of 9 dwellings per hectare and area 4 had a rate of 10.2 dwellings per hectare.

The appellant argued that density is a relative concept, and as such, the existing density of area 3, having regard to its dwelling per hectare rate compared to areas 1, 2 and 4 was already medium-density and, as such, the proposed development was in accordance with the existing pattern of development in the locality.

This argument was advanced despite the fact that the average allotment size in the locality was 986m2, and the site area for each proposed group dwelling was approximately 350m2.

In rejecting the appellant's density argument, the Court held that density is indeed a relative concept, but that it is determined by reference to not only dwellings per hectare, but also site area, site coverage, bedrooms per dwelling and so on.

Accordingly, the Court found that, having regard to all of these factors, particularly site area and site coverage, the existing density was not medium-density, but rather low-density, and as such, the proposed development would be at odds with existing development in the locality.

This judgment is a useful reminder that although density is a relative measure, and can vary from locality to locality, factors such as site area and site coverage cannot be ignored in making a determination in this regard.

Victoria Shute, Associate, Wallmans Lawyers

VICTORIA

Civil and Administrative Appeals Tribunal

Coastal Estates Pty Ltd v Bass Coast SC & Ors (Red Dot) [2010] VCAT 1807

This summary is provided by the Tribunal:

The applicant filed proceedings under s 39 of the *Planning and Environment Act 1987* (P&E Act) having made submissions to Amendment C93 to the Bass Coast Planning Scheme and appearing before the panel appointed to consider submissions in relation to that planning scheme amendment. The applicant claimed to be substantially and materially affected by a failure of the panel to comply with ss 24(a), 25(1) and 161(1)(b) of the P&E Act in considering and hearing submissions and in reporting its findings on a variety of issues.

Some of the applicant's concerns were that the panel that took into account irrelevant considerations, or made findings or recommendations not open on the evidence, wrong in law, or manifestly unreasonable.

The decision concludes that the jurisdiction of the Tribunal under s 39 of the *Planning and Environment Act 1987* does not enable a review of substantive errors by the panel, but is limited to procedural defects. [The Tribunal makes no finding as to whether the panel in this case misdirected itself on the material before it.]

Some of the applicant's concerns raised issues of natural justice, and whether the panel provided a fair hearing. The Tribunal held that it did have jurisdiction to consider these matters under s 39 but, after examining the specific allegations, found no breach to have occurred. In reaching this conclusion, the Tribunal makes some observations on the principles of natural justice applicable to panel hearings.

The Tribunal also makes comment on the panel's participation in the s 39 proceedings, and expresses concern at the risks to panel impartiality if it becomes a protagonist in its own cause or seeks to defend its position through counsel or affidavit evidence.

Linaker v Greater Geelong CC & Ors (Red Dot) [2010] VCAT 1806

This summary is provided by the Tribunal.

The issues in this case concern an applicant's standing pursuant to s 33B(1) of the *Environment Protection Act 1970* (Vic) to review a decision of the EPA to issue a works approval and who may rely upon the grounds specified in s 33B(2) of the Act.

The Supreme Court has recently considered the issue of standing by applicants in environmental and similar cases in Environment *East Gippsland Inc v Vic Forests* [2010] VSC 335 and *Thirteenth Beach Coast Watch Inc v Environment Protection Authority and anor* [2009] VSC 53. In the Environment East Gippsland Inc case, Justice Osborn reviewed the authorities on standing and referred to comments made by Sackville J in *North Coast Environment Council Inc v Minister for Resources* [1994] FCA 1556; (1994) 55 FCR 492, which identified the following principles:

A plaintiff must demonstrate a 'special interest' in the subject matter of the action. A 'mere intellectual or emotional concern' for the preservation of the environment is not enough to constitute such an interest. The asserted interest 'must go beyond that of members of the public in upholding the law ... and must involve more than genuinely held convictions'.

A plaintiff may be able to demonstrate a special interest in the preservation of a particular environment. If it does so an intellectual or emotional concern is no disqualification from standing to sue.

An allegation of non-compliance with a statutory requirement or an administrative procedure is not enough of itself to confer standing.

The fact that a person may have commented on environmental aspects of a proposal as part of an environmental assessment process does not of itself confer standing to complain of a decision based on that process.

An organisation does not demonstrate a special interest simply by formulating objects that demonstrate an interest in and commitment to the preservation of the physical environment.

Determining whether a person has standing will always depend upon the facts and circumstances in each case. However, there is no basis for suggesting that the interests that must be affected in order to establish standing under s 33B(1) are any different to the interests that are referred to in s 33B(2)(a). Equally, a person who seeks to rely upon the ground in s 33B(2)(b) must still establish that they are a person whose interests are affected by the decision.

In practice, it will tend to be individuals or corporations who are most likely to rely upon the ground in s 33B(2)(a) and, although there is nothing to prevent them from relying on the ground in s 33B(2)(b), this ground is more likely to be relied upon by groups or associations.

HIGH COURT

Selected Seeds Pty Ltd v QBEMM Pty Limited [2010] HCA 37

Selected Seeds Pty Ltd is a grain and seed merchant in Queensland. In 2002 it purchased seed held out to be Jarra grass seed but which was substantially contaminated with Summer grass seed. While Jarra grass is high quality feed for livestock, Summer grass is an aggressive weed.

Selected Seeds sold the seed crop to S and K Gargan. The Gargans then supplied the seed to M Gargan, who cultivated the seed. With each successive harvest, the crop contained a higher proportion of Summer grass. By the time M Gargan sold the seed crop to Landmark Operations Limited (Landmark), the crop was almost entirely Summer grass. Landmark sold this crop as Jarra grass seed to R and J Shrimp. When the Shrimps sowed the Summer grass seed on their land, the resulting Summer grass weed infestation caused financial loss.

In 2006 the Shrimps commenced proceedings in the Federal Court against Landmark for damages. Landmark joined M Gargan to the proceedings, who in turn joined Selected Seeds. The parties reached a settlement under which Selected Seeds paid for some of the damage, but their insurer–QBEMM Pty Ltd, refused to indemnify for this loss.

Selected Seeds bought an action against QBEMM in the Supreme Court of Queensland to enforce the insurance policy. The policy provided that QBEMM would indemnify Selected Seeds against sums payable as compensation for property damage. The Supreme Court allowed the claim, and QBEMM appealed to the Court of Appeal. The Court of Appeal allowed the appeal, prompting Selected Seeds to appeal to the High Court.

Grounds of appeal

The arguments before the High Court focused on the operation of an efficacy clause. This clause exempted QBEMM from liability to indemnify Selected Seeds for the failure of any product to correctly fulfil its intended use or function.

Selected Seeds argued that the damage had resulted from introduction of Summer grass, not from a failure of the seeds to correctly fulfil their intended use or function. Therefore, the efficacy clause did not apply and QBEMM was liable to pay under the insurance policy. QBEMM argued that because the seed had not produced Jarra grass, the seed had not fulfilled its intended function, and the efficacy clause did apply. These arguments were the grounds on which each party succeeded at the Supreme Court and Court of Appeal, respectively.

Patrick Vuleta

Decision

The High Court was critical of the Court of Appeal's reasoning in choosing to characterise the damage as resulting from the seeds' failure to correctly fulfil the intended use or function. The Court of Appeal read the terms of the efficacy clause broadly, applying it to liability having any causal connection with a failure to fulfil an intended use. Consequently, a seed which produced an unexpected crop could be seen as not fulfilling an intended function.

The High Court stated this interpretation was too wide and inconsistent with the rest of the insurance policy. The operation of the efficacy clause had to be determined by construing its words according to their natural and ordinary meaning. This must be done in light of the policy which was aimed at insuring against property damage. Examined in this way, the efficacy clause acted to limit the insurance policy to property damage, not provide a broad exemption from liability.

The High Court held that liability did not arise from the seeds' failure to produce Jarra grass. It came from property damage caused by Summer grass contamination. Liability was caused by what the seed actually did, not what it failed to achieve. Consequently, the High Court found that the efficacy clause did not apply, and ruled in favour of Selected Seeds.

Patrick Vuleta

ENVIRONMENTAL LAW AND LAWYERS' ETHICS

By Robyn Glindemann*

Introduction

Both the drivers of the modern corporation, and the ethical components of environmental law, are derived from sources which extend far beyond the requirements of Commonwealth, state and territory environmental legislation. In the 21st century, the regulatory environment that companies inhabit continues to change and adapt, not only as a result of corporate leadership, but as a result of changes in focus and thinking at a political level, both nationally and internationally. Increasingly, corporations, governments and investors are alive to the environmental consequences of development and recognise that a healthy, sustainable economy requires a similarly healthy and sustainable environment.

Global concern in relation to issues such as climate change, international security and sustainable development mean that the ethical parameters of legislation, including environmental law, are relevant to how decisions under that legislation are made and the way in which corporations are required to comply with that legislation. Major companies are transitioning in corporate reporting from environmental reporting to more expansive sustainability reporting, which combine mandatory, voluntary and co-regulatory initiatives.[1] Although not currently mainstream investment practice, issues of environmental and social governance and responsibility are forming part of investment decision making.[2] The growing number of inputs which affect corporate behaviour in turn affects the role of corporate advisers, including lawyers. But the rules governing the legal profession are not yet, in this country, broad enough to oblige lawyers to advise on the ethical aspects underpinning legislation, or on non-traditional regulation beyond the law.

This article discusses standards and obligations contained in reporting requirements, corporate governance rules and business systems and practices. These influence how a corporation behaves and the outputs it produces within the broader framework of environmental law. It also discusses evolving lawyers' ethics, which are beginning to take broad sustainability norms and sustainability principles into account.

Ethical considerations when advising clients

In general terms, members of the legal profession have obligations to the community in relation to the law and the administration of justice. In *Re B*,[3] Moffitt P, repeating the words of Dixon J in *Re Davis*[4] framed the duty of the lawyer in the following terms:

> *The duty is owed to the public, in that in exchange for the legal privileges which the law confers on the barrister or on his relationship with his client, his duty in the public interest is to conduct himself in relation to those privileges and otherwise in the manner which will uphold the law and further its pure administration*.[5]

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* Special Counsel, Allens Arthur Robinson. The author's views in this paper do not represent the views of Allens Arthur Robinson. My heartfelt thanks to Allens Lawyers Ainsley Reid and Sunili Govinnage and Law Graduate Robert Merriam for assistance in preparing and updating this paper, which was first presented at a Legalwise Seminar 'Key Ethical Issues for WA Lawyers' in Perth on 2 June 2010, and edited and updated for the NELR.

1 See Bryan Horrigan, '21st Century Corporate Social Responsibility Trends – An Emerging Comparative Body of Law and Regulation on Corporate Responsibility, Governance, and Sustainability' (2007) 4 *MqJBL* (2007) at footnote 32 where the author cites KPMG Global Sustainability Services, *KPMG International Survey of Corporate Responsibility Reporting* (2005).

2 Ibid, citing United Nations Environment Programme Finance Initiative (UNEP F1) Asset Management Working Group (AMWG), *A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment* (2005) 23–27.

3 [1981] 2 NSWLR 372

4 (1947) 75 CLR 409

5 *Re B* [1981] 2 NSWLR 372 at 381–382

A lawyer *must* act in the best interest of their client.[6] This requirement includes an obligation to 'conduct each case in the manner counsel considers will be the most advantageous to the client,'[7] and legal services must be delivered competently and diligently.[8] However, the duty to the Court and to the administration of justice is paramount and overrides any duty to the client.[9]

In the context of advising on compliance with environmental laws and regulations, a difficult dichotomy exists between the role of the lawyer in serving the interests of their client, and the lawyer as a 'public-minded professional', whose commitment in 'promoting, in his own sphere, the cause of justice'[10] may take precedence over the interests of the client. On the one hand, when considering options under environmental legislation, the lawyer assists in maximising the client's welfare. On the other, where the lawyer encourages their clients to act in accordance with the public purposes underlying the legislation, even where other options may have greater expected value to the client; the lawyer is, at least in part, an agent for the public good.[11]

'Legal services' is defined in both the Western Australian and Commonwealth draft professional conduct rules as work done in the 'ordinary course of legal practice'.[12] The question that arises concerns the scope of the advice a lawyer must provide their client 'in the ordinary course' of their legal practice in providing competent, diligent advice that is in the client's best interests.

As Dal Pont has noted, 'as a matter of good practice lawyers should supply 'rounded' legal advice, which may involve taking into account non-legal factors', which leads to the conclusion that 'legal advice does not operate in a vacuum, and that client interests may not infrequently justify proffering other than legal advice'.[13]

The current Law Society of WA Professional Conduct Rules (July 2008) (*PCR*) include a requirement that 'a practitioner must draw the client's attention to the possible effect of any proposed cause of action which may adversely affect the client's reputation'.[14] There is evidence to suggest that companies regard environmental breaches as a potential threat to reputation.[15] This being the case, there may be scope to advise on 'non-legal' or 'ethical' components of environment legislation under this rule, although the extent to which any such advice is required is limited not only by the fact that the PCR (and the Western Australian Bar Association Rules) do not have statutory force, but the lack of more specific language.

The American Bar Association (*ABA*) includes a rule in their Model Rules of Professional Conduct that provides:

> *In representing a client, a lawyer shall exercise independent professional judgement and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.*[16]

The rule directs that non-legal factors may, and probably should, be taken into account in giving legal advice.[17] Kim Connolly notes:

> *This rule recognises that purely technical legal advice can sometimes be inadequate,*

6 Commonwealth Government, *Legal Profession National Law, Legal Profession National Rules – Solicitor's Rules 2010*, Consultation Draft 14 May 2010, rule 4.1.1; Legal Practice Board of Western Australia, *Draft Practitioner's Conduct Rules, Review and Discussion Draft*, 15 February 2010, rule 3.1.1

7 The Law Society of Western Australia, *Professional Conduct Rules (July 2008 Revision)*, rule 14.1

8 Commonwealth Government, above n 6, rule 4.1.3; Legal Practice Board of Western Australia above n 6, rule 3.1.3

9 *Kyle v Legal Practitioner's Complaints Committee* (1991) 21 WAR 56; Commonwealth Government, above n 6; Legal Practice Board of Western Australia, above n 6, rule 2.1

10 See *Myers v Elman* [1939] 4 All ER 484 at 509

11 See David Dana, 'Environmental Lawyers and the Public Service Model of Lawyering' (1995) 74 *Or. L Rev.* 57, 58-59

12 Commonwealth Government, above n 6, Glossary of Terms; Legal Practice Board of Western Australia, above n 6, Glossary of Terms

13 Gino Dal Pont, *Lawyers' Professional Responsibilities* (4th Edition, 2010) 115

14 The Law Society of Western Australia, above n 7, rule 13.2

15 The Economist Intelligence Unit, *Reputation: Risk of risks* (2005)

16 Kim Connolly, 'Considering 'nonlegal' environmental issues while counselling clients' (2010) 41(3) *Trends: ABA Section of Environment, Energy and Resources Newsletter*, 6–7

17 Ibid 6

> *because many legal problems arise in contexts that are so charged with nonlegal considerations that no 'pure' legal choice exists. In such cases these nonlegal factors directly affect how the law itself will be applied. In these cases giving inadequate advice could violate the duties [of]… competence and… communication indirectly because the lawyer has failed to provide the client with sufficient information to allow for intelligent decision making.*[18]

The draft rules released recently in relation to the National Legal Profession Reform are not as prescriptive as the American approach. However, as the current PCR require a practitioner to refer to any adverse reputational effects,[19] as well as the requirements to act in the client's best interests when competently and diligently providing legal services, there may be scope for at least a consideration of whether it is our professional responsibility to advise our clients on ethical issues arising out of environmental law queries.

Given the growing importance of environmental law and policy, and its increasing complexity, close attention to the rules of professional conduct may become vital to successful client representation. If Australia's professional conduct rules do not go so far, it may simply be time for lawyers to consider how and whether their role should be evolving.[20]

Ethics influencing best practice environmental management

The way in which Australian companies interact with the environment is shaped by various obligations and expectations. These obligations and expectations have changed greatly over the last century. Previously, companies, regulators and the community might have paid little attention to major environmental damage which a company's activities caused. This is no longer the case. Broadly, in Australia today, major environmental damage is seen as avoidable and unacceptable, whether or not it is permitted under environmental legislation. Companies, regulators and the community pay close attention to how companies interact with the environment, and expect companies to use their best efforts to minimise the environmental damage which their activities cause.

This moral shift in society has altered the way in which companies interact with the environment. The moral epicentre of a company, which dictates the environmental practices of that company, is now shaped by various legislative and non-legislative factors. These factors also drive best practice environmental management.

Bubna-Litic argues:

> *Environmental law can only go so far. It cannot, and should not, prescribe every decision taken by every business. Rather, consideration of environmental issues: the direct and indirect environmental impacts of the business; the environmental issues of concern to the wider community; and the risks and opportunities associated with them, should be part of good business practice.*[21]

'Best practice' environmental management is not driven primarily by legislation and regulatory frameworks more generally. Whilst legislation can influence corporate behaviour, there are limits to the extent to which it can prescribe responsible and desirable environmental practice.[22] The Corporations and Markets Advisory Committee (*CAMAC*) reported in 2006:

> *Beyond [compliance with laws], companies are influenced in their decision-making by the marketplace of opinions and expectations in which their businesses are carried out. They are subject to various pressures that need to be taken into account if a company is to be successful. These include environmental or other social issues that affect*

18 Ibid 7
19 The Law Society of Western Australia, above n 7, rule 13.2
20 Connolly, above n 16, 7
21 Karen Bubna-Litic, 'Climate change and corporate social responsibility: The intersection of corporate and environmental law' (2007) 24 *EPLJ* 253, 266
22 Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations* (2006) iii

> *a company's business and that, if not adequately addressed, will put the value and viability of the business at risk.*[23]

Beyond compliance with environmental legislation, a company's environmental practice can be influenced by:

- obligations under non-environmental legislation (such as disclosure obligations and directors' duties under the *Corporations Act 2001* (Cth) (*Corporations Act*))
- obligations created by 'soft law' (eg the Australian Securities Exchange's (*ASX*) listing rules and the ASX Corporate Governance Council's *Principles of Good Corporate Governance*), and international standards and voluntary codes of practice which a company adopts
- corporate social responsibility considerations (which are based on the idea that the role of a company is not limited to complying with legal obligations and returning profits to shareholders, but that it is to consider the economic, social and environmental impacts of its activities).

Corporate social responsibility

Corporate social responsibility (*CSR*) refers to the idea that the contribution which a company is responsible for making to society is not limited to returning profits to shareholders. The activities of a socially responsible company are determined not only by consideration of strict legal obligations, but by broader considerations of the economic, social and environmental impacts of those activities. A socially responsible company considers not only financial interests of its shareholders, but the financial and non-financial interests of society more broadly.

The CSR movement received support from the CAMAC, when it concluded in its 2006 report *The Social Responsibility of Corporations* (*CAMAC Report*) that the Corporations Act allows company directors to take relevant interests and broader community considerations into account in performing their duties.[24]

A cynic might dismiss CSR as something only 'do-gooder' companies that are not serious about financial returns would worry about. But the Parliamentary Joint Committee on Corporations and Financial Services (*PJC*), in its 2006 report *Corporate Responsibility: Managing Risk and Creating Value (PJC Report)*, noted various actual benefits that CSR can have for a company. These included the maintenance and improvement of company reputation, the recruitment, motivation and retention of staff, the attraction of investment from sustainable investment funds, good status on sustainability market indices, risk management and minimisation and the avoidance of regulation (by taking voluntary action to improve corporate conduct, companies might forestall the imposition of mandatory obligations).[25]

There are also potential negative consequences for companies which choose not to adopt socially responsible practices:

Companies that do not take positive steps and proactive measures to mitigate climate change impacts may create a competitive disadvantage for themselves. This is because climate change issues have the potential to influence consumers in their decisions when buying goods and services and consumers may prefer particular goods or services because of a company's position on climate change or the greenhouse gas friendliness of the product or service. These disadvantages generally take the form of diminished reputation and customer loyalty.[26]

Directors' duties

Whose interests should a company director consider in performing his or her function? The idea of a director considering interests beyond those of shareholders is discussed above. The ways in which Australian corporations law provides directors with scope to consider corporate responsibility issues will now be considered.

23 Ibid 7
24 Corporations and Markets Advisory Committee, above n 22, 7
25 Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value* (2006) 20–32
26 Riccardo Troiano, 'Climate change: Corporate liability, disclosure requirements and shareholders' remedies' (2008) 26 *C&SLJ* 418, 424

***Corporations Act* – s 180(1)**

Section 180(1) requires a company director to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise in their position. This duty must be defined by reference to the nature and extent of the foreseeable risk of harm to the company that might arise if the director does not act with care and diligence. Failure to exercise care and diligence will not be established under s 180 unless at the time the director acted (i.e., not with the benefit of hindsight) it was reasonably foreseeable that their actions might harm the company's interests.[27]

Poor environmental performance has the potential to harm a company's interests, and therefore may be something that a director ought to consider in performing his or her duties. As will be discussed below, shareholders and investors may decline to hold interests in a company because of environmental concerns. It is useful however to briefly consider the example of Rio Tinto and the Grasberg mine in Indonesia. In 2008 the Norwegian Government Pension Fund divested its $1.05 billion interest in Rio Tinto because of the company's involvement in the 'severe environmental degradation caused by [the Grasberg mine]'.[28] Two years earlier, the Fund had divested its interest in Rio Tinto's joint venture partner in the mine, Freeport McMoRan, because of the same environmental concerns.

To use this as an example, one day a reasonable director might be expected to behave differently in managing the company's involvement in a development like Grasberg. A reasonable director might be expected to consider not only the short term profits of involvement in a development, but also the potential negative impacts for the company, such as damaged reputation, and the possibility of shareholders divesting their interests in the company because of environmental concerns.

The weight that a reasonable person can be expected to give to non-financial considerations may increase over time, as the community becomes more concerned with environmental protection. The interrelatedness of a company's financial and non-financial performance may also encourage the consideration of issues that might not appear to have any immediate impact on a company's financial performance.

Corporations Act – s 181

Section 181 requires a company director to exercise their powers and discharge their duties in good faith in the best interests of the corporation, and for a proper purpose. What are the best interests of the corporation? In the English case of *Greenhalgh v Ardene Cinemas*,[29] Lord Evershed MR said that the phrase 'company as a whole' did not mean the company as a commercial entity, distinct from the shareholders, but that it meant the shareholders as a general body.[30] This interpretation has been cited in various Australian decisions.[31]

Bielefeld *et al* argue that if directors are to act in the best interests of shareholders, that this might include the interests of both current and future shareholders or at least the long term interests of current shareholders.[32] It follows, that to protect these long term interests of shareholders, a director ought to make decisions that ensure the long term viability of the corporation:

> *The long term viability of a corporation may be threatened where a corporation engages in repetitive breaches of environmental legislation, but it may also, in some situations, be threatened by actions, which although not technically unlawful, involve serious environmental impacts which will continue to be associated with the company in the future.*[33]

27 *Vrisakis v Australian Securities Commission* (1993) 11 ACSR 162 at 212

28 Norwegian Ministry of Finance, *The Government Pension Fund divests its holdings in mining company,* Press Release (9 September 2008) <http://www.regjeringen.no/en/dep/fin/press-center/Press-releases/2008/the-government-pension-fund-divests-its-.html?id=526030>

29 [1951] Ch 286

30 *Greenhalgh v Ardene Cinemas* [1951] Ch 286 at 291

31 See *Ngurli Ltd v McCann* [1953] HCA 39 at 24; *Reefton Mining NL v Kimbriki Nominees Pty Ltd* [2007] FCA 17 at [38]; *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239 at [4392]

32 Shelley Bielefeld et al, 'Directors' duties to the company and minority shareholder environmental activism' (2004) 23 *C&SLJ* 28, 38

33 Ibid

Bielefeld *et al* continue:

> *Directors may often feel compelled to maximise short term profits, which could lead to environmental degradation, at the expense of ensuring the long term viability of the company. However, directors would be advised not to engage in activities which, although promising higher short term profits, could have serious implications regarding a corporation's long term viability. It may be that in pursuing short term profits at the expense of long term sustainability, directors will be in breach of their duty to act in the best interests of the corporation under s 181.*[34]

Therefore, whilst a company might maximise short term profits by remaining involved in a profitable project with significant environmental impact, this might be overshadowed by the potential long term consequences of the divestment of shareholdings from the company and a damaged reputation. These long term consequences may alter what a director needs to do to satisfy the duty to act in good faith in the company's best interest.

This view was echoed in the PJC Report. The PJC determined that the most appropriate interpretation of the interests a director should consider in performing directors' duties was the 'enlightened self-interest' interpretation.[35] This interpretation recognises that investments in corporate responsibility and corporate philanthropy, while not generating immediate profit, can contribute to the long term viability of a company. [36] This enables directors to consider and act upon the legitimate interests of stakeholders to the extent that these interests are relevant to the corporation.[37] Stakeholders are groups and individuals that are impacted on by corporate activity, including shareholders, employees, the community and the environment.[38] The PJC preferred the enlightened self-interest interpretation of directors' duties to interpretations which made profit-making and legal compliance the only concerns for companies.[39] The PJC recommended companies and directors act in a 'socially and environmentally responsible manner at least in part because such conduct is likely to lead to the long term growth of their enterprise.'[40]

The directors' duties set out in the United Kingdom's *Companies Act 2006* (UK) (the *UK Act*) are said to codify and mandate the 'enlightened self-interest' approach[41] or the comparable 'enlightened shareholder value' approach.[42] Section 172 of the UK Act, entitled 'Duty to promote the success of the company', provides:

> *(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—*
>
> *(a) the likely consequences of any decision in the long term,*
>
> *(b) the interests of the company's employees,*
>
> *(c) the need to foster the company's business relationships with suppliers, customers and others,*
>
> *(d) the impact of the company's operations on the community and the environment,*
>
> *(e) the desirability of the company maintaining a reputation for high standards of business conduct, and*
>
> *(f) the need to act fairly as between members of the company.*
>
> *(2) Where or to the extent that the purposes of the company consist of or include*

34 Ibid 39
35 Parliamentary Joint Committee on Corporations and Financial Services, above n 25, 53
36 Ibid 52
37 Ibid
38 Ibid 5-6
39 Ibid 53
40 Ibid 53
41 Ibid 55
42 Horrigan, above n 1, 104

> *purposes other than the benefit of its members, subsection (1) has effect as if the*
>
> *reference to promoting the success of the company for the benefit of its members were to achieving those purposes.*
>
> *(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.*

Horrigan described the UK Act as 'pregnant with potential CSR implications for a variety of CSR actors.'[43] Its drafters were obviously convinced by the argument that a company which embraces CSR is likely to benefit in various ways, and ultimately be successful. The UK Act explicitly links the success of a company with its directors having regard to the environmental impacts of the company's operations, the company's good reputation and likely long term consequences of decisions. In a recent article, Dr Richard Alexander argued that the directors of BP might have breached their obligations under s 172 in connection with the events of the oil spill in the Gulf of Mexico.[44]

Returning to directors' duties generally, it seems unlikely for the moment that directors' duties under Australian legislation will be amended so as to reflect the UK Act and the enlightened self-interest approach. The PJC decided that the British approach 'appears to introduce great uncertainty into the legal expression of directors' duties.'[45] The PJC suggested that the British approach did not provide clear guidance as to whom the directors' duties were owed, nor how the duties were to be discharged.[46] The PJC also suggested that mandating CSR practices would lead to a 'culture of compliance', and would stifle voluntary efforts of companies to be socially responsible.[47]

CAMAC was also cautious of the British approach, suggesting that it could 'result in a radical change from traditional company law' and 'entrench in legislation particular stakeholder and other criteria that, while possibly reflecting current concerns, may not necessarily be appropriate for corporate decision-making in the future.'[48]

ASX Corporate Governance Council's Principles of Good Corporate Governance

The second edition of the ASX's Corporate Governance Council's *Corporate Governance Principles and Recommendations* (*ASX Recommendations*), which came into effect in 2008, offers guidance and suggestions as to good corporate governance practices. Although these guidelines are voluntary, if a company decides not to follow a recommendation it must explain why.[49] Various aspects of the ASX Recommendations encourage companies to adopt socially responsible practices and to consider interests beyond those of shareholders.[50] The ASX Recommendations continue:

> *To make ethical and responsible decisions, companies should not only comply with their legal obligations, but should also consider the reasonable expectations of their stakeholders including: shareholders, employees, customers, suppliers, creditors, consumers and the broader community in which they operate.*[51]

The ASX Recommendations suggest that a company should produce a code of conduct setting out policies on the appropriate behaviour of directors and employees.[52] This code of conduct 'identify measures the company follows to encourage the reporting of unlawful or unethical behaviour and to actively promote ethical behaviour.'[53]

43 Ibid
44 Richard Alexander, 'BP: protection of the environment is now to be taken seriously in company law' (2010) *The Company Lawyer*, Issue 9, 271
45 Parliamentary Joint Committee on Corporations and Financial Services, above n 25, 55
46 Ibid 56
47 Ibid
48 Corporations and Markets Advisory Committee, above n 22, 106–107
49 ASX Corporate Governance Council, *Principles of Good Corporate Governance* (2nd ed, August 2007) 3
50 Including Principle 3, Ibid 21
51 Ibid
52 Ibid
53 Ibid 22

Principle 7 of the ASX Recommendations states that companies should establish a sound system of risk oversight and management and internal control.[54] The ASX Recommendations provide that the company's board should implement a risk management system to manage and control the company's material business risks,[55] which might include environmental risks.[56] The ASX Recommendations go on to provide:

> *When considering risk management policies the company should take into account its legal obligations. A company should also consider the reasonable expectations of its stakeholders [which can include the broader community]… Failure to consider the reasonable expectations of stakeholders can threaten a company's reputation and the success of its business operations.*[57]

Sustainability reporting

Sustainability reporting is an important feature of CSR. It refers to 'the practice of corporations and other organisations measuring and publicly reporting on their economic, social and environmental performance.'[58] This reporting allows companies to demonstrate their commitment to CSR, and allows others to judge that commitment. Sustainability reporting may occur in a company's annual financial report (for example, the Westpac group did this in 2009[59]), or in a separate sustainability report (for example, BHP Billiton creates an annual sustainability report[60]). Like CSR more generally, it is not only a sense of satisfaction at having 'done-the-right-thing' that drives a company to prepare sustainability reports. The PJC Report noted several reasons which might lead a company to prepare sustainability reports:

- informing non-shareholder stakeholders (such as employees and customers) about societal and environmental impacts of a company's performance and the strategies in place or being developed to improve such impacts
- assisting shareholders, investors and the market to determine how well companies are dealing with material non-financial and financial risks.

This will enable companies to:

- identify areas of operational or management improvement
- identify and better manage their non-financial risks
- identify new markets or business opportunities
- benchmark their performance against competitors
- improve their reputation
- recruit and retain good staff.[61]

Notwithstanding these potential benefits, a company may not choose to prepare sustainability reports voluntarily. Statutory reporting requirements can also encourage a company to disclose the sustainability of its practices and the company's approach to sustainability. There are various mandatory reporting obligations on corporations which are beyond the scope of this paper to discuss in detail.[62]

Social responsibility issues (the shareholders are watching)

Shareholders have various powers under Australian corporations law to influence the activities of companies, from

54 Ibid 32
55 Ibid 33
56 Ibid 32
57 Ibid 33
58 Parliamentary Joint Committee on Corporations and Financial Services, above n 25, 79
59 The Westpac Group, *Customer Brandwidth - Annual Review and Sustainability Report 2009*, <http://www.westpac.com.au/docs/pdf/aw/ic/annualreview-2009.pdf>
60 BHP Billiton's sustainability reports from 2001 to 2009 available at: <http://www.bhpbilliton.com/bb/sustainableDevelopment/reports.jsp?page=1>
61 Parliamentary Joint Committee on Corporations and Financial Services, above n 25, 79-80
62 Including *Corporations Act 2001* (Cth) ss 674, 299(1)(f), 299A, 1013D, ASX Listing Rule 4

raising questions at general meetings to commencing shareholder litigation.[63] A group of 100 shareholders can communicate their concerns about the environmental impacts of a company's activities, or their suggestions for the adoption of socially responsible practices, to a much larger group of shareholders. Even if a resolution which is put forward is not passed, its proposal will highlight the particular shareholders' concerns. An early example of the use of these provisions was the Wilderness Society's campaign against the Jabiluka uranium mine in Kakadu National Park. Although the group's resolutions were defeated they stimulated reform.[64] In the years since, various ethical shareholder groups have formed amongst the shareholders of some well-known Australian companies, including:

- BHP Shareholders for Social Responsibility[65]
- Boral Green Shareholders
- Gunns Ethical Shareholders[66]
- North Ethical Shareholders Group,[67] and
- Wesfarmers Investors and Shareholders for the Environment.

Ethical investment funds (discussed below) are also beginning to use shareholder resolutions to encourage companies to be more environmentally-friendly. In the past, ethical investment funds in Australia typically invested in companies that engage in 'green' activities like producing solar and wind power. Some of these funds are now investing in some of Australia's largest polluters, to allow the funds to draw attention to environmental concerns by raising shareholder resolutions.

In 2010 the Climate Institute and the Australian Ethical Investment fund created a new investment fund, called the Climate Advocacy Fund, which will put forward these environment-focussed shareholder resolutions.[68] In September 2010 the Climate Institute and the Australian Ethical Investment fund announced plans to put forward shareholder resolutions before the general meetings of various companies to force them to fully disclose their carbon emissions, how they intend to cut those emissions, and the assumptions they have made regarding potential carbon pricing in the future.[69]

Woodside Petroleum, Paladin Energy, Oil Search and Aquila Resources will be the first companies targeted by the Climate Advocacy Fund for 'failing to have adequate carbon disclosure policies and not informing shareholders of the risks associated with their carbon footprint.'[70] The first resolutions will be put forward at the general meeting of Aquila Resources and Paladin Energy's general meeting late in 2010.[71] James Their, the executive director of Australian Ethical Investment, said that the aim of environment-focussed resolutions was to protect long-term investor returns from the risk of climate change: 'The reality is that emissions-intensive companies and major polluters that aren't prepared for the rapidly emerging low pollution economy risk becoming uncompetitive.'[72]

Institutional investors

The PJC Report identified the potential influence that institutional investors like superannuation funds and managed funds could have on CSR. The PJC found that whilst small investors were essentially passive, and had little capacity to influence the management of companies, institutional investors had the capacity to influence a company's approach

63 *Corporations Act 2001* (Cth) s 250S, 249N and 249O

64 Australian Broadcasting Company, 'Transcript: Taking care of business' *Australian Story* (9 August 2001) <http://www.abc.net.au/austory/transcripts/s339970.htm>

65 See <http://www.bhpethical.shares.green.net.au/>

66 See <http://www.green.net.au/gunnsethicalshareholders/>

67 See <http://www.northethical.shares.green.net.au/nesg.html>

68 Mark Colvin and Jennifer Macey, 'Green investors target big polluters', *PM with Mark Colvin* on ABC Radio, 21 September 2010. Transcript available from: <http://www.abc.net.au/pm/content/2010/s3018098.htm>

69 Ibid

70 Matthew Murphy, 'Fund to confront firms over carbon' *Sydney Morning Herald* (Sydney) 22 September 2010 <http://www.smh.com.au/business/fund-to-confront-firms-over-carbon-20100921-15lcs.html>

71 Colvin and Macey, above n 68

72 Nicola Berkovic, 'Shareholders to grill firms on climate risk plans' *The Australian* (Sydney) 22 September 2010 <http://www.theaustralian.com.au/national-affairs/shareholders-to-grill-firms-on-climate-risk-plans/story-fn59niix-1225927540330>

to CSR. Unlike small investors, institutional investors 'control vast sums of money, and have both the capacity and the occasion to exert direct and substantial influence over the operation of listed companies.'[73]

Institutional investors are able to invest in the long term and can afford to support corporate strategies which provide the basis for longer term sustainable profitability rather than short term profits.[74] The PJC has suggested that long term institutional investors might be able to influence company directors to operate the company in a socially and environmentally responsible manner, even if this meant sacrificing short term profits.[75]

The significance of institutional investors on corporate governance can be observed when one examines their influence on a global scale. It is estimated that approximately US $1.5 trillion worth of assets were held in ethical investment funds worldwide at the turn of the century, under investment portfolios of socially and environmentally responsible investments.[76] In early 2007, a group of almost 300 global institutional investors managing funds worth US$41 trillion asked 2 400 of the world's largest companies to disclose how they managed business risks and opportunities stemming from climate change, which is becoming an investment-relevant consideration of growing importance.[77] Mounting evidence also suggests that investors are increasingly investing in ethical investment funds.[78] These funds make investments according to particular ethical and social criteria, and typically avoid investing in companies which engage in practices considered unethical or socially undesirable.[79] Investors are choosing these funds not only because the funds suit their ethical concerns, but also because they believe that these funds' investments carry less exposure to risk.[80]

The consequences of failure

In its 2005 white paper, the Economist Intelligence Unit entitled 'Reputation: Risk of risks'[81] engaged 269 senior risk managers to participate in a survey on risk and reputation. Of a choice of 13 categories of risk, reputational risk emerged as the most significant threat to business out of a choice of 13 categories.[82] Good corporate governance requires observation not only of the law, but of numerous and varied voluntary regulatory mechanisms, both internal and external. In this environment, arguably, a company's reputation has become its most valuable asset.[83]

Enforceable undertakings

Enforceable undertakings under Australian legislation are mechanisms which recognise the value of corporate reputational capital. Enforceable undertakings are sanctions which attempt to translate non-compliance with environmental standards set out in the relevant legislation into reputational loss. Where a breach or alleged breach of environmental legislation occurs, the offending party may be able to avoid prosecution by entering into an enforceable undertaking, by which it promises to act in a certain way (for example, to rehabilitate a polluted area). By using an enforceable undertaking, a company can not only satisfy the desire of public authorities to see that environmental legislation is enforced, but also improve the company's environmental practices and lessen any negative effect on its reputation.

Environmental legislation of the Commonwealth, New South Wales and Victoria provides for the use of these enforceable undertakings.[84] These are voluntary, binding agreements between a person or company with the government authority which oversees the environmental legislation. If the person or company breaches a term of an enforceable undertaking, the government authority can apply to a court for orders directing the person or

73 Parliamentary Joint Committee on Corporations and Financial Services, above n 25, 65
74 Ibid 67
75 Ibid
76 Horrigan, above n 1 at footnote 28 where the author cites Michael Hopkins 'Corporate Social Responsibility: An Issues Paper' (Working Paper No 27, Policy, Integration Department, World Commission on the Social Dimension of Globalisation, International Labour Office, Geneva, 2004) 4.
77 Ibid at footnote 30 where the author cites Nick Ridehalgh and Andrew Petersen, 'Climate for Change Has Arrived', *The Australian Financial Review* (Sydney), 24 May 2007, 63
78 Anne Durie and Laura Horn, 'Sustainability reporting: The role of financial institutions' (2009) 37 *ABLR* 342, 346
79 Julian Donnan, 'Regulating Ethical Investment: Disclosure under the Financial Services Reform Act' (2002) 13 *JBFLP* 155, 156
80 Durie and Horn, above n 78, 346
81 The Economist Intelligence Unit, above n 15
82 Ibid 3
83 Kevin Jackson, 'Global Corporate Governance: Soft law and reputational accountability' (2010) 35 *Brook. J Int'l L.* 41, 47
84 *EPBC Act* (Cth) s486DA; *Protection of the Environment Operations Act 1997* (NSW) s253A; and *Environment Protection Act 1970* (Vic) s67D

company to comply with its obligations.[85]

In May 2009 the Victorian Environmental Protection Authority (*Victorian EPA*) released guidelines for the use of enforceable undertakings under the *Environment Protection Act 1970* (Vic). The key objective of an enforceable undertaking is 'to implement systemic change in an organisation to prevent future breaches' of environmental legislation.[86]

Public awareness is an important feature of the use of enforceable undertakings. The Guidelines state that the Victorian EPA 'considers that enforceable undertakings are matters for the public record in the same way as outcomes of court proceedings. For this reason the [Victorian EPA] will maintain a register of enforceable undertakings open for public inspection.'[87] Public inspection of enforceable undertakings is also possible in the Commonwealth and New South Wales jurisdictions, on websites.[88]

Examples of enforceable undertakings published in recent years include:

- remediation actions after an overflow of diesel into the Thredbo river, NSW[89]
- remediation and preventative actions following damage to an area on the Burrup Peninsula which contained significant examples of Indigenous heritage, including rock art and which was protected as a National Heritage place[90]
- conservation offset action following damage to critically endangered native grasslands in Melbourne.[91]

Though these media releases castigated the offending companies to some extent, they also published the positive steps that the companies were taking to remedy the damage that had been caused. In this way, these publications are not entirely negative for the companies concerned. Other methods of enforcement, such as fines or prosecution, generally do not allow the company to demonstrate a commitment to improved environmental practices. Another reason for which enforceable undertakings might be preferred is that publicity caused by prosecution generally causes stigma to attach to an offending company.[92]

Bad press

Causing harm, or potentially causing harm to the environment is a potential threat to a company's reputation. Linked to the threat is the possibility of reluctance on the part of investors, shareholders and other companies to be seen as supporting a company that has a poor environmental record. Technological advancements in communication via the internet, as well as decentralised and globally available media, such as YouTube or Facebook now mean that information concerning business conduct can be disseminated virtually instantly around the globe.[93] As noted in the Economist Intelligence Unit's paper of 2005[94]:

85 *EPBC Act* (Cth) s486DB; *Protection of the Environment Operations Act 1997* (NSW) s253A(3) and (4); *Environment Protection Act 1970* (Vic) s67E

86 Victorian Government, *Victoria Government Gazette*, No. G 20; 'Environment Protection Act 1970: Enforceable Undertakings: Guidelines' (14 May 2009) 1202

87 Ibid 1204. See also: New South Wales Environment Protect Authority, *Enforceable undertakings guidelines* (August 2009) 4 <http://www.environment.nsw.gov.au/resources/prpoeo/enforceableundertakingsguidelines.pdf>

88 See: Australian Government Department of the Environment, Water Heritage and the Arts; *Case judgments* <http://www.environment.gov.au/epbc/compliance/judgements.html>; and New South Wales Department of Environment, Climate Change and Water; *Enforceable undertakings* <http://www.environment.nsw.gov.au/prpoeo/enforceableundertakings.htm>

89 Kosciuszko Thredbo Pty Ltd, *Undertaking to the Environment Protection Authority given for the purposes of section 253A by Kosciuszko Thredbo Pty Ltd ACN 000 139 015* (14 August 2009) 5 <http://www.environment.nsw.gov.au/resources/prpoeo/undertakingEPA0005.pdf>

90 Australian Government Department of the Environment, Water Heritage and the Arts; *Company pays out over rock art damage*, Media Release (9 February 2010) http://www.environment.gov.au/about/media/dept-mr/mr20100209.html; Holcim (Australia) Pty Ltd, *Enforceable Undertaking – Undertaking to the Minister for the Environment, Heritage and the Arts given for the purposes of s486DA by Holcim Pty Ltd* (8 February 2010) <http://www.environment.gov.au/epbc/compliance/pubs/holcim-australia.pdf>.

91 Australian Government Department of the Environment, Water Heritage and the Arts; *Company pays out for grass clearing*, Media Release (17 March 2010) http://www.environment.gov.au/about/media/dept-mr/dept-mr20100317.html; Cromwell Property Securities Ltd, *Enforceable Undertaking – Undertaking to the Minister for the Environment, Heritage and the Arts given for the purposes of s486DA by Cromwell Property Securities Limited* (11 March 2010) <http://www.environment.gov.au/epbc/compliance/pubs/enforcable-undertaking-grassland-clearing.pdf>

92 Zada Lipman, 'An evaluation of compliance and enforcement mechanisms in the Environment Protection and Biodiversity Conservation Act 1999 (Cth) and their application by the Commonwealth' (2010) 27 EPLJ 98, 111

93 Jackson, above n 83.

94 Economist Intelligence Unit, above n 15

> *Perception is the biggest threat to reputation today … you can be doing everything right, but if people don't think you are you still have a problem.*[95]

Conclusions

In situations where the stakes are high in relation to environmental risk, failing to prioritise systems to manage that risk can lead to damage to both a company's reputation and its brand, the effects of which can be long lasting. The damage may manifest in negative press, a decline in share value, or a reluctance on the part of investors, shareholders and other companies to deal with a corporation who has failed to live up to society's demand for corporate social responsibility in their approach to environmental management.

The factors which influence corporate behaviour in relation to the environment are numerous and varied. Aside from striving for environmental outcomes, minimising environmental harm, minimising pollution or reducing carbon emissions, corporations are driven by the desire to minimise the risk of measurable damage to their brand or reputation in implementing systems which regulate behaviour and influence corporate culture in relation to the environment.

In combination with legislative requirements, mandatory and voluntary reporting obligations and the growing influence of institutional investors, the landscape in which the modern corporation exists demands demonstrated consideration of environmental risk and impact. In turn, social awareness, public demand and the evolution of government policy shapes the way in which environmental obligations are construed, both under legislation and otherwise. Statutory obligations are directed at protecting environmental health, framed by core sustainability principles which import ideals rooted in international policy and theory developed over decades. The obligations in relation to the environment therefore take on an ethical character, through the recognition of the intrinsic value of the environment and the imperative of preservation of that value into the future. In light of the reputational consequences of breaches of environmental obligations and causing environmental harm as a result, it may be prudent for professional advisers to consider the ethical components of the obligations in advising clients. An obligation to do so however, does not exist at this time in Australia.

95 Ibid 13

DANCING TO THE SAME TUNE? – MAJOR PROJECTS, THE ENVIRONMENT AND THE RULE OF LAW

By David Cole*

Environmental regulation and the rule of law

The relationship between the rule of law and governmental decision-making under environmental legislation is critical to the protection of environmental values in developed and developing economies.

The evolution of environmental and natural resources laws is a political recognition of community demands for legal restriction on human activities that damage the environment. However, despite the adoption of the concept of "sustainable development" by numerous environmental laws, the tension between economic development and protection of environmental quality has not yet been resolved". The inability or unwillingness of governments of all persuasions in Australia to develop and effectively apply a formula that reconciles social, economic and environmental aspirations has seen governments often amending their own environmental laws when confronted with the possibility of 'losing' an economically and politically attractive development.

Furthermore, such amendments often seek to prevent legitimate disputes over potential environmental impacts being subject to adjudication by the courts. This is achieved by introducing privative clauses into legislation that for all intents and purposes prohibit access to the courts by third parties to challenge governmental decisions made under that legislation.

Such clauses attempt to quarantine government decision making from the scrutiny of the courts. The courts, and particularly the High Court of Australia,[1] have generally endeavoured to allow judicial review of decisions purportedly excluded from such review. However, governments persist in introducing environmental and resources legislation containing privative clauses which, at the very least, provide an initial formidable hurdle to the use of the courts to review governmental decisions made under the particular Act of Parliament.

The concept of the 'rule of law' is frequently misunderstood and confused. Fundamentally it is a bulwark against the abuse of authority by those in political power. It protects the rights of the individual by imposing on all persons, including governments, obligations to comply with the law. It also subjects all persons equally (or as equally as is practicable) to the laws in force at any particular time.

However, it arguably does more than simply address the application of laws equally to all. What if a law is demonstrably unfair, unreasonable or pernicious? Aronsen et al make the following observation:

> *It is trite to observe that the rule of law stands for a lot of principles. It includes the notion that government must act according to the law, but most commentators take the doctrine further than that because it would otherwise fail to constrain the making of deeply unjust laws legalising all government acts. In administrative law it has come to stand for the ideals of holding government accountable to 'ordinary law' before 'ordinary courts' so far as reasonable. That is sometimes offered as a constraint on legislative supremacy, so as to justify, for example, judicial disobedience to privative clauses.*[2]

The fundamental *human* issue addressed in this paper is one of contemporary social values – a re-setting of priorities in order that environmental outcomes are not assumed to be subordinate to economic growth. However, the essential *governmental* issue considered here is the growing conflict between the exercise of executive power

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1 Attempts by the Commonwealth and state governments to legislate constraints on the judicial review powers of the state and federal courts, and the High Court, have generally been restricted by the High Court's interpretation of the Constitution and judicial powers. See for example *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1 (3 Feb ruary 2010), the Hon RS French AC CJ, 'The Executive Power', Inaugural George Winterton Lecture, Sydney Law School, 18 February 2010, viewed November 2010, http://www.hcourt.gov.au/publications/speeches/current/speeches-by-chief-justice-french-ac

2 M Aronsen, B Dyer and M Groves, *Judicial Review of Administrative Action*, (Thomson LawBook Company, 3rd ed, 2004) 173

and the role of the courts. Where governments introduce legislation with the express purpose of removing the power of the courts to determine the legality, or otherwise, of governmental decisions under that legislation, they are claiming a right to act arbitrarily and without the risk of legal challenge. Such action asserts the power of the executive over and above the power and role of the courts. The strategy represents a major step towards authoritarian government, whatever the motivations.

Developing nations are vulnerable to the demands of resource developers that their proposals and projects be protected against legal action. In most developed economies the use of the courts to protect the community's interest in at least maintaining the quality of its environment is regarded as fundamental. As will be seen, however, the gradual erosion and, on occasion, direct attack on these presumed rights is not confined to developing countries.

Resource projects in Papua New Guinea – recent statutory amendments

In June 2010, the Papua New Guinea **(**PNG) Parliament passed amendments to the country's *Environment Act 2000* which effectively prevent third party legal action challenging the granting of pollution permits by the PNG Government to facilitate resource projects. These resource projects are perceived in some quarters to be environmentally damaging.[3] The new legislation highlights a problem that has dogged PNG for decades.

In this case, the amendments to the PNG *Environment Act* were apparently instigated by the concerns of the Metallurgical Construction Corp (MCC) which is developing the Ramu nickel mine at an alleged cost of $1.5 billion. MCC is a Chinese state-owned corporation. The Brisbane-based company, Highlands Pacific, holds an 8.56% interest in the project. It appears that the amendment to the legislation was a direct response to the acquisition of injunctions by Ramu landowners to prevent completion of a pipeline designed to dispose of mine slurry to the sea off Madang.

The amendments introduced a new regime of decision-making in relation to pollution and waste permits in PNG. The Director of Environment may authorise the carrying out of specific acts or works associated with approvals obtained for development under the *Environmental Planning Act* (an 'authorisation instrument').[4] Such authorisation may be retrospective.[5] Procedural irregularity does not affect the validity of any such authorisation which is deemed to be a permit under the Act.[6] The Director's decision is final and may not be challenged or reviewed in any court or tribunal.[7]

Where the Director has issued such an authorisation, the holder of the permit allowing the activity under the *Environmental Planning Act* may carry out the relevant works and they 'do not constitute a civil cause of action, whether in torts or otherwise, or an offence and is (sic) not unlawful'.[8]

In the case of non-compliance with an authorisation instrument, the Director may issue an exemption certificate.[9] That decision is expressed to be final and not challengeable in any court or tribunal.[10] The Director may also issue a 'best practice certificate' confirming that a certain methodology or conduct (or proposed methodology or conduct) associated with a project or activity approved under an authorisation Instrument complies with best practice standards or best available standards. Judicial challenges to the Directors' decision in this case are available only to the aggrieved holder of an authorisation instrument.[11]

Section 87C of the Act now empowers the Director to issue a 'certificate of necessary consequence' confirming that activities and their consequences are necessary to undertake work authorised by an authorization instrument.[12] The Director's decision is not judicially challengeable, other than by an aggrieved holder of an authorisation instrument. Conduct undertaken in pursuance of such a certificate is deemed lawful and not subject to legal action.[13]

3 Environment (Amendment) Bill 2010; Statutory Instrument No. 3 of 2010: *Environment (Permits Transitional) Regulation* 2010. 27 May 2010
4 *Environment Act 2000 (EA Act)*, s 69A(1)
5 EA Act, s 69A(1)
6 EA Act, s 69A(2)
7 EA Act, s 69A(3)
8 EA Act s 69B
9 EA Act, s 87A
10 EA Act, s 87A(4)
11 EA Act, s 87B
12 EA Act, s 87C
13 EA Act, s 87C(4)&(5)

Finally, the amendments permit the Director to issue a certificate of compliance declaring that work has been conducted in conformity with an authorisation instrument, supplementary approval or an environment permit. The carrying out of the work does not constitute a civil cause of action and is not unlawful.[14] The Director's decision may not be judicially challenged.[15]

The political underpinning of these changes is perhaps best illustrated by the comments of Mr Luther Wenge, Member for Morobe in his third reading speech in support of the Bill.

> *Mr Speaker, with the developments of our natural resources and the proceeds of these operations boosts this nation's economy and this country is on the path forward. Mr Speaker, we were saddened by the Supreme Court decision to prevent what is a big contributor to our nation's economy in the Rai-Coast Electorate. As we all know, the nickel mine is the biggest project which is going to bring billions of kina'*

It is understood that in late 2010 opponents of the proposed tailings disposal method were considering challenging the validity of the amendments as part of their continuing legal action in the PNG courts against the proposed off-shore slurry pipeline.

BHP and the PNG Government – Ok Tedi

Attempts to legislate away rights of local landholders to protect their environmental, cultural and economic interest in the face of major resource developments are not new to PNG. In 1995 the Supreme Court of Victoria handed down its judgment in *Dagi and Others v. The Broken Hill Proprietary Company Ltd and Another.*[16] That matter arose out of the Ok Tedi mining project developed and operated by BHP in the Western Province of PNG. The release of tailings from the dam had resulted in pollution of the river and had seriously affected the use of adjacent land by local people. The villagers' claims included causes of action based on negligence, nuisance and trespass.

The initial issue for the court was to determine whether it had jurisdiction to hear the claims bearing in mind that the claimants were foreign nationals and the alleged damage had occurred within PNG. The Court held in relation to the claims in trespass and nuisance that it did not have jurisdiction because those causes of action depended on possessory or proprietary rights over foreign land. However in relation to the negligence claims, the Court held that other than in the case of the Dagi claim, the Court did have jurisdiction because the foundation of the claims was based on the loss of amenity or enjoyment of the land and waters relied upon for subsistence. Eventually, the matter was settled with a multi-million compensation package being negotiated that included a formal denial of liability by BHP.

In the interim, however, and prior to the above judgment being handed down, the plaintiffs brought actions in the Supreme Court of Victoria alleging contempt of court by BHP. The plaintiffs alleged that BHP and their lawyers had involved themselves in drafting PNG legislation that would, in effect, oust the jurisdiction of the Supreme Court of Victoria before which the proceedings were current. Cummins J. agreed with the allegations acknowledging that 'it is entirely within this Court's competence to deal with interference in this Court's administration of justice' and found BHP guilty of contempt.[17]

BHP appealed against this decision and in a 3:2 decision the majority of the Court of Appeal determined that the plaintiffs did not have standing to bring contempt proceedings.[18] The issue of whether BHP was in contempt was not therefore finally determined.

The causes of these attempts in PNG to prohibit legal action to protect the economic and environmental rights of individuals and communities are not simply defined. They are a combination of legitimate concern by politicians

14 EA Act, s 87D

15 EA Act, s 87D (4)

16 *Dagi and Others v. the Broken Hill Proprietary Company and Another (No.2); Shackles and Another v. The Broken Hill Proprietary Company and Another (No.2); Ambetu and Others v. The Broken Hill Proprietary Company and Another (No.2); Maun and Others v. The Broken Hill Proprietary Company and Another (No.2).* [1996] 2 V.R. 567

17 *Dagi v. Broken Hill Pty Co Ltd* (Supreme Court of Victoria, Cummins J. No. 5782 of 1994. 20 September 1995, unreported.

18 *Broken Hill Pty Co v. Dagi* (Court of Appeal of Victoria, Winneke P, Brooking, Tadgell, Phillips and Hayne JJA, No. 5782 1994, 15 December 1995, unreported, Australia)

about the need for material development in their country and of pressure being exerted by developers to obtain concessions at the expense of environmental and cultural values. Furthermore, embryonic democracies generally do not possess the checks and balances that a mature democracy brings to the political process. Systems of governance are often flawed and structures and procedures designed to ensure political and personal accountability lack rigour. Consequently, corruption in fledgling democracies is commonplace.

South Australia – major projects and environmental law

The response of some sectors of the press in Australia to the current issue in PNG reflects a consternation that, whilst justified, might be interpreted as implying that developing countries should be rightly criticised for short-sighted economic objectives and questionable principles of governance that are rarely exhibited in developed economies such as Australia.[19]

However, we would be wise to recall instances of Australian governments taking action similar to that taken by the PNG government. Recent examples from South Australia illustrate this.

In 1999 the Conservation Council of SA Inc, a not-for-profit environmental organisation, challenged in the Environment, Resources and Development Court (ERD Court) a decision of the Development Assessment Commission (DAC) under the *Development Act 1993* to approve a series of tuna farms off Louth Bay on the east coast of the Eyre Peninsula.[20] The development was a 'Category 3' development under the relevant development plan[21] which permitted third parties to object to the proposed development during the approvals process with a consequent right of appeal to the ERD Court. The appellants successfully challenged the approval on the basis that the DAC had not had regard to the precautionary principle contained in the principles of sustainable development, that concept being referred to in the relevant development plan.

The response of the then state government was to amend the development regulations to change the categorisation of development applications for aquaculture development from Category 3 to Category 1 thus removing any right of objection or appeal by third parties to such proposals. The applications were re-submitted and approved.

In the mid-2000s in South Australia the steel producers, OneSteel, in Whyalla, challenged the inclusion in their renewed authorisation (licence) under the *Environment Protection Act* conditions that would have required them to comply with national dust emission targets. For some two decades red dust had been emitted from the steel works causing considerable damage to the properties and quality of life of residents in north-east Whyalla. The Environment Protection Authority (EPA) defended the merits appeal by OneSteel in the Environment, Resources and Development Court (the ERD Court). In parallel with these proceedings, the Whyalla Red Dust Action Group brought civil enforcement proceedings against OneSteel in the ERD Court seeking orders that OneSteel comply with national emission targets and compensate for damage to affected residents.

The determination of OneSteel to avoid compliance with national dust emission targets saw it approach agencies of the state government other than the EPA. This resulted in the government then amending the Indenture Act that originally established the steel works so that the licensing of the operation was effectively removed from the jurisdiction of the EPA.[22] A new licence was drafted and issued under the amended legislation and the legal action became redundant as the EPA no longer had responsibility for the contested licence. The new licence did not require compliance with the national dust emission targets.

In 2007 a proposal from developers to construct the Penola Pulp Mill in the south east of the State created considerable local disquiet among some residents about the potential environmental impacts. The Minister refused to declare it a major project for the purposes of environmental impact assessment under the *Development Act*

19 See for example, '*The Australian*, 2nd June 2010 '*PNG law to shield resource giants from litigation*'; http://australianetworknews.com/story.htm?id=29834 '*PNG Government accused of selling out to foreign companies*'.

20 *Cons Council of SA v. DAC and Tuna Boat Owners Association (No 2)* [1999] SAERDC 86 (16 December 1999).

21 South Australia. *Land Not Within a Council Area (Coastal Waters) Development Plan*. 28 August 1997.

22 *Broken Hill Proprietary Company's Steel Works Indenture (Environmental Authorisation) Amendment Act 2005*

despite its scale and potential impact on the water resources of the south east of the State.[23] Local opponents decided to bring judicial review proceedings in the Supreme Court challenging the validity of the decision of the Development Assessment Commission to approve the project under the *Development Act*.

The Government outflanked this proposed legal action by introducing into Parliament the *Penola Pulp Mill Authorisation Bill*. That Act contains a clause prohibiting any legal challenge to the proposed development.[24] The clause states:

> *Despite any Act or law, no proceeding for judicial review or for a declaration, injunction, writ, order or other remedy may be brought to challenge or question—*
>
> *(a) a decision or determination of the Governor, the Minister or any other person under this Act or otherwise required to be made by this Act; or*
>
> *(b) procedures under this Act; or*
>
> *(c) an act, omission, matter or thing incidental or relating to the operation of this Act.*[25]

The use of such privative clauses is not uncommon in South Australia. The 'major projects' provisions of *the Development Act* contain a clause that prohibits any legal action challenging procedures and decisions in relation to major projects subject to environmental impact assessment processes under the Act.[26]

Inconsistency within South Australia's formal assessment of the impacts of proposed major developments is compounded by the fact that there are no statutory criteria specified for the exercise of ministerial discretion as to whether a proposal should be subject to formal assessment under the Act. This lack of screening criteria has resulted in substantial industrial proposals such as the Penola Pulp Mill not being declared major projects but urban residential/retail developments being so declared.[27]

The objective of declaring the latter type of proposal to be a major project is to transfer responsibility for approving controversial projects favoured by the state government from local government under the conventional development approval provisions of the *Development Act* to the state government that then utilises the major projects provisions of the Act. The effect is to centralise the approvals process and remove the risk of local opposition halting a project favoured by the state government.

Conclusions

In developing countries such as Papua New Guinea, the pressing need for economic expansion is clear. However, that would not appear to be an argument for the government to deny public access to the courts to challenge the validity of decisions made by politicians and regulators under environmental legislation. Unfortunately, in many respects, developed economies such as Australia would appear to have limited moral authority to argue this position.

Regular attempts by governments to erode the application of the rule of law in introducing and implementing environmental legislation is a reflection of the continuing ambivalence that contemporary societies have about the relationship between material development and the safeguarding of environmental quality. Nevertheless, the application of the rule of law to environmental decision-making by governments is every bit as essential as a constraint on arbitrary and possibly unlawful application of laws as it is in its application to governmental processes and decisions that directly affect the individual rights of citizens.

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23 The Major Projects Division of Planning SA stated on its web site at the time that the project would produce 350 000 air dry metric tonnes per annum of mechanical pulp and export revenue of up to $300 000 000 per annum. The capital cost was estimated at $1.5 billion.

24 To date the project has not proceeded.

25 *Penola Pulp Mill Authorisation Act 2007,* s.10

26 Section 48E. For an example of a failed attempt to judicially challenge the decision of the relevant Minister to declare a project under section 46 of the *Development Act*, see *Pupfan Pty Ltd v. the State of South Australia* [2003]SASC 283 (21 August 2003).

27 See Highway Inn (Anzac Highway) proposal; Le Cornu (North Adelaide) site redevelopment proposal: http://www.planning.sa.gov.au/go/major-developments

In the context of our environment, however, the issue is clouded by the deep and continuing social dilemma about the relationship between economic growth and environmental quality. Citizens might readily accept the need for the application of the rule of law to prevent the arbitrary removal of social security benefits. However, they are likely to view with less clarity its application to ensure that an economically attractive industrial proposal does not irreparably damage a wetland ecosystem.

The role of the courts as arbiters of the validity of government decision-making is the last institutional barrier to arbitrary and authoritarian government decision-making in democratic systems. Without a genuinely independent judiciary which possesses full capacity to review government decisions, a political system cannot be truly democratic. It therefore falls to the courts to resist as far as is lawful attempts by governments to limit their powers to review Acts of Parliament, including environmental laws, and decisions made under them.

REGULATING THE DEVELOPMENT OF ENERGY RESOURCES –

THE DIFFICULT RELATIONSHIP BETWEEN DOMESTIC REGULATION AND INTERNATIONAL RELATIONS

By Vivienne Bath*

There are a number of difficult questions relating to the development of energy resources; in particular, the relationship between domestic and international regulation. This article commences by looking at the Energy Charter Treaty and then examines some issues related to energy security in China and Australia.

The Energy Charter Treaty is the successor to the Energy Charter of 1991, and provides a multilateral framework for energy cooperation and the promotion of energy security through the operation of open and competitive energy markets.

The membership of the Energy Charter Treaty is primarily European, with the exception of Japan. As of late 2009, there were 46 members plus the European Community and four signatories use which have not yet ratified (plus Russia, which has withdrawn). There are also 24 country or territory observers, including organizations such as ASEAN. Australia has signed the Energy Charter Treaty, but has not ratified it. Although many of China's neighbours, such as Kazakhstan, Kyrgyzstan and Japan, have become members, China is an observer and not a member.

The range of observers as well as members shows that the treaty has influence that goes beyond the number of ratifications. The issues identified in the treaty are highly relevant in terms of summarizing international energy issues and suggesting possible solutions. These include protection and promotion of foreign energy investments (article 10), trade in goods and services (part two), sovereignty over energy resources, states and state-owned companies, environmental aspects and dispute resolution. In particular, the Energy Charter Treaty deals with the encouragement and protection of investment, specifically in energy resources. It requires the state to provide stable, equitable, favourable and transparent conditions for investments; most-favoured nation treatment and national treatment for investors; compensation in case of expropriation; protection of fund transfers and provisions relating to investor-state dispute resolution. It does not, however, require that a state grant to foreign investors proposing to make an investment the same terms and conditions as it would grant to domestic investors.

Article 18 of the treaty recognizes the concept of state sovereignty and sovereign rights of energy resources. This principle is, however, subject to rules of international law; there is an overall objective of providing access to natural resources and exploration and development on a commercial basis and the allocation of licenses and so on must be on a non-discriminatory manner on the basis of published criteria.

These restrictions are balanced by a number of provisions which make clear that states retain the power to regulate their own jurisdictions. In particular, the Treaty does not prejudice the rights of the state to make and implement its rules relating to property ownership. Similarly, a state has the right to determine which areas may be exploited; and the timing, rate of exploitation and the tax, environmental and safety regimes which will apply.

Of particular relevance are provisions which make clear that a state has the right to participate in exploitation of natural resources either directly or through state enterprises. At the same time the state is responsible for ensuring that a state enterprise conducts its activities in a manner consistent with the state's obligations in its treaty area and to cause state enterprises and regional sub-divisions to act in accordance with the treaty. These provisions are of continuing significance in view of the growth in participation and international level of national oil and resources companies owned and operated by states. This is particularly noticeable in the Chinese context, where

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the major oil companies, such as China National Offshore Oil Corp., CNPC and Petro-China, are state-owned and have been very active internationally in making investments in natural resources.

The last 15 years have seen substantial changes in the nature of international investment, including in natural resources and energy. Investment in these resources is no longer the preserve of developed countries. According to the most recent United Nations Conference on Trade and Development (UNCTAD) World Investment Report, 'UNCTAD expects global inflows to reach more than $1.2 trillion in 2010, rise further to $1.3 to $1.5 trillion in 2011, and head towards $1.6–$2 trillion in 2012. Developing and transition economies attracted half of global caps FDI inflows, and invested one quarter of global FDI outflows.'

An important feature of the Energy Charter Treaty (reflected in many bilateral investment treaties and free trade agreements) is the availability of investor-state arbitration. According to UNCTAD, in 2009 there were a total of 357 investment arbitration cases, of which 202 were commenced in the previous five-year period. A majority of these were instituted by investors from developed countries, against both developing and developed countries. This position is changing, however. For example, China's bilateral investment treaties traditionally provided for very limited access to dispute resolution by investors directly against the Chinese states. Newer treaties signed by China, however, provide for investor-state arbitration on a similar basis to that set out in the Energy Charter Treaty.

The argument for the investment provisions of the Energy Charter Treaty and similar provisions in investment protection treaties is that they encourage investment by offering investors additional security. It is not, however, clear to what extent investors know or are influenced by investment protection provisions when making their investments. Although some surveys indicate that most investors are aware of investment treaties and influenced by their availability, other studies are much less definitive and some, indeed, have concluded that there is no real evidence of any positive link. For example, although Chinese investors have been eager to buy assets in Australia, a country with which China has a bilateral investment treaty and which is considered to be politically stable, a number of studies of Chinese investment indicate that Chinese state-owned enterprises investing in natural resources do not generally seem to be particularly sensitive to political risk or the existence of bilateral investment treaties.

In addition, the balance struck in these treaties has also come under challenge. There is a tension between the requirement for states to maintain (or compensate investors for changes in) investment policies and regulations which were in effect at the time the investment was made and which may have assisted to attract investment in the first place and the ability of government to regulate its own territory and its own industries. Given the time frame involved in many natural resources projects, and the rapid changes in the international marketplace as demand for energy sources increases, there is a risk that some countries may feel that the balance struck in the Energy Charter Treaty and investment treaties does not fairly accommodate their interests. Ecuador and Bolivia, for example, have withdrawn from the International Convention for the Settlement of Investment Disputes; Russia has withdrawn from the Energy Charter Treaty.

What, then, are the issues for China and Australia? Both China and Australia have complex policies on foreign investment. China's policies relating to foreign investment in such sectors as oil and gas are quite clear and require majority ownership by a Chinese party. Australia's policies are not directed specifically at investment in the energy sector. However, the implementation of more detailed rules relating to the national interest test which require close analysis of proposed investments by foreign governments and state enterprises appear to be a response to public disquiet expressed at the efforts of Chinese state owned companies to acquire interests in Australia national resources. Neither of these forms of restriction is limited by the Australia-China investment treaty.

An additional issue for both China and Australia is the role of other stakeholders in the investment process. In the case of both China and Australia, sub-national entities may have different approaches to energy and investment policy. In Australia, for example, the federal government has encouraged the development of an export industry for natural gas. The governments of Western Australia and Queensland, however, have concerns in relation to the soaring price of gas domestically as the international price increases and the availability of gas to the domestic market. Both have enacted legislation to provide for the reservation of gas for domestic use.

Other issues which cause difficulties for the governments of China and Australia arise from strains in the relationship between public policy and commercial entities, both private and publicly owned. For example, major resources companies are often international and their interests do not necessarily coincide with those of the state or states in which they are incorporated, listed or operate. The decision by the then Australian Treasurer, Peter Costello, to block Shell's acquisition over Woodside in 2001, was based on a national interest assessment that Shell would develop its gas reserves based on its own interests rather than Australia's. Rio's shareholders seem to have been responsible for the collapse of the Rio Tinto – Chinalco transaction, notwithstanding the support of the Rio Tinto Board of Directors and the Chinese government. Chinese state-owned enterprises are commercial enterprises in their own right, not merely obedient arms of government. In 2005, the independent shareholders of CNOOC Ltd, which was listed in Hong Kong, refused to allow the parent of CNOOC Ltd, China National Offshore Oil Corporation, to expand its ability to invest in overseas projects at the possible expense of CNOOC Ltd.

These cases demonstrate the difficulty of balancing the sovereign right of states to manage their non-renewable natural resources with the need of states and private actors to have access to sources of energy internationally. The Energy Charter Treaty represents an effort to provide a degree of international standardisation relating to these issues. Notwithstanding the limited membership of the Energy Charter Treaty, and the challenges presented by the changing nature of international investment, the attempt in the Treaty to define this balance continues to be relevant to members and to other states and investors.

Information for contributors

How to contribute

Written contributions to the National Environmental Law Review, by way of articles, case notes, book reviews or letters to the editor are welcomed. Please send contributions to your state or territory editor in the first instance, who will generally review them and advise the national editor. The NELR Editors contact details are set out on the previous two pages.

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As a general guide, articles should be between 3 000 – 5 000 words in length and should conform to standard conventions of legal writing. For example the Australian Guide to Legal Citation (by Melbourne University Law Review Association) is an illustrative style guide available on-line.

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