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National Environmental Law Review

In this issue:

NELA environmental law essay competition winner Kate Browne, writing on climate change and statelessness: the disappearance of small island states

Plus runner up Glen Wright's paper on the national electricity market and the environment

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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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Photo inset: Kate Browne, University of Melbourne

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Rio+20 UN Conference on Sustainable Development

Stakeholders have discussed ways and means for strengthening the institutional framework for sustainable development and international environmental governance in the lead up to the June 2012 Rio+20 UN Conference on Sustainable Development. As the Conference will be short, taking place over three days (June 20–22) rather than the 10 days spent at Stockholm (1972), Rio (1992) and Johannesburg (2002), the preparatory work has had to be more focused and time bound. By 1 November 2011 the conference secretariat had received nearly 700 submissions which were synthesised into a Co-Chair's proposal for a zero draft of the outcome document of the Conference. That document was circulated for comment to all permanent representatives to the United Nations on 10 January 2012, and as a basis for further informal consultations in January 2012. The *Earth Negotiations Bulletin* summary and analysis of the January UNCSD informal consultations are available at <http://www.iisd.ca/uncsd/idzod/>.

Environmental lawyers' global conference

The 3rd World Meeting of Environmental Lawyers and Associations held in Limoges, France, in September 2011, called for the creation of an International Environmental Court (IEC), and a World Environment Organisation (WEO) with powers comparable to that of the World Trade Organisation. The conference suggested that the IEC would hear matters referred by parties to new and amended multilateral environmental agreements and protocols that provide for compulsory dispute settlement and compliance mechanisms. The WEO would develop new global environmental conventions, implement and enforce environmental conventions, resolve environmental conflicts, and establish a sanctions mechanism focussed on restoration of the environment. The conference also recommended that a World Organisation for Environmental Refugees be created.

Another resolution agreed at Limoges was that the United Nations Commission on Sustainable Development and the Economic and Social Council be merged, with a Permanent Forum established to monitor and provide technical expertise in relation to the three areas of sustainable development (social, economic and environmental). The proposed new Economic Social and Environmental Council would supervise implementation of environmental conventions and coordinate environmental matters across the UN system.

In all, twenty-six resolutions were agreed, including on the themes:

- human rights and environment: the challenges of the law
- new world conventions on environment
- the institutional framework for sustainable development and international environmental governance
- the green economy in the context of sustainable development and poverty eradication: issues for greening the planet.

The resolutions in three languages have been circulated by the IUCN Liaison Officer for the Commission on Environmental Law (maria.zanotti@idea.org.py). Please contact the NELA secretariat for an e-copy.

Asia and Pacific regional preparatory meeting for Rio+20

The Asia and Pacific regional preparatory meeting for the Rio+20 Conference was held in the Republic of Korea on 19–20 October 2011. Participants considered the institutional framework for a green economy and sustainable development (IFSD), and poverty eradication. A range of views were expressed, with many speakers agreeing on the value of strengthening that framework and international environmental governance (IEG). Some favoured strengthening UNEP, but there was no consensus on whether this should be achieved under UNEP's current status and structure, or should involve elevating UNEP's status to that of a UN environment organization (UNEO) or world environment organization (WEO). There was also some support for a proposal to establish a Sustainable Development Council.

Delegates adopted the report of the meeting and heard closing statements from Chair Yoon Jong-Soo and the Secretary-General of the UNCSD Secretariat and UN Under-Secretary-General for Economic and Social Affairs, Sha Zukang. On the green economy, Sha Zukang noted comments on the value of a roadmap and toolkit, and on the Rio sustainable development principles, particularly that of common but differentiated responsibilities. He acknowledged concerns that a green economy could be

used as a pretext for non-tariff barriers and reiterated the need for clear guidelines. He also noted comments on the idea of developing sustainable development goals. On IFSD, he noted continued interest in simplifying the current governance structure, as well as support for strengthening UNEP, establishing a specialized agency on the environment and support for a Sustainable Development Council based on the model of the Human Rights Council. Arguing that failure at Rio+20 was not an option, he stated that there is an arduous road ahead and that, although input was still being collected, negotiations would begin soon.

The outcome indicates that the green economy should be seen in the context of the overriding objectives of sustainable development and poverty eradications and

- be one of the means to achieve sustainable development
- facilitate trade opportunities for all countries, and particularly developing countries
- address the three pillars of sustainable development in a comprehensive, coordinated, synergised and balanced manner
- allow governments to pursue strategies based on national circumstances and stages of development
- involve all stakeholders
- facilitate technological innovation and transfers
- address the challenges for small island developing states (SIDS), high mountains and land locked states
- increase resilience to natural disasters.

Green Climate Fund

The conference of the parties to the UN Framework Convention on Climate Change in Durban in December 2011 agreed to establish the Green Climate Fund to support projects, programmes, policies and other activities in developing country parties, using thematic funding windows. A fundraising target of least $100b per year by 2020 was agreed. A work program is to be established to look at sources of long-term finance for developing countries. The fourth meeting of the transitional committee for the design of the Fund had taken place in South Africa in October 2011. That Committee had 15 members from developed country parties and 25 members from developing country parties, with members having the necessary experience and skills. (http://climate-l.iisd.org).

Biodiversity Convention

The 15th meeting of the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) of the Convention on Biological Diversity (CBD) met in November 2011 in Montreal, Canada, immediately following the seventh meeting of the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions. Delegates adopted the meeting's report with minor amendments (UNEP/CBD/SBSTTA/15/L.1 and Add.1-2). Delegates also agreed to take note of the draft agenda for SBSTTA 16 (UNEP/CBD/SBSTTA/15/16), requesting the Secretariat to accommodate a new item on the review of the draft capacity-building strategy for the Global Taxonomy Initiative (GTI). The GTI may be adopted at SBSTTA 16.

The meeting was marked as a success, and despite a light agenda, its work had not been easy.Poland, on behalf of the European Union and its member states, noted that SBSTTA built on COP 10's success and, with Ukraine, (Central and Eastern Europe), praised the scientific, technical and technological focus of the discussions. See generally: <http://www.iisd.ca/vol09/enb09562e.html>

Solar PV record

Solar photovoltaic (PV) companies manufactured a record 24000 megawatts of PV cells worldwide in 2010, more than doubling their 2009 output. Annual PV production has grown nearly 100-fold since 2000, when just 277 megawatts of cells were made. The new record brought the total worldwide capacity of solar PV to nearly 40 000 megawatts, which is enough to power 14 million homes in Europe.

PV cells are used to convert solar radiation directly to electricity. Chinese manufacturers again dominated the global industry with close to 11 000 megawatts of PV cell production, followed by Taiwan with 3 600 megawatts. Germany, which ranks fourth, superseded other countries in the amount of electricity it generated from solar panels. PV in Germany now generates enough electricity to meet power demands for some 3.4 million German homes, adding 7400 megawatts in 2010. Germany accounts for than 40% of global PV capacity. See: <www.earth-policy.org> and <http://permaculture.org.au/2011/10/28/solar-power-2011-solar-pv-breaks-records-in-2010>.

Greece's revenue alternative

Greece's debt crisis has been at the forefront of media reports over recent months. A little known aspect is Greece's proposal to use revenue from a $30m solar project to help fund its debt repayment. The proposal includes Greece providing its northern creditors with $22b worth of electricity generated by the Helios solar energy project. The project was a central mechanism in the bailout aimed at securing the agreement of other European Union countries. The European environment energy and climate change Minister, Mr George Papaconstantinou said that Greece would commit future cash flows from project Helios, or other privatization revenue outside the adjustment program, to further reduce the indebtedness of the Hellenic Republic by up to 15 billion euros, with the aim of restoring the lending capacity of the European Financial Stability Fund.

The project has the potential to deliver nearly $120b over its 25 year life and would help northern European countries to meet European Union requirements for power sourced from renewable energy. See <http://www.bloomberg.com/news/2011-10-27/greece-to-use-revenue-from-solar-project-to-pay-debt-eu>

China changes air quality standards

In September 2011 China announced that it would include air-borne particles with a diameter of 2.5 microns or less (PM2.5) in its national air quality standards. In most parts of China, PM2.5 account for more than half of the air particulate pollution. PM2.5 has serious health implications. The particles are small enough to penetrate human lung tissue and can cause asthma, lung cancer and cardiovascular disease.

At the seventh Environment and Development Forum held on 22 September 2011, pollution control secretary Zhau Hualin announced that China intended to revise its National Ambient Air Quality Standards to include PM2.5 measurements, recognising the contribution that PM2.5 pollution makes to poor visibility and air quality. The decision is seen as a positive strengthening of China's environmental performance and trend towards a political culture that is more open about environmental conditions. <http://www.chinadaily.com.cn/china/2012-01/10/content_14417799.htm> and <www.climatespectator.com.au>

FEDERAL

Dr Nicola Durrant and Shol Blustein

Draft Murray Darling Basin Plan released

A key feature of the draft Murray Darling Basin Plan is the recommendation that a long-term environmentally sustainable level of take of water for consumptive use from the Murray Darling be set at 10 873 gigalitres per year (GL/y).[1] According to the MDBA, using 2009 as a baseline year, the environmentally sustainable level of take would be achieved by reducing consumptive use of water by 2 750 GL/y. Of this, 1 068 GL/y has already been recovered for the environment through buyback and infrastructure improvement schemes, and a further 214 GL/y has been announced recently, leaving 1 468 GL/y to be secured.

It is proposed that a review of the Basin Plan be undertaken in 2015. A seven-year transition period is also proposed, and long-term average sustainable diversion limits will not be enforced until 2019.

The MDBA is seeking submissions on the draft Basin Plan by 16 April 2012.[2]

In November 2011, the Australian Government tabled its final response to the report of the Standing Committee on Regional Australia inquiry into the Guide to the Murray Darling Basin Plan.[3] The Government announced that it would:

- develop and publish a water recovery strategy to provide greater transparency and certainty to communities about how the water purchase program will be implemented
- conduct further consultation with industry on how best to integrate water purchases with infrastructure reconfiguration
- focus on targeted purchases in progressing its commitment to Bridging the Gap (and is not considering general tenders in the southern connected system for the remainder of 2011 and 2012)

1 <http://download.mdba.gov.au/proposed/plain_english_summary.pdf>

2 <http://download.mdba.gov.au/proposed/proposed_basin_plan.pdf> and <http://download.mdba.gov.au/proposed/plain_english_summary.pdf>

3 <http://www.environment.gov.au/water/publications/mdb/pubs/windsor-inquiry-response.pdf>

- establish a separate Commonwealth Environmental Water Office as a distinct entity within the Department of Sustainability, Environment, Water, Population and Communities to improve accountability and stakeholder engagement in environmental water management.[4]

Discussion paper: Commonwealth environmental water trading

The Australian Government has released a discussion paper on the options for the trading of Commonwealth environmental water. It poses the question of whether water should be used within the current year, carried over for use in future years, or whether trade should occur (disposal or acquisition). Responses to the discussion paper are sought by 27 April 2012.[5]

State of the Environment 2011 report

The Australian State of the Environment 2011 report was tabled in Parliament on 12 December 2011. Written by an independent committee of experts, the report presents a review of the state of the environment, environmental trends including environmental pressures and drivers, management initiatives and their impacts, and environmental resilience and threats. It also provides an overall outlook for the Australian environment. For the first time the report includes graded 'report-card' style assessments.[6] A summary of the key findings of the report is available.[7]

Mining coal seam gas in the Murray Darling Basin

The Senate Standing Committees on Rural Affairs and Transport is inquiring into the management of the Murray-Darling Basin. It will examine the development and implementation of the Basin Plan with particular reference to the implications for agriculture and food production and the environment; the social and economic impacts of proposed changes in the Basin and their impacts on the sustainable productivity and viability of the Basin. The committee is also examining the impact of mining coal seam gas on the:

- sustainability of water aquifers and future water licensing arrangements
- property rights and values of landholders
- sustainability of prime agricultural land and Australia's food task
- social and economic benefits or otherwise for regional towns, and the effective management of relationships between mining and other interests
- other related matters including health impacts.[8]

On 30 November 2011, the Interim report on the impact of mining coal seam gas on the management of the Murray Darling Basin was released.[9] It makes a number of recommendations, including that:

- the federal and state governments conduct a thorough review of the appropriateness of adaptive management in the context of regulating the industry, given the significant gaps in information regarding cumulative and long term impacts of the industry
- the Commonwealth not give any further approvals for production of coal seam gas in that part of the Murray-Darling Basin overlying the Great Artesian Basin pending the completion of the Queensland Government's regional groundwater model and the CSIRO and Geoscience Australia basin scale investigation of water resources
- the Commonwealth await the completion of the Namoi Catchment study before considering any applications under the Water Act or the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) for approvals to undertake coal seam gas production
- all future coal seam gas development approvals should be preceded by the development of 'a regional-scale, multi-state and multi-layer model of the cumulative effects of multiple developments' of ground and surface water
- the Commonwealth take the necessary steps to amend the EPBC Act to include the sustainable use of the Great Artesian Basin as a 'matter of national environmental significance'.

The Senate has granted an extension of time for the Committee to report, to 29 June 2012.

4 <http://www.environment.gov.au/minister/burke/2011/mr20111124.html>
5 <http://www.environment.gov.au/ewater/publications/water-trade-discussion-paper.html>
6 <http://www.environment.gov.au/soe/2011/index.html>
7 <http://www.environment.gov.au/soe/2011/report/key-findings.html>
8 <http://www.aph.gov.au/senate/committee/rat_ctte/mdb/info.htm>
9 <http://www.aph.gov.au/senate/committee/rat_ctte/mdb/interim_report/index.htm>

Amendments to Antarctic protections

In November 2011, the Australian Government introduced legislation to the House of representatives seeking to amend the *Antarctic Treaty (Environment Protection) Act 1980* (Cth) to implement three measures agreed to by nations under the Antarctic Treaty and the Madrid Protocol. The new measures will enter into force when approved by all 28 Consultative Parties to the Antarctic Treaty, including Australia.[10]

The Antarctic Treaty (Environment Protection) Amendment Bill 2011 (Cth) would:

- allow the Australian environment minister to grant a safety approval or an environmental protection approval, and to impose conditions on such approvals
- create new offences and civil penalties for unapproved activities, activities in contravention of the conditions under a safety or environmental protection approval, and offences and civil penalties related to environmental emergencies
- establish a liability regime for environmental emergencies that occur in the Antarctic
- implement new offences and civil penalties applicable to tourist vessels operating in the Antarctic.[11]

Biodiversity Fund 2011–12

The Australian Government has established a number of funds for the land sector as part of its Clean Energy Future plan.[12] This includes the Biodiversity Fund which will invest around $946m over the next six years to help land managers store carbon, enhance biodiversity and build greater environmental resilience across the Australian landscape. The Biodiversity Fund will invest in the following three main areas:

- biodiverse plantings – funding will help land managers expand native habitat on their property through planting mixed vegetation species appropriate to the region. This will help build landscape resilience and connectivity
- protecting and enhancing existing native vegetation – funding will support land managers to protect, manage and enhance existing native vegetation in high conservation areas on their land for its carbon storage and biodiversity benefits
- managing threats to biodiversity – funding will control the threat of invasive pests and weeds in a connected landscape.

The 2011–12 application round closed on 31 January 2012.[13]

Olympic Dam Mine expansion approved

On 10 October 2011, the proposed expansion of Olympic Dam mine in South Australia received approval under the EPBC Act subject to 100 conditions of approval including establishing a 140 000 hectares offset area, biodiversity conservation, environment protection management programs and compliance strategy.[14]

Coal companies' enforceable undertaking

Centennial Angus Place Pty Ltd and Springvale Coal Pty Ltd and have provided the Australian Government with an enforceable undertaking that they will pay $1.45m towards a research program to be administered by the Fenner School of Environment and Society at the Australian National University.[15] The companies' coal mining operations on the Newnes Plateau, near Lithgow in New South Wales have been found to have caused a significant impact on the endangered Temperate highland peat swamps on sandstone ecological community.[16] An investigation by the Department of Sustainability, Environment, Water, Population and Communities (DSEWPaC) found there has been a loss of ecosystem function shown by loss of peat, erosion, vegetation dieback and weed invasion in three swamps and a large slump hole, several metres wide and more than one metre deep, has formed at the East Wolgan swamp.[17]

EPBC Amendment (Emergency Listings) Bill

The Environment Protection and Biodiversity Conservation Amendment (Emergency Listings) Bill 2011 (Cth) provides for the emergency listing of threatened species and ecological communities where they are at

10 <http://www.environment.gov.au/minister/burke/2011/mr20111123.html>

11 <http://www.comlaw.gov.au/Details/C2011B00248>

12 See <http://www.environment.gov.au/cleanenergyfuture/index.html> for other funds available.

13 <http://www.environment.gov.au/cleanenergyfuture/biodiversity-fund/apply.html>.

14 <http://www.environment.gov.au/minister/burke/2011/mr20111010.html>

15 <http://www.environment.gov.au/epbc/compliance/pubs/enforceable-undertaking-centennial.pdf>

16 <http://www.environment.gov.au/about/media/dept-mr/dept-mr20111021.html>

17 <http://www.environment.gov.au/epbc/compliance/judgements.html>#centennial>

risk from a significant and imminent threat.[18] The bill was introduced into the Senate on 13 October 2011.

Listing of three new threatened ecological communities

The Minister has approved the listing of three new threatened ecological communities. These are:

- Arnhem Plateau Sandstone Shrubland Complex[19]
- Lowland Rainforest of Subtropical Australia.[20] See also text for Victoria, p 28.
- Upland Basalt Eucalypt Forests of the Sydney Basin Bioregion.[21]

Consultation paper on cost recovery under the EPBC Act

The Department of Sustainability, Environment, Water, Population and Communities has released a consultation paper outlining options for recovering the costs of national environment law regulatory activities and reform. This document was open for public comment until 31 October 2011.[22]

Protection for the Australian Alps from cattle grazing

On 21 October 2011, it was announced that the Australian Government had introduced a new regulation under the EPBC Act to protect the Australian Alps National Parks and Reserves from cattle grazing. The Government proposed to undertake a process of consultation with the States and Territories regarding the draft regulation. According to the Government's media release, the regulation specifies that grazing of domestic stock including cattle would have a significant impact on the heritage values of the Australian Alps Heritage Area and that any future new grazing activities proposed in the Australian Alps Heritage Area, including the Alpine National Park, would require assessment under the EPBC Act.[23]

The Victorian Government has since referred the matter to the Australian Government under the EPBC Act. The Victorian Government proposes to reintroduce cattle on a trial basis to determine whether they would assist in the reduction of fuel load in the region.[24]

***Maritime Legislation Amendment Act 2011* (Cth)**

The *Maritime Legislation Amendment Act 2011* (Cth) commenced following assent in early December 2011. The Act aims to deter shipping companies and crew from engaging in unsafe and irresponsible actions at sea, particularly near environmentally sensitive marine ecosystems in Australia and on the high seas. The Act increases the penalties payable under the *Navigation Act 1912* (Cth) and the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth). New offence provisions are created, such as where the master of a ship fails to report in accordance with the regulations after an incident in a mandatory reporting area such as the Great Barrier Reef Marine Park.[25]

Bioregional planning: Temperate East Marine Region

A draft marine bioregional plan and a Commonwealth marine reserves network proposal has been released for the Temperate East Marine Region comprising nine marine reserves in Commonwealth waters, including the:

- Jervis Commonwealth marine reserve
- Hunter Commonwealth marine reserve
- Cod Ground Commonwealth marine reserve (existing reserve with boundary adjustment and zone name change)
- Solitary Islands Commonwealth marine reserve (Commonwealth waters) (existing reserve with boundary adjustment to Pimpernel Rock and zone name change)
- Clarence Commonwealth marine reserve
- Tasmantid Commonwealth marine reserve
- Gifford Commonwealth marine reserve
- Lord Howe Commonwealth marine reserve (includes existing reserve Lord Howe Island Marine Park (Commonwealth waters), existing Elizabeth and Middleton Reefs marine national nature reserve and proposed new areas and zone name change)

18 <http://www.comlaw.gov.au/Details/C2011B00211>
19 <http://www.environment.gov.au/cgi-bin/sprat/public/publicshowcommunity.pl?id=111>
20 <http://www.environment.gov.au/cgi-bin/sprat/public/publicshowcommunity.pl?id=101>
21 <http://www.environment.gov.au/cgi-bin/sprat/public/publicshowcommunity.pl?id=60>
22 <http://www.environment.gov.au/epbc/publications/consultation-draft-cost-recovery.html>
23 <http://www.environment.gov.au/minister/burke/2011/mr20111021.html>
24 <http://www.beefcentral.com/p/news/article/996>
25 <http://www.aph.gov.au/library/pubs/bd/2011-12/12bd060.htm>

- Norfolk Commonwealth marine reserve.[26]

The draft Temperate East Marine Bioregional Plan contains information on the marine environment and conservation values of the Temperate East Marine Region, including protected species, protected places and key ecological features. The draft Temperate East Plan sets broad objectives for conservation, identifies priorities and outlines strategies and actions to achieve them. Specific advice on environmental assessments and referrals to assist people who wish to undertake activities that may impact on the marine environment in Commonwealth waters and other matters of national environmental significance is also presented in the draft Plan.[27] Submissions closed on 21 February 2012.

Bioregional planning: Coral Sea

The proposed Coral Sea Commonwealth Marine Reserve will be located in Commonwealth waters on the eastern side of the Great Barrier Reef Marine Park.[28] Submissions on the proposal closed on 24 February 2012.

National Offshore Petroleum Safety and Environmental Management Authority

On 7 December 2011 the Federal Executive Council approved amendments to legislation governing environmental management arrangements for offshore petroleum and greenhouse gas storage activities in Commonwealth waters. Amendments which came into effect on 1 January 2012 are a result of changes to the:

- *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth)
- *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003* (Cth)
- *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Regulations 2004* (Cth)
- *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth).[29]

The role of the former National Offshore Petroleum Authority has been expanded to include the regulation of occupational health and safety, wells and well operations and the structural integrity of facilities and environmental management within Commonwealth waters.[30] Commonwealth waters are usually 3 nautical miles from the low water mark to 200 nautical miles out to sea at the edge of Australia's Exclusive Economic Zone (EEZ). From 1 January 2012 these functions will be performed by the new National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA).[31]

National offshore petroleum titles administrator

On 1 January 2012, the National Offshore Petroleum Titles Administrator (NOPTA) was established as a branch of the Resources Division of the Department of Resources, Energy and Tourism (RET). NOPTA's key functions in Commonwealth waters are to:

- provide information, assessments, analysis, reports, advice and recommendations to members of the Joint Authorities and the responsible Commonwealth Minister in relation to the performance of those Ministers' functions and the exercise of their powers
- manage the collection, management and release of data, titles administration, approval and registration of transfers and dealings
- oversee the keeping of the registers of petroleum and greenhouse gas storage titles.[32]

States and the Northern Territory (NT) will maintain a titles administrator role in State and NT waters. NOPTA's head office will be in Perth, with a regional office in Melbourne.

Draft Conservation Management Plan for the Southern Right Whale (2011–16)

Southern right whales (*Eubalaena australis*) are currently listed as endangered under the EPBC Act. A draft recovery plan that conforms with the International Whaling Commission's Conservation Management Plan format, while meeting the requirements of a recovery plan under the EPBC Act was open for comment until

26 <http://www.environment.gov.au/coasts/mbp/temperate-east/consultation/index.html>#networkproposal>.
27 <http://www.environment.gov.au/coasts/mbp/temperate-east/consultation/index.html>#plan>
28 <http://www.environment.gov.au/coasts/mbp/coralsea/consultation/index.html>
29 <http://www.nopsa.gov.au/document/Notice%20-%20Changes%20to%20environmental%20management%20arrangements%20-%20December%202011.pdf> .
30 <http://www.nopsa.gov.au/document/Booklet%20-%20New%20arrangements%20for%20offshore%20petroleum%20environmental%20management%20regulation.pdf> .
31 <http://www.nopsa.gov.au/>
32 <http://www.ret.gov.au/RESOURCES/NOPTA/Pages/nopta.aspx.>

13 February 2012.[33] The draft plan outlines the current status of and threats to the southern right whale in Australian waters and prioritises recovery actions for the 2011–16 period.

Product stewardship amendments – televisions and computers

A national scheme for recycling televisions and computers came a step closer with the making of the *Product Stewardship (Televisions and Computers) Regulations 2011* (Cth) on 8 November 2011, 3 months after the *Product Stewardship Act 2011* (Cth) came into effect.[34] There is a new material recovery target of 90% for materials that need to be recovered through the recycling process for further processing into useable materials and to limit the amount of material being sent to landfill. This is consistent with the estimated average material recovery rate currently being achieved by Australian recyclers of televisions and computers. The target will not come into effect until the 2014—15 financial year, to provide time to standardise measurement and reporting methodologies.[35]

Carbon Farming Initiative commences

The Carbon Farming Initiative is 'open for business'[36] following the commencement of the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) and the making of the Carbon Credits (Carbon Farming Initiative) Regulations 2011 (Cth).[37] The Carbon Farming Initiative is a key component of the Australian Government's Clean Energy Future plan as it enables farmers, land owners, local government and a range of other stakeholders to reduce greenhouse gas emissions by adopting various land-based greenhouse gas abatement measures.[38]

Australia's Clean Energy Future package

Australia will have a carbon pricing mechanism from 1 July 2012 following the commencement of the *Clean Energy Act 2011* (Cth). The details of the mechanism were described in detail (2011) 3 *NELR 5–6*. The Australian Government is developing the regulatory infrastructure to support this mechanism.

On 30 September 2011, the Australian Government invited expressions of interest from eligible generators seeking to participate in the Contract for Closure program. The Program aims to support the closure of around 2 000 megawatts of highly emissions-intensive electricity generation capacity by 2020. Eligible generators selected through a competitive tender process will be able to seek Australian Government payment to retire their operations by an agreed date. Eligible generators were invited to respond by 21 October 2011. Five generators have been invited to proceed to the negotiation phase:

- Playford Power Station (Alinta)
- Energy Brix (HRL)
- Hazelwood Power Station (Hazelwood Power Partnership, 91.8% owned by International Power GDF Suez Australia)
- Collinsville Power Station (RATCH)
- Yallourn Power Station (TRUenergy).

The negotiation stage will involve the generators being asked for detailed closure proposals, followed by bilateral negotiations between the Australian Government and the relevant generator.[39]

Australian Renewable Energy Agency

The *Australian Renewable Energy Agency Act 2011* (Cth) establishes the Australian Renewable Energy Agency (ARENA). ARENA will commence operations on 1 July 2012 and is charged with managing approximately $3.2b in Australian Government funding for renewable energy such as solar (including large scale solar), biomass, biofuels, ocean and geothermal.[40] The *Australian Renewable Energy Agency Act 2011* (Cth) received royal assent on 4 December 2011.[41]

33 <http://www.environment.gov.au/biodiversity/threatened/publications/recovery/draft-for-comment-southern-right.html>.
34 <http://www.environment.gov.au/settlements/waste/ewaste/>
35 <http://www.environment.gov.au/settlements/waste/ewaste/>
36 <http://www.climatechange.gov.au/minister/greg-combet/2011/media-releases/December/mr20111208.aspx>
37 <http://www.climatechange.gov.au/cfi>
38 <http://www.climatechange.gov.au/minister/greg-combet/2011/media-releases/December/mr20111208.aspx>
39 <http://www.ret.gov.au/energy/clean/contract/Pages/ContractforClosure.aspx>
40 <http://www.climatechange.gov.au/minister/greg-combet/2011/media-releases/October/mr20111012.aspx>
41 <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=priority,title;page=1;query=Dataset_Phrase%3A%22billhome%22%20ParliamentNumber%3A%2243%22;rec=9;resCount=Default>

NELR recent developments

Clean Energy Regulator start date

On 15 November 2011, the Minister for Climate Change and Energy Efficiency, the Hon Greg Combet AM MP, announced that the new administrative body for the carbon pricing mechanism, the Clean Energy Regulator, will commence from 2 April 2012. It will administer the carbon pricing mechanism, the National Greenhouse and Energy Reporting Scheme, the Renewable Energy Target and the Carbon Farming Initiative.[42]

Australian National Register of Emissions Units

On 31 October 2011 consultation draft *Australian National Register of Emissions Units Regulations* (Cth) were released for comment.[43] The proposed register will be used to track Australian carbon credit units generated under the Carbon Farming Initiative, Kyoto units issued under the Kyoto Protocol, and carbon units issued under the carbon pricing mechanism.[44] These regulations were made on 7 December 2011.[45]

Draft Energy White Paper released

On 13 December 2011, the Minister for Resources and Energy and Tourism, the Hon Martin Ferguson AM MP, released the draft *Energy White Paper, Strengthening the Foundation for Australia's Energy Future*, for public comment.[46] It contains a series of proposed priorities for the Australian Government to address the various challenges affecting Australia's energy sector. The four priorities proposed are:

- strengthening the resilience of Australia's energy-policy framework
- reinvigorating the energy market reform agenda
- developing Australia's critical energy resources – particularly gas
- accelerating clean energy outcomes.

The consultation period closes on 16 March 2012. The Australian Government intends to release the final Energy White Paper in mid 2012.

Australia's new resources tax regime

On 23 November 2011, the Minerals Resource Rent Tax Bill 2011 (Cth) was passed by the House of Representatives. The proposed Minerals Rent Resource Tax (MRRT) will apply to all new and existing iron ore and coal projects in Australia and will be applied at a rate of 30% on the taxable profit of a project from 1 July 2012.[47]

The passage of the MRRT through the House of Representatives was made possible by an agreement between the Government and the Independents Tony Windsor and Rob Oakeshott.[48] The agreement requires the establishment of an Independent Expert Scientific Committee (Committee) under the EPBC Act. The Government will provide $150m for the Committee to:

- advise on research priorities and commission and coordinate research to inform the assessment and management of extractive industry impacts, particularly relating to coal seam gas and major coal mining developments, including through engagement with relevant natural resource management/catchment management authorities
- provide scientific advice to federal and state ministers so that regulatory decisions take into account the best available scientific advice,
- and support the development of relevant best-practice national standards.

Before the necessary legislative amendments are made to establish the Committee, the Government has agreed to create an interim board for the Independent Expert Scientific Committee.

The agreement also requires the Government to establish a National Partnership Agreement through the Council of Australian Governments (COAG) focussed on the work of the Committee. The Government will provide $50m to the states to deliver the Partnership, which aims to 'lift the standard of extractive industry regulation across all jurisdictions, on a consistent basis'.

42 <http://www.climatechange.gov.au/minister/greg-combet/2011/media-releases/November/mr20111115.aspx>

43 <http://www.climatechange.gov.au/minister/greg-combet/2011/media-releases/October/mr20111031.aspx>

44 <http://www.climatechange.gov.au/minister/greg-combet/2011/media-releases/October/mr20111031.aspx.

45 http://www.comlaw.gov.au/Details/F2011L02585.

46 <http://minister.ret.gov.au/MediaCentre/MediaReleases/Pages/DraftEnergyWhitePaperReleased.aspx>

47 <http://minister.ret.gov.au/MediaCentre/MediaReleases/Pages/FairReturnAustraliaResourceWealth.aspx> and <http://www.ato.gov.au/taxprofessionals/content.aspx?doc=/content/00286481.htm>

48 <http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2011/141.htm&pageID=003&min=wms&Year=2011&DocType=0 and <http://www.tonywindsor.com.au/releases/111121.pdf>

State and federal agencies charged with the regulation of extractive industry assessments will be required to take into account advice from the Committee relating to the impacts of extractive industries and to ensure all approval processes take into account advice from the Committee. The Government will work towards agreeing the National Partnership Agreement at the first meeting of COAG in 2012. If agreement cannot be reached, the Government will introduce legislation to amend the EPBC Act to achieve similar outcomes.[49]

In the same sitting that the MRRT was passed, the House of Representatives also passed the Petroleum Resource Rent Tax Assessment Amendment Bill 2011 (Cth). The Act amends the Petroleum Resource Rent Tax (PRRT) established by the *Petroleum Resource Rent Tax Assessment Act 1987* (Cth). The PRRT currently applies to all petroleum (oil and gas) projects in offshore areas (other than certain production licenses derived from the North West Shelf exploration permits). The PRRT is applied at a rate of 40% on the taxable profit of a project.[50] The amendments proposed by the Petroleum Resource Rent Tax Assessment Amendment Bill 2011 (Cth) would extend this tax to all Australian onshore and offshore oil and gas projects, including the North West Shelf. The Government has announced that, if successful, the extension to the PRRT will come into effect from 1 July 2012.

On 10 November 2011 the Minerals Resource Rent Tax Bill 2011 and related bills were referred to the Economics Legislation Committee with a reporting date of 14 March 2012. Submissions were due by 23 December 2011.

49 <http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2011/141.htm&pageID=003&min=wms&Year=2011&DocType=0 and <http://www.tonywindsor.com.au/releases/111121.pdf>

50 <http://www.ato.gov.au/businesses/content.aspx?doc=/content/39230.htm&pc=001/003/117/001/001&mnu=44895&mfp=001&st=&cy=1>

AUSTRALIAN CAPITAL TERRITORY by EDO (ACT) volunteers

Challenge to development approval for suburb of Coombs

The Conservation Council of the South-east Region and Canberra is challenging an approved development application for the suburb of Coombs in the Molonglo Valley in inner-Canberra (DA 2011/20676). The Council considers the approved development to be inconsistent with the Territory Plan, the *Planning and Development Act 2007* (ACT), the Coombs and Wright Concept Plan, the residential Subdivision Code, and the approval conditions under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). The Council argues that unacceptable vulnerability to bushfire will be created for some residential dwellings, and that habitat for the Pink-tailed Worm Lizard (*Aprasia parapulchella)* will be compromised. Aprasia has special protection status, and is listed as vulnerable under ACT, NSW and Commonwealth biodiversity protection legislation. The Council aims to have all bushfire buffer zones moved 100 metres outside the Molonglo River Corridor and nature reserve boundaries in order to ensure protection to threatened species and endangered ecological communities, and to have some housing areas removed from the Plan.

The suburbs of North Weston, Coombs and Wright were assessed and approved under EPBC Act Part 9 referrals (2009/4752, 2009/5041 and 2009/5050).

All urban and commercial development in the Molonglo Valley must follow an approved Structure Plan which is part of the Territory Plan. The Structure Plan includes planning and development guidelines and principles for urban development and associated infrastructure in Molonglo and North Weston. Development is also subject to the *Molonglo Valley Plan for the Protection of Matters of National Environmental Significance* (the Plan).

On 20 December 2011, the federal environment minister approved actions associated with urban development in East Molonglo in accordance with the Plan that he had endorsed on 7 October 2010. The Plan had been subjected to a strategic assessment process under the EPBC Act in 2008–10, a public consultation period, and as a result of that consultation, a Supplementary Assessment Report was prepared. The strategic assessment became the third to reach endorsement stage under the EPBC Act. The assessment dealt with the management of matters of national environmental significance including the Pink-tailed Worm Lizard, listed under the EPBC Act as vulnerable; *White Box-Yellow Box-Blakely's Red Gum grassy woodland and derived native grassland*, listed as critically endangered; and *natural temperate grasslands of the Southern Tablelands of NSW and the ACT*, listed as endangered.

The ACT EDO has assisted with the appeal but also supports the holding of a joint inquiry by the Australian Parliament's Standing Committee on the National Capital and External Territories and the ACT Legislative Assembly's Standing Committee on Planning and Environment – a planning reform that had been recommended in 2007 by the ACT Committee.[1]

Draft ACT planning strategy consultation

The consultation period on the draft ACT planning strategy was extended to 12 February 2012. The strategy is required to be prepared under the *Planning and Development Act 2007* (ACT) and will provide long-term planning policy and goals to guide the sustainable development of the ACT. The draft was informed by community and stakeholder engagement during the Sustainable Future program and Time to Talk Canberra 2030 and a public exhibition of relevant documents. The Planning Strategy will build on the *Canberra Spatial Plan* (2004) and *Sustainable Transport Plan* (2004). It has to be taken into account when the statement of strategic directions in the Territory Plan and the Territory Plan is varied. It does not apply directly to decisions on development applications or compliance actions.

1 ACT Legislative Assembly, *Report on Annual and Financial Reports 2005–06*, Report 26, April 2007, iv, 35–8 <http://www.parliament.act.gov.au/downloads/reports/26peAnnuallReports05-06.pdf>

Large scale feed-in tariff

Renewable energy companies have been invited to submit proposals to establish large scale solar power generating facilities of up to 40MW capacity in the ACT. This follows the enactment in December 2011 of the *Electricity Feed-In (Large Scale Renewable Energy Generation) Act 2011* (ACT). At least two facilities may be constructed, but at least one could generate power for the equivalent of 7 000 homes or 14% of minimum energy demand of the ACT.[2] The 2008 greenhouse gas inventory for the ACT estimated that 62% of the 4.182m tonnes of CO2 equivalent generated in the ACT produced by the burning of fossil fuels for electricity, while 23% was generated by transport and 9% by heating.[3] The introduction of a large scale feed-in tariff is 'measure 23' in the government's *ACT Sustainable Energy Policy: Energy for a Sustainable City 2011–2020*.

Weathering the Change – Draft Action Plan 2

The second Weathering the Change Action Plan was open for public comment until 2 March 2012. The ACT Government has a zero net emissions target for 2060 and a 40% reduction in greenhouse gas emissions from 1990 levels by 2020. The draft plan is accessible at <http://www.timetotalk.act.gov.au/climate-change/>.

Nature Conservation Act review

The Nature Conservation Act remains under review. In November 2010 a discussion paper inviting submissions to the review of the *Nature Conservation Act 1980* (ACT) was released. It is entitled *Review of the Nature Conservation Act 1980 – Enhancing nature conservation in the Australian Capital Territory*. The Act provides for the protection of native plants and native animals and provides for the management of public land that is reserved for nature conservation purposes. The initial report of the review was submitted by Marsden Jacob Associates in July 2008. An exposure draft bill is expected to be released after the consultation process

with stakeholders focused on the discussion paper and following consultations on that draft bill, the proposed

2 ACT Minister for Environment and Sustainable Development, Simon Corbell MLA, Media releases: 'Call for large scale solar proposals', 27 January 2012, and 'Large scale solar on the horizon in the ACT', 8 December 2011

3 Legislative Assembly for the ACT, *2011 Week 10 Hansard (20 September)*, 4080.

legislation will be submitted to the ACT Legislative Assembly. For further information see:

A shrub (*Bossiaea grayi*) was declared a new endangered species under the current Act in the *Nature Conservation (Species and Ecological Communities) Declaration 2012 (No 1) (*ACT*)* (DI2012–11).

Office of Commissioner for Sustainability and the Environment

Announcements must be imminent concerning the Office of Commissioner for Sustainability and the Environment. The term of appointment of the acting Commissioner, Mr Bob Neil, expires in March 2012. The former Commissioner, Dr Maxine Cooper, is now the ACT Auditor General. A report on an expanded role for the Commissioner has been with the ACT Government since 2009. Under-resourcing of the Office has been an issue for many years. The Minister for the Environment and Sustainable Development, Simon Corbell MLA, is considering both the report on the expanded role of the Commissioner, recommendations arising from the Governing the City State Report (the Hawke Review) and the Commissioner for the Environment's tree investigation report.

Farewell John Hibberd

On 27 January 2012 family and people prominent in the ACT conservation community celebrated the life of John Hibberd. The former Executive Director of the Conservation Council was an environmental scientist, green campaigner, devoted family man, and friend and colleague to many. He had worked for a range of government and non-government environmental organisations in Australia and the region.

SOUTH AUSTRALIA — Victoria Shute

Regulated Trees

On 17 November 2011, the long-awaited *Development (Regulated Trees) Amendment Act 2009* and the *Development (Regulated Trees) Variation Regulations 2011* were proclaimed.

On the same day, the state-wide Regulated Trees Development Plan Amendment was declared to be in interim operation.

As reported in NELR in late 2010, the Regulated Trees amendments to the Development Act and Regulations alter the tree-protection system that has existed in the Greater Adelaide Area since the proclamation of the *Development (Significant Trees) Amendment Act 2000* over a decade ago.

To summarise a number of the significant changes made to the *Development Act 1993* and *Development Regulations 2008*:

- a two-tier system of tree protection has been created with trees being 'regulated trees' or 'significant trees' depending on their size, with less vigorous criteria in Development Plans applying to development applications seeking the removal of 'regulated trees'
- the previous list of trees in Regulation 6A of the Development Regulations which are exempt from the definitions of 'regulated' and 'significant' trees has been expanded, meaning that such trees have no legislative protection and can be removed without requiring development authorisation. The expanded list includes trees located within 10 metres of an existing dwelling or existing swimming pool, other than Willow Myrtles and Eucalypts, and certain 'pest' trees listed in Regulation 6A(5)(b) of the Development Regulations
- the definition of 'tree-damaging activity', which is defined as an act of 'development' in s 4 of the Development Act (and therefore requires approval under the Development Act) by excluding the pruning of regulated and significant trees where no more than 30% of the crown of the tree is removed provided that the pruning is required to remove dead or diseased wood; branches that pose a material risk to a building; or branches to a tree that is located in an area frequently used by people and the branches pose a material risk to such people
- Schedule 3 to the Development Regulations has been expanded so that several forms of tree-damaging activity are excluded from the

definition of 'development' in the Development Act, including tree-damaging activity undertaken to a tree that is within 20 metres of an existing dwelling within Bushfire Protection Areas of Medium and High Bushfire Risk.

Since 17 November 2011, a number of instances where trees which were protected under the previous legislative regime have been removed have attracted high-profile media attention.

Further, on 23 November 2011, a motion to disallow the *Development (Regulated Tree) Variation Regulations* was moved in the Legislative Council by the State's Liberal Opposition. This motion was adjourned.

So whilst the Regulated Trees provisions are in force, there may well be some amendments to them in the near future. We will report on such developments in the future.

NEW SOUTH WALES — Dr Nicholas Brunton

Implementation of planning and development reforms

On I October 2011, most of the provisions of the *Environmental Planning and Assessment Amendment (Part 3A Repeal) Act 2011* (NSW) (the Repeal Act) commenced operation. This had the effect of repealing Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act).

The accompanying *Environmental Planning and Assessment Amendment (Part 3A Repeal) Regulation 2011 (Repeal Regulation)* and *State Environmental Planning Policy (State and Regional Development) 2011* (SEPP(SRD)) also commenced on 1 October 2011.

These reforms implemented one of the Coalition's major election promises – to repeal the unpopular Part 3A provisions of the EP&A Act. Indeed so unpopular were those provisions that the new elected government quickly put in place transitional arrangements for projects already in the Part 3A system, pending its repeal. These arrangements included removing from Part 3A projects involving residential, commercial or retail development with a capital investment value greater than $100m and coastal subdivisions. Projects that were yet to have environmental assessment requirements issued by the Director-General were sent back to local councils for determination. Projects that had been substantially progressed under the Part 3A system were to continue to be determined under Part 3A, however, they were to be assessed by the Planning Assessment Commission (PAC) or a senior member of the new Department of Planning and Infrastructure.

However, while the political rhetoric was all about transferring projects back to councils, empowering communities and removing the taint of 3A, associated as it was, with many dubious decisions of the former Labor Government, the Government still retains a significant role in the planning system. In effect, it winds back the clock to much the same arrangements that were in place before Part 3A so dramatically expanded the Minister's role, powers and functions. In addition, the Repeal Act also increased the thresholds for what is called 'regional development' and which are sent to a Joint Regional Planning Panel (JRPP). It also amends the composition of the JRPP to give local councils greater power to appoint panel members.

Thus the legislation performs a clever dual function. Some projects are devolved back to elected councils to satisfy local political demand, while State control over major projects is retained to satisfy major proponents and ensure growth is not stymied. An expertise-based role for decision making is also retained but with some enhanced political representation, with the JRPPs to achieve both ends.

What the Repeal Act did on 1 October 2011 was insert a new Division 4.1 into Part 4 of the EP&A Act. These provisions introduce two new categories of development: State significant development (SSD) and State significant infrastructure (SSI).

State significant development

SSD is intended to be the assessment process for larger development that is sought by private proponents. Schedule 1 of the SRD SEPP sets out the classes of development that are SSD. These include intensive livestock agriculture, mining, petroleum (oil, gas), extractive industries, road, rail and related transport facilities, waste and resource management facilities and remediation of contaminated land. Development in each class must also meet the capital investment value threshold of $30 m to be classified as SSD.

Specific sites may also be declared by the Minister to be SSD, but only if the Minister has obtained, and made publicly available, advice from the Planning Assessment Commission about the State or regional planning significance of the development.

Schedule 2 of the SRD SEPP retains many of the sites which were previously Part 3A sites including the Sydney Opera House, Sydney Olympic Park, The Rocks and Barangaroo as SSD sites. Development on a specified site must also meet the capital investment threshold to be classified as SSD.

The consent authority for SSD will be the Minister for Planning, although it is expected that the Minister will delegate his decision-making authority for most SSD to the PAC or senior officers of the Department.

A major change to the assessment process is that because SSD is now within Part 4 of the EP&A Act, many of the current development assessment processes that apply to development applications lodged with councils will apply to SSD. For example, there is an express provision (s89H) that the relevant matters set out in s79C are to apply to the determination of an SSD application.

This has the effect that environmental planning instruments and development standards will need to be considered in the determination of an SSD application. However, the SRD SEPP specifically excludes the operation of development control plans to SSD. SSD will also be subject, with one minor exception, to the modification powers in s96 of the EP&A Act.

State Significant Infrastructure

SSI has been inserted into a new Part 5.1 of the EP&A Act and applies to development for which, generally, a government authority is the proponent. Schedule 3 of the SRD SEPP provides for classes of development that are SSI.

These classes include activities of a public authority that would otherwise require an environmental impact statement under Part 5, rail infrastructure, pipelines and water storage or treatment facilities. In order to be SSI however, development specified in Schedule 3 must be capable of being carried out without development consent under Part 4 of the Act. Additionally, development in a particular class must also meet the capital investment value threshold to be classified as SSI.

Specified sites may also be declared by the Minister to be SSI. In relation to SSI, the Minister may simply declare a specified site to be SSI. There is no need for the Minister to seek advice as required to specify a site as SSD. Currently there are no specified SSI sites under the SRD SEPP other than certain transitional projects.

Development can be declared Critical SSI if it is of a category that, in the opinion of the Minister, is essential for the State for economic, environmental or social reasons (s115V).

The SRD SEPP identifies the Pacific Highway projects and certain rail infrastructure projects as Critical SSI.

The Minister for Planning is the consent authority for SSI projects. It is expected that applications will be determined by senior officers of the Department if there are fewer than 25 submissions by members of the public objecting to the proposal and the relevant local council does not object to the proposal.

The pre-approval and assessment provisions under the former Part 3A are generally comparable with the new provisions for SSI. There are also SSI provisions governing staged infrastructure applications that are comparable with concept plans under the former Part 3A. Critical SSI is still generally immune from legal challenge except in limited circumstances.

Transitional Part 3A projects

The provisions of Part 3A as in force immediately before the commencement of the Repeal Act (including provisions relating to modification applications under s75W) will continue to apply to projects that fall within the definition of 'transitional Part 3A projects'. These include approved projects and projects that have been the subject of a Part 3A project application and for which environmental assessment requirements have been notified or adopted. In addition, any SEPP or other instrument remaining in force and as amended after Part 3A's repeal will continue to apply to a 'transitional Part 3A project'.

In addition, concept plans that were approved before the repeal of Part 3A will continue to have effect.

However, all future applications for development under those concept plans will now be assessed under Part 4 of the EP&A Act.

Joint regional planning panels (JRPP)

Projects that are not SSD or SSI will be determined by local councils or, if the development meets specified capital investment thresholds, by the applicable JRPP. The capital investment value threshold for development to be sent to the JRPP will increase from $10m to $20m. Development of less than $20m that would have been sent to the JRPP will be returned to local councils.

The capital investment value threshold for referral of applications to a JRPP will be reduced to $5m for Crown development applications; applications where the council is the applicant; applications for certain private infrastructure; and community facilities or eco-tourist facilities.

The Repeal Act also introduces a new provision relating to the composition of JRPPs. One of the three State-appointed members of a JRPP will now have to be appointed by the Minister with the concurrence of the Local Government and Shires Association. This aims to alleviate concerns that local councils are not able to control development that occurs in their own area.

The Repeal Act also allows a JRPP to determine development applications that have a capital investment value of between $10m and $20m if an application has not been determined by the local council within 120 days of being lodged. This provision is subject to the applicant making a written request to the council for the application to be dealt with by the JRPP and the chairperson of the relevant JRPP determining that the delay in the determination of the development application was not caused by the applicant.

Amendments to the EP&A Regulation

The *Environmental Planning and Assessment Amendment (Part 3A Repeal) Regulation 2011* (Amending Regulation) commenced on 1 October 2011. It introduced a number of significant changes to the *Environmental Planning and Assessment Regulation 2000* (EP&A Regulation). A new Division 6 has been inserted which sets out the public participation requirements for SSD. In addition, the Amending Regulation inserts a new Division 15 into Part 6 of the EP&A Regulation which details the processes to be followed when SSD is called in by the Minister under the EP&A Act. Recent guidelines for the use of the call in power have been published.

Provisions relating to SSI are located in a new Part 10 of the EP&A Regulation and set out requirements relating to applications for SSI, owners' consent and notification, the exhibition period for SSI applications and other matters.

New provisions prescribing the fees payable for SSD and SSI applications are contained in a new Division 1AA of Part 15 of the EP&A Regulation.

Also, a new Schedule 2 has been inserted into the EP&A Regulation which sets out new requirements relating to environmental impact statements and environmental assessment requirements.

Other Instruments

The SRD SEPP also makes minor changes to the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Regulation 2007* (NSW); and the *State Environmental Planning Policy (Infrastructure) 2007* (NSW).

Review of the NSW planning system – issues paper released

Submissions closed on 17 February 2012 on an issues paper for the NSW planning system review being conducted by Commissioner Tim Moore and Ron Dwyer. The paper, released in December 2011, addresses the structure and objectives of a new planning system, and includes an extensive list of questions inviting feedback. A Green Paper is expected to be released in April 2012 and draft legislation should be available for consultation in the second half of 2012. A copy of the issues paper can be found at <http://www.planningreview.nsw.gov.au>

Consultation has included 91 community forums spread across 44 locations in NSW attended by almost 2 000 people. Approximately 70 meetings were also held with stakeholders from across the spectrum, ranging from those with property development interests to environmental groups. More than 330 written submissions were lodged from the public and interested parties.

The issues paper explores Guidelines on exercise of call in powers

As noted above, the changes to the EP&A Act included the making of a new SEPP for State Significant Development (SSD) and other relevant matters. A full list of SSD development types and specified sites can be found in Schedules 1 and 2 of the State and Regional Development SEPP.

Development that is not identified in Schedule 1 or 2 of the SEPP may be declared to be SSD by the Minister for Planning and Infrastructure after obtaining, and making publicly available, advice from the Planning Assessment Commission (PAC) as to the State or regional planning significance of the proposed development.

Following consultation with key industry stakeholders, the Minister has released a Guideline which sets out how a request can be made to declare a development proposal as SSD. The Guideline also provides further information about matters that are relevant in deciding whether a proposal is of State or regional planning significance. The Minister has sent a request to the PAC to consider these matters when providing advice on the planning significance of development proposed to be declared as SSD.

SSD projects are assessed by the NSW Department of Planning and Infrastructure, with input sought from local government, other NSW Government agencies and the community as part of the assessment process. A copy of the guideline can be found at <http://www.planning.nsw.gov.au>.

Environmental Legislation Amendment Act 2011 (NSW)

Following a major emission from the Orica plant at Newcastle, the NSW Government introduced significant change to the reporting requirements for holders of environment protection licences and any person responsible for a pollution incident.

Occupiers of licensed premises will be required to immediately notify all relevant authorities of pollution incidents, or face a $2m fine. Additional obligations regarding the public notification of pollution monitoring data and the preparation of incident response management plans will also be imposed on all licence holders.

The Protection of the *Environment Legislation Amendment Act 2011* (NSW) received Royal Assent on 18 November 2011. The Act has made substantial changes to reporting requirements for premises licensed under the Protection of the *Environment Operations Act 1997* (the POEO Act).

Immediate notification of pollution incidents

Formerly, the POEO Act required a person who became aware of a pollution incident to notify the appropriate regulatory authority 'as soon as practicable'. Now a licence holder must verbally notify the EPA by telephoning the pollution hotline 'immediately' after the pollution incident. This must be followed up by a written report within 7 days.

The new reporting requirement will apply to licence holders and any person who is responsible for a pollution incident. The EPA will also have the power to direct persons who make a notification of a pollution incident to notify the public and any other government departments of the incident.

The maximum penalty for not complying with the new reporting requirements has doubled to $2m for corporations and $500 000 for individuals. Daily penalties for failing to report a pollution incident have also doubled to $240 000 for corporations and $120 000 for individuals.

Pollution incidents must now be notified to both the EPA and the local Council regardless of which body is the appropriate regulatory authority for the purpose of the Act. The Ministry of Health, WorkCover Authority and Fire and Rescue NSW must also be notified.

Publication of monitoring data

It will be mandatory for licence holders who are required to prepare pollution monitoring data as a condition of their licence to make such data freely and publicly available. This will only apply to data collated after the commencement of the Amendment Act.

If the licence holder maintains a business website for the activity the subject of its licence, then the monitoring data must be published on that website. On commencement, licence holders will have three months to comply with this section. Corporations will face fines of up to $4 400 for publishing false or misleading data.

NELR recent developments

Pollution incident response management plans

All licence holders must prepare and implement a pollution incident response management plan. The EPA can also direct any other person to prepare such a plan. Licence holders will have six months from the date the Act commences to comply. Corporations face fines of up to $2m for non-compliance.

Health and environmental risk analysis

The EPA will have new powers to undertake an environmental risk analysis, or to direct the Ministry of Health to undertake a health risk analysis, if it reasonably suspects that a pollution incident has occurred. The EPA can recover the costs of undertaking such an analysis from the person who allegedly caused or is causing the pollution.

Administrative matters

The Act also provides for the appointment of a Chairperson of the Environment Protection Authority (the EPA) who will have the function of managing and controlling the affairs of the EPA, and it reconstitutes the Board of the EPA.

***Heritage Amendment Act 2011* (NSW)**

The *Heritage Amendment Act 2011* (NSW), passed on 24 November 2011, aims to improve the independence of the Heritage Council and remove red tape that slows down the approval system. It reverses some of the previous government's changes by:

- reducing the number of members of the Heritage Council from 11 to 9
- abolishing Ministerial Review Panels
- requiring the Heritage Council, once it makes a decision to recommend the listing of an item on the State Heritage Register under s33 of the *Heritage Act 1977* (the Act), to make the recommendation to the Minister within 14 days of giving of notice of the decision
- requiring the Minister to publish all decisions relating to whether or not to direct the listing of items on the State Heritage Register and the reasons for the decisions
- requiring a consent authority in relation to certain State significant development that affects State heritage matters
- enabling the Heritage Council, rather than the Minister, to approve forms for the purposes of the Act
- making other minor and consequential amendments.

***National Parks and Wildlife Legislation Amendment (Reservations) Act 2011* (NSW)**

This Act received assent on 25 October 2011. The Act amends the *National Parks and Wildlife Act 1974* (NSW):

- to change the reservation of part of Wianamatta Regional Park to a nature reserve to be known as Wianamatta Nature Reserve
- to add certain land to Hunter Wetlands National Park
- to revoke the reservation of certain other land that is currently reserved as part of Hunter Wetlands National Park

The Act also amends the *National Park Estate (South-Western Cypress Reservations) Act 2010* (NSW) to delay the commencement of the reservation of certain State forests as part of Lachlan Valley National Park and Yathong Nature Reserve.

Local Government Amendment Bill 2011 (NSW)

The Local Government Amendment Bill 2011 Bill was introduced into Parliament on 14 October 2011. It aims to create favourable conditions for councils to engage in structural reform to achieve a strong and sustainable local government sector now and in the future. The proposals cover a range of matters including provisions to reduce the period of the employment protections provisions for council staff following amalgamation of councils, return to councils their body corporate status, introduces caretaker provisions to regulate council decision-making before ordinary elections, makes changes to the system of vote counting in local government elections, extends the maximum term of the lease or licence of community land from 21 years to 30 years, and clarifies provisions relating to pecuniary interest and simplify pecuniary interest exemptions in relation to the adoption of standard local environmental plans.

Marine Pollution Bill 2011

The Marine Pollution Bill 2011 (NSW) was introduced to Parliament on 23 November 2011. It aims to protect the State's marine and coastal environment from pollution by oil and other marine pollutants discharged from ships by:

- repealing and re-enacting the *Marine Pollution Act 1987*, which prohibits discharges of oil and noxious liquid substances
- implementing additional provisions of the International Convention for the Prevention of Pollution from Ships, 1973 (known as MARPOL), to prohibit discharges of harmful substances in packaged form and discharges of sewage and garbage.

Threatened Species Conservation Amendment (Ecological Consultants Accreditation Scheme) Bill 2011

The object of the Threatened Species Conservation Amendment (Ecological Consultants Accreditation Scheme) Bill 2011, introduced to Parliament on 5 August 2011, is to amend the *Threatened Species Conservation Act 1995* (the Principal Act) to establish an accreditation scheme for ecological consultants preparing or carrying out certain assessments, impact statements or surveys under the Principal Act, the *Fisheries Management Act 1994* or the *Environmental Planning and Assessment Act 1979* (the Planning Act), and certain other documents and activities (ecological assessments).

The Bill will make it an offence for a person to:

- prepare or carry out an ecological assessment if the person is not an accredited ecological consultant (unless the person is acting in accordance with the directions of, or under the supervision of, an accredited ecological consultant), or
- prepare or carry out an ecological assessment requiring specialist accreditation if the person has not obtained specialist accreditation in accordance with the scheme (unless the person is acting in accordance with the directions of, or under the supervision of, a specialist ecological consultant), or
- make representations, or cause or allow any representation to be made, that the person is accredited or has specialist accreditation under the scheme (unless the person is so accredited).

The Bill also:

- establishes the processes for the grant and renewal of accreditation
- enables the Chief Executive of the Office of Environment and Heritage (the Chief Executive) to impose, vary or revoke conditions in respect of accreditation or to revoke or suspend accreditation in certain circumstances
- establishes an accreditation panel to perform certain functions relating to accreditation, such as making certain recommendations to the Chief Executive and conducting peer reviews of any ecological assessment that has been prepared or carried out by an accredited ecological consultant, and
- establishes a process for the conduct by the accreditation panel of peer reviews of ecological assessments, so that the accreditation panel may make recommendations in respect of revocation or suspension of, or the imposition, variation or revocation of conditions on, a person's accreditation.

NELR recent developments

QUEENSLAND by Dr Justine Bell

The Pacific Adventurer case

In March 2009 the cargo ship Pacific Adventurer discharged approximately 270 tonnes of oil into waters around Cape Moreton, Queensland. Some containers on board were lost overboard when the vessel rolled during a storm, and those containers punctured the vessel's hull, where the fuel tanks were located, causing the oil spill. The defendants pleaded guilty under s 26(1)(a) of the *Transport Operations (Marine Pollution) Act 1995* (Qld), which prohibits the discharge of oil into coastal waters. The maximum penalty was $1.75m for a corporation.

On 14 October 2011 Judge Dorney of the Queensland District Court ordered each of the defendants to pay a fine of $600 000 (a total of $1.2m), and recorded convictions.[1] There was no order made with regard to recovery of expenses, as the Federal Court has already made an order regarding this. Judge Dorney observed that the following features of the case indicated the seriousness of the offence:

- the impacts were serious, but the case was not in the worst category as it did not involve loss of human life, significant wildlife deaths, or significant impacts on other organisms
- the owners were aware of a problem with the ship's lashings and its potential consequences.

Mitigating factors included:

- the early alerting of authorities, co-operation with the clean-up authorities, and a timely plea of guilty
- contribution of $7.5m to the Commonwealth fund
- the apology made to the Governor and Premier on 17 March 2009 and the expressions of remorse
- the voluntary help in cleaning up, which involved a significant financial contribution
- the lack of history with incidents of this kind
- the fitting of vessels with new lashing systems after the spill
- the absence of evidence of deliberate misconduct.

1 *R v Santos & Ors* [2011] QDC 254 (14 October 2011).

Greentape reduction bill

The Environmental Protection (Greentape Reduction) and Other Legislation Amendment Bill 2011 was introduced to Queensland Parliament on 26 October 2011 following a period of public consultation. According to the Explanatory Notes, the objectives of the Bill are to simplify approvals processes by:

- introducing a licensing model proportionate to environmental risk for the licensing of environmentally relevant activities
- introducing flexible operational approvals
- streamlining the approvals process for mining and petroleum
- streamlining and clarifying information requirements.

The first objective is to introduce a new licensing model, which will involve a tiered system consisting of:

- standard applications – these apply to lower risk environmentally relevant activities where standard conditions have been developed, and allow the operator to make a standard application where the proposal complies with standard eligibility criteria
- variation applications – this is linked to standard applications, and allows an operator to make a variation application where their proposal does not meet all of the standard eligibility criteria
- site specific applications – these are required where there are no standard conditions in place.

This simplifies the approvals process for lower risk activities.

The second objective is to introduce flexible operational approvals. At present, some activities require both a development approval and an environmental authority, which has the effect of tying a project to land. The Bill will allow for operators to obtain a single project approval instead, which will attach to the operator. The Bill also allows for operators with more than one site to obtain a single corporate authority for all sites. Finally, all operating conditions will be allowed to be contained in an environmental authority, meaning that where amendments are sought, operators will not need to seek additional development approvals under the

Sustainable Planning Act 2009 (Qld).

The third objective is to streamline the approvals process for mining and petroleum activities. At present, operators of mining activities need to obtain separate approvals for environmentally relevant activities on site related to mining, and those not related to mining. The Bill allows for all approvals to be amalgamated.

Finally, the third objective is streamlining and clarifying information requirements. This includes establishing a framework for third party certification and amending the standard criteria.

Following the first reading of the Bill, it was referred to the Environment, Agriculture, Resources and Energy Committee, and the Committee is due to report to Parliament on 20 April 2012.

EPA amendments

Amendments to the duty to notify under the *Environmental Protection Act 1994* (Qld) came into effect on 2 December 2011. Under the previous s 320, a person carrying out an activity was subject to a duty to notify if they became aware that serious or material harm was threatened by their own, or someone else's, act or omission in carrying out the activity. The amendments introduce new ss 320–320G. The duty to notify still applies to circumstances where serious or material environmental harm is caused or threatened, but the duty also extends to circumstances where a person is carrying out a chapter 5A activity (greenhouse gas storage and petroleum activities, which includes coal seam gas activities), and where an event occurs which has a negative effect on the water quality of an aquifer, or has caused the connection of two or more aquifers (s 320A).

The duty now involves the following elements:

- in an employment context – the employee must notify their employer, or if they cannot be contacted, the administering authority (s 320B). The employer must then notify the administering authority and any occupier and registered owner of the affected land (s 320D)
- in other contexts – the person must notify the administering authority, as well as any occupier and registered owner of the affected land (s 320C)
- service requirements for the notice to occupiers of affected land are set out in s 320E
- all notifications must be made within 24 hours, as opposed to the previous requirement of 'as soon as reasonably practicable'
- the penalty for failure to notify where serious or material environmental harm is caused or threatened has been raised from 100 penalty units to 500 penalty units. The exception is where an employee fails to notify, in which case the penalty is 100 penalty units. The penalty for failure to notify in relation to chapter 5A activities is 100 penalty units.

These provisions create a more onerous reporting system, and also provide for greater regulation of the coal seam gas industry.

New biodiversity strategy

The Queensland government released a new biodiversity strategy in November 2011 called *Building Nature's Resilience: A Biodiversity Strategy for Queensland* (the Strategy).[2] Its primary objective is to build resilient ecosystems through declaring protected areas, conserving species and managing the extent, condition and connectivity of ecosystems. Targets for 2020 and priority actions include:

- for protected areas – building and strengthening national parks, marine parks, world heritage areas and other protected areas
- for conserving species – securing priority threatened species through targeted conservation, protecting iconic species, keeping common species common
- for managing extent, condition and connectivity of ecosystems – minimising loss of habitat, protecting and improving biodiversity on rural leasehold land, and improving ecological connectivity across landscapes and seascapes.

The Strategy is complemented by the establishment of the Joint Ministerial Advisory Committee, which will assist with implementation of the strategy across government.

2 <http://derm.qld.gov.au/wildlife-ecosystems/biodiversity/pdf>/biostrategy-web-2011.pdf>

Land Title Act – carbon abatement interests

The *Waste Reduction and Recycling Act 2011* (Qld) (the Waste Act) introduced amendments to several Queensland Acts to complement the Commonwealth Carbon Farming Initiative. Under the Commonwealth Initiative, a person can obtain credits for carbon abatement projects through forestry activities provided that they have a legal right to carry out the project, and an exclusive, long-term carbon sequestration right. The Waste Act amended the *Land Title Act 1994* (Qld) and the *Land Act 1994* (Qld) to provide for a new type of registrable interest termed a carbon abatement interest. By registering a carbon abatement interest on title, a person carrying out carbon abatement activities can demonstrate that they meet the requirements under the Commonwealth legislation to gain credits.

TASMANIA by Jess Feehely and Tom Baxter

Changes to marine farming legislation

In December 2011, the Tasmanian government passed the *Marine Farming Planning Amendment Act 2011* (the amending Act), with the support of the Liberal party. The Tasmanian Greens, including the two Green Cabinet ministers, opposed the legislation. Significantly, the amending Act removed the power of the independent, expert Marine Farming Planning Review Panel to refuse a draft amendment to a Marine Farming Development Plan under the *Marine Farming Planning Act 1995*. Instead, the Panel is now required to make a recommendation to the minister, who has discretion to make a determination contrary to the recommendation and to make any changes to a draft amendment that he considers necessary. However, pursuant to amendments introduced to the amending Act by the Legislative Council, the minister is required to table reasons in each house of Parliament for any decision that is contrary to the Panel's recommendation.

The amendments were introduced only a week after details were released regarding a draft amendment to the *Macquarie Harbour Marine Farming Development Plan* to facilitate a 60% increase in salmon farm leases in the area (see below). In March 2011, the Panel had exercised its powers to refuse a draft amendment for the first time, refusing a proposed expansion of a salmon farming lease on the basis of ecological impacts. The minister's second reading speech for the *Marine Farming Planning Amendment Bill 2011* explicitly stated that the amendments were proposed in response to that decision.[1]

The amending Act did not address concerns raised by conservation groups that there are no rights of appeal against decisions made in relation to Marine Farming Development Plans. In response to a letter from the Tasmanian Aquaculture Reform Alliance regarding the amendments, the minister advised that the absence of appeal rights was 'intentional' as other opportunities for public comment were provided.[2]

Proposed Macquarie Harbour expansion

In late November 2011, a conglomerate of three aquaculture companies, Huon Aquaculture Group, Petuna Aquaculture and Tassal Operations Pty Ltd, applied for amendments to the *Macquarie Harbour Marine Farming Development Plan 2005*. The amendments sought will allow the expansion of marine farming lease areas in Macquarie Harbour from 564ha to 926ha – the largest single aquaculture expansion in Tasmanian history.

The public comment period in respect of the draft amendment closed on 22 December 2011. While industry and commercial groups have supported the proposal, community and environment groups have raised concerns about the lack of baseline data regarding ecological conditions in Macquarie Harbour, the inadequacy of hydrodynamic modeling, potential impacts on the endangered Maugean skate, and adverse impacts on the adjacent Tasmanian Wilderness World Heritage Area.[3]

The Marine Farming Planning Review Panel is expected to make a recommendation to the minister regarding the expansion proposal in the first half of 2012.[4]

1 Minister Bryan Green, Second reading speech, 17 November 2011, <www.parliament.tas.gov.au>.

2 Letter from Minister Bryan Green to the Tasmanian Aquaculture Reform Alliance and Environment Tasmania, 23 December 2011.

3 See, for example, the Environment Tasmania submission at <www.et.org.au>.

4 'Seafood project waits on green light', *The Mercury*, 24 January 2012, 8.

Tasmanian forests conservation agreement signed

The Tasmanian Forests Intergovernmental Agreement (IGA), signed by the Tasmanian and Australian Governments in August 2011, committed to protect areas of native forest, security for a minimum wood supply and financial assistance for displaced workers, transitional arrangements and management of conservation areas.

The IGA provided for the immediate protection of 430 000ha of high conservation value forest in informal reserves, while the Independent Verification Group completed its assessment regarding final boundaries and appropriate reserve categories for the 572 000ha of native forests nominated by the conservation signatories. Under the agreed terms of reference, the Verification Group is required to determine whether the nominated areas satisfy the high conservation value criteria and should be protected, having regard to the need to maintain a secure minimum wood supply.

Clause 36 of the IGA provided that, until completion of the independent verification process, the agreed 430 000ha would be protected by a Conservation Agreement under the EPBC Act. The IGA also committed to honouring existing wood supply agreements. The IGA required scheduled harvesting within the 430 000ha to be relocated wherever possible but, if an independent expert confirmed that some wood supply contracts could not be met outside the 430 000ha, compensation could be paid to the contractor.

The Independent Verification Group sought an extension until February 2012 to complete their assessment of conservation boundaries. Independent forestry experts advised the government that it was not possible to reschedule harvesting in all coupes within the 430 000ha for the period to February 2012.[5]

On 13 January 2012, a Conservation Agreement was signed by the federal minister, the Tasmanian minister and Forestry Tasmania. Though the Conservation Agreement excluded those coupes which the experts had indicated could not be rescheduled, the governments have promoted the agreement as providing protection for 'more than 99.5% of the 430 000ha nominated for interim protection'.[6] Environmental NGOs have been critical of the Conservation Agreement. In particular, the groups claim that the exclusion of forest areas which could not be rescheduled from the Conservation Agreement, rather than compensating affected contractors, fails to deliver on key commitments under the IGA and puts conservation values at risk.[7]

The Conservation Agreement will remain in force until the Verification Group releases its findings. After that time, a second conservation agreement will be entered into covering the area of forest identified by the Verification Group as having high conservation values, and will remain in place until legislation is enacted to provide longer term protection for those areas.

Three Capes Track proposal

The Tasmanian Parks and Wildlife Service released the draft Development Proposal and Environmental Management Plan (DPEMP) for the controversial Three Capes Track for public comment in November 2011. The proposal involves construction of infrastructure to support a hut-based bushwalk covering nearly 70km within the Tasman National Park (including Cape Raoul, Cape Pillar and Cape Hauy). The project is jointly funded by the Australian and Tasmanian Governments, who anticipate that the track will attract up to 10 000 visitors annually. Additional private investment is also expected for promotion and operation of the tourist track.[8]

Conservation groups have criticised the scale and commercial nature of the proposal, potential impacts on wilderness values (including disturbance of Wedge-Tailed Eagle habitat) and the extent of vegetation clearance. Concerns have also been raised regarding the visual impact of the proposal and associated impacts on the heritage values of the nearby Port Arthur Historic Site.[9]

The DPEMP, and public comments made on it, will be assessed under the Parks and Wildlife Service Reserve Activity Assessment process.

The proposal was also referred for assessment under the EPBC Act. On 16 January 2012, the minister identified threatened fauna (particularly, the Wedge-Tailed Eagle)

5 The independent schedulers' reports are available at <www.environment.gov.au/land/forests/independent-schedulers.html>.
6 See Department of Infrastructure, Energy and Resources media release, 13 January 2012. <www.dier.tas.gov.au/forests/tasmanian_forests_agreement/verification_process>.
7 The Wilderness Society, Environment Tasmania Conservation Council , Australian Conservation Foundation 'Governments fail to deliver on Forests Agreement', joint media release, 13 January 2012, <www.et.org.au/news/2012/governments-fail-deliver-forests-agreement>.
8 Copies of the DPEMP are available on the Parks and Wildlife Service website at <www.parks.tas.gov.au/?base=25657>.
9 See, for examples, <keepthecapeswild.org.au>.

as a controlling provision but determined that the proposal was not a controlled action provided it was carried out in accordance with specific conditions.[10]

Enforcement review

A number of amendments have been proposed to Tasmania's principal environmental legislation, the *Environmental Management and Pollution Control Act 1994* (Tas) (EMPCA). The amendments, which are primarily aimed at improving enforcement options, include:

- expanding the definition of 'environmental nuisance'
- allowing EMPCA to apply to minor discharges of oil and hazardous substances at sea from small vessels that would not be effectively captured by the provisions of the *Pollution of Waters by Oil and Noxious Substances Act 1987* (Tas) (which gives effect to the MARPOL Convention in Tasmania). The proposed amendments will allow such minor incidents to be dealt with by infringement notice.
- improving access to information regarding contaminated sites
- increasing the EPA Board's powers to require additional information during the EIA process, and making it an offence to provide false information
- confirming that an environment protection notice can be issued to a former owner where it becomes clear that environmental harm is being caused as a result of past activities. The proposed amendments also clarify the extent to which responsibilities under an environment protection notice can be transferred to a new owner or another party.
- Confirming that the EPA has power to compel a person to answer questions or provide documents, even where the information may incriminate them, but any information gathered in that manner will not be admissible in any proceedings against a natural person.

State of the Derwent report

The Derwent Estuary Program (DEP) is a regional partnership between local governments, the Tasmanian government, commercial and industrial operators and community groups working to restore and promote the Derwent Estuary. Since 1999, the DEP has worked with all partner groups in research and other activities aimed at understanding the estuary, informing the community about its values and making progressive improvements in the health of the estuary.

The 2011 DEP report card summarised monitoring data and reported on trends in sewage and industrial and stormwater pollution, including health impacts at swimming beaches and heavy metal concentrations in seafood. The report card also outlined clean-up actions taken during the year.

The report concluded that investments in the DEP were paying off, with material reductions in industrial discharges into the Derwent observed over the monitoring period. However, the report also identified the need for additional funding to extend the scope of the DEP to monitor discharges and nutrient levels in the broader catchment and the D'Entrecasteaux Channel. The report card is available at <www.derwentestuary.org.au>.

Legal challenges to work at pulp mill site

As reported in the last edition of NELR, a community organisation, Pulp the Mill Inc, filed criminal prosecution proceedings against Gunns Limited in September 2011, claiming that ongoing work on the pulp mill's Bell Bay site was unlawful as the permit issued for the project had lapsed.[11]

On 28 September 2011, the Director of the Environment Protection Authority released a document outlining his view that work at the pulp mill site had been substantially commenced and work under the permit could lawfully continue.[12]

The Tasmanian Conservation Trust (TCT) disputes that view and, in October 2011, commenced an action in the Supreme Court seeking a determination that:

- the Pulp Mill permit had lapsed when the pulp mill was not substantially commenced by 30 August 2011

10 The decision that approval was not required is available at <www.environment.gov.au>.

11 For an overview of the charges, see <tasmaniantimes.com/index.php?/article/pulp-the-mill-launches-prosecution-of-gunns-ltd/>.http://tasmaniantimes.com/index.php?/article/pulp-the-mill-launches-prosecution-of-gunns-ltd/

12 The Director of the EPA's views are available at <epa.tas.gov.au/Documents/Director_EPA%E2%80%99s_view_regarding_substantial_commencement_of_the_Pulp_Mill_project.pdf>.

- the dam works permits issued for the pulp mill project had lapsed and the Assessment Committee for Dam Construction has no power to grant new permits for dam works associated with the construction or operation of the pulp mill.[13]

In December 2011, Pulp the Mill Inc applied to withdraw their complaint citing lack of funds. The group also argued that, given that the TCT action in the Supreme Court had the potential to more definitively resolve the issue of substantial commencement, continuing to pursue their criminal prosecution was not a good use of resources.[14] On 12 January 2012, Magistrate Hill refused the application to withdraw and dismissed the complaint. Gunns Limited has applied for costs. The TCT matter is scheduled for further mention in early 2012.

Interim greenhouse gas emissions targets

The *Climate Change (State Action) Act 2008* (Tas) set a target for the Tasmanian Government to reduce its greenhouse gas emissions to at least 60% below 1990 levels by 2050. Last year the Minister for Climate Change asked the Climate Action Council to review the legislated target and to consider introducing interim targets for 2020.

In November 2011 Ms Cassy O'Connor MP introduced a private members bill, *Climate Change (State Action) Interim Targets Amendment Bill 2011*[15], on behalf of the Tasmanian Greens. The Bill seeks to:

- replace the current 2050 reduction target with a target of net zero greenhouse gas emissions
- introduce an interim target of reducing greenhouse gas emissions to at least 40% below 1990 levels by 2020.

The Bill, which is unlikely to get support from the Labor government, will be debated later in 2012.

New chair for Tasmanian Heritage Council

Dr Dianne Snowden has accepted a three year contract as the new Chair of the Tasmanian Heritage Council, the body responsible for managing cultural heritage (other than indigenous heritage) assessments in Tasmania.

Seven new members have also been appointed, including persons with expertise in archaeology, architecture, planning, history, local government, building, and tourism issues.

Tasmanian coastal planning advisory committee appointed

In June 2011, the Tasmanian Government accepted the recommendation of the Tasmanian Planning Commission to reject the draft *State Coastal Policy 2008*. The Premier subsequently directed the Minister for Planning to 'present recommendations to Cabinet in the near future on the priorities and scope of a comprehensive coastal planning framework.'[16]

In late 2011, a Coastal Planning Advisory Committee (CPAC) comprising representatives of the Tasmanian Planning Commission, Department of Primary Industries, Parks, Water and Environment, Department of Justice and the Climate Change Office was appointed to develop Tasmania's coastal policy framework. As part of this role, CPAC will work to develop a sea level rise planning tool, consider the draft interim Coastal Hazards Code and investigate options for managing coastal developments such as canal estates.[17]

13 See Tasmanian Conservation Trust, 'TCT seeks Tasmanian Supreme Court determination that the Tamar Valley Pulp Mill permit has lapsed', media release, 26 October 2011 <www.tct.org.au/media/documents/26.10.2011FINALTCTMediaReleaseSupremeCourt_Web_Version.pdf>.

14 See ABC new report, 22 December 2011. <www.abc.net.au/news/2011-12-22/20111222-activists-seek-to-dump-gunns-legal-action/3744362>.

15 The Bill is available at <www.parliament.tas.gov.au/bills/pdf/82_of_2011.pdf>.

16 See NELR Recent Developments: Tasmania June 2011.

17 Tasmanian Government submission, 'Barriers to Effective Climate Change Adaptation', December 2011, <www.pc.gov.au/__data/assets/pdf_file/0005/114548/sub051.pdf>

WESTERN AUSTRALIA

by Joe Freeman and Ainsley Reid

Proposed Marine Park at Eighty Mile Beach

On 30 September 2011, the WA Minister for the Environment released an Indicative Management Plan for a proposed class A marine park at Eighty Mile Beach, situated between Broome and Port Hedland, for public comment. The proposed marine park is part of the WA Government's Kimberley Wilderness Parks initiative within the Kimberley Science and Conservation Strategy. Eighty Mile Beach is a Ramsar-listed wetland which is a significant feeding ground for migratory birds, and supports an important nesting population of flatback turtles, along with other marine life including sawfish, dugongs, dolphins and invertebrates.

The Indicative Management Plan was open for comment until 20 January 2012 and is available at <http://www.dec.wa.gov.au/component/option,com_docman/task,doc_download/gid,5635/Itemid/>.

The Kimberley Wilderness Parks initiative will also see the establishment of marine parks at Camden Sound, North Kimberley and Roebuck Bay.

New environmental offsets policy

On 27 September 2011, the WA Government released its Environmental Offsets Policy, which provides guidance on the imposition of environmental offset obligations as conditions on clearing permits and approvals of proposals subject to environmental impact assessment.

The Department of Environment and Conservation is developing an Environmental Offset Register under the policy. This will provide a public record of all offset agreements in WA, including all offsets that may be negotiated by different agencies under different legislation.

Under the policy, environmental offsets:

- will only be considered after avoidance and mitigation options have been pursued
- are not appropriate for all projects
- will be cost-effective, as well as relevant and proportionate to the significance of the environmental value being impacted
- will be based on sound environmental information and knowledge
- will be applied within a framework of adaptive management
- will be focussed on longer term strategic outcomes.

The State Department of Environment and Conservation will develop detailed guidelines under the policy outlining:

- the roles and responsibilities of agencies, proponents and statutory bodies
- legislative requirements
- assessment, decision making, auditing, monitoring and review processes.

South West Forest Management Plan

On 10 November 2011, the WA Government began a consultation process for the development of a new Forest Management Plan, covering a 2.5m ha area from Moore River to the South Coast. The initial phase of the consultation will involve government agencies before moving to key stakeholder groups, such as the Conservation Council of WA and the Forest Industries Federation of WA.

The current 10-year Forest Management Plan is due to expire at the end of 2013. The EPA and Conservation Commission is expected to release a draft management plan for public comment in mid-2012. More information about the preparation process is provided on the Department of Environment and Conservation website at <http://www.dec.wa.gov.au/content/view/6857/2431/>.

Man imprisoned again for land clearing

On 11 November 2011, Martin CJ of the Supreme Court of Western Australia convicted Maxwell Jan Szulc of two acts of contempt of court for clearing native vegetation in breach of an injunction against illegally clearing native vegetation on his farming property near Esperance. He was committed to prison for terms of 9 months and 15 months, to be served concurrently.

Mr Szulc had already become the first person to be imprisoned in relation to the native vegetation clearing provisions of the *Environmental Protection Act 1986* (WA), after serving a 3 month sentence in 2010 for

contempt of court for similar clearing activities on the same property. He had ignored several notices from the Department of Environment and Conservation seeking to restrain him from unlawful clearing. In both cases, the Court noted that Mr Szulc's breach was wilful and deliberate, and in spite of his knowledge that his activities were illegal and contrary to court orders.

Minister upholds EPA coal mining rejections

The WA Minister for the Environment has upheld two decisions by the Environmental Protection Authority to reject applications for coal mining approvals.

On 20 December 2011, the minister rejected five appeals, including one by proponent Central West Coal Pty Ltd, against an EPA report concluding the company's proposal to develop a coal mine near Eneabba could not meet the EPA's objectives for flora and fauna. Foremost among the environmental concerns was uncertainty surrounding impacts to groundwater-dependant ecosystems in the nearby Lake Logue Nature Reserve.

On 21 December 2011, the minister rejected five appeals, including one by proponent Vasse Coal Management Pty Ltd, against the EPA's report rejecting the company's proposed coal mine north-east of Margaret River. Primary environmental concerns related to the uncertainty of risks to surface and groundwater in the Margaret River area. The EPA found that the proposed mine would pose serious risks to important environmental values, including significant impacts on the Leederville and Sue Aquifers, and that these would have consequential impacts on the social surroundings.

The minister will consult, in relation to each proposal, with relevant decision-making authorities under s 45(1) of the *Environmental Protection Act 1986* (WA) to determine whether either proposal may be implemented based on broader social and economic factors.

Conditional approval for lead transportation

On 3 October 2011, the EPA released the report of its review into the conditions placed on Magellan Metals' approval to transport lead carbonate from its Wiluna mine site to Fremantle. Magellan was issued a stop order in December 2010 after two instances of potential non-compliance. The WA Minister for the Environment imposed interim conditions in February 2011, relating to monitoring, reporting and auditing requirements, allowing Magellan to resume transportation.

In April 2011 Magellan voluntarily ceased transportation and placed the mine on care and maintenance after mud containing lead from Magellan's mine was found on the outside of a number of shipping containers at Fremantle, West Kalgoorlie, Forrestfield and Leonora.

In its report, the EPA approved of the interim conditions, and recommended further improvements, including:

- ensuring that shipping containers are free from visible mud containing lead carbonate prior to leaving the mine site
- requiring independent review of sampling and analysis methods to ensure the results are reliable
- requiring Magellan to provide the EPA with a report detailing options for downstream processing of lead carbonate, benchmarked against best environmental practice.

Magellan Metals' parent company, Ivernia Inc, responded that it would wait until the final operating conditions were decided before making an announcement regarding the impact they would have on the timing of a decision to restart the mine.

Decision of Environment Minister in relation to Cockburn Cement licence partially quashed

On 20 December 2010, the CEO of the Department of Environment and Conservation amended Cockburn Cement Limited's licence by imposing more stringent conditions, including that Cockburn Cement install new pollution control equipment to serve Kiln 6 at its Munster plant by 29 April 2011. The licence requires Cockburn Cement to operate the kilns within specified emissions limits and monitor and report on environmental performance. The licence will expire on 30 March 2012.

Two members of the community, who claimed to be affected by the operation of the plant, appealed the decision to the Minister for the Environment, arguing that stricter conditions should have been imposed. The minister allowed the appeals and imposed further conditions, including a requirement the new control equipment must be installed to serve Kiln 5 at the same plant, to be installed and operating by 30 November 2012.

Cockburn Cement appealed the minister's decision in the Supreme Court, on the grounds that the works

could only be completed in accordance with a works approval granted by the CEO of DEC, and that the date for installing the equipment would fall after the expiration of the licence.[1]

On 12 September 2011, Edelman J quashed this part of the minister's decision. The minister's power was to 'subject' the licence to conditions. Justice Edelman held that a condition on a licence must be 'fairly and reasonably related' to the licence. The condition in question did not meet this test, as it did not require Cockburn Cement to do anything within the time period of the licence. Further, the emissions which would be controlled by the condition would not be regulated by the licence, since from 30 March 2012 they would be controlled by a new licence. Therefore, the quashed decision was in excess of power and was a jurisdictional error.

Cockburn Cement's operations manager, Darrin Strange, has said that the technology is unproved, and that the company does not wish to add it to Kiln 5 until it had been demonstrated to be effective at Kiln 6.[2] The minister responded to residents' concerns by emphasising that the other conditions the minister imposed on the licence were upheld, and that the licence conditions were the 'toughest' to date.[3]

The Department is currently discussing the conditions which will apply to the new licence with Cockburn Cement.

WA's Southern Seawater desalination plant begins operations

On 2 September 2011, three months ahead of schedule, the WA Minister for Environment opened the Southern Seawater Desalination Plant, near Binningup in the Shire of Harvey. Current capacity of the plant is 50 GL per year, with plans to expand to 100 GL by the summer of 2012–13.

The Southern Seawater plant is the second reverse osmosis seawater desalination plant to provide drinking water in Western Australia. The Perth Seawater Desalination Plant in Kwinana, which has a capacity of 45GL per year, was completed in 2006, and was the first to begin operating in Australia.

1 See *Cockburn Cement Ltd v Minister for Environment (WA)* [2011] WASC 260.

2 <http://au.news.yahoo.com/thewest/business/a/-/wa/10245143/cockburn-cement-wins-appeal-over-licence/

3 <http://www.mediastatements.wa.gov.au/Pages/WACabinetMinistersSearch.aspx?ItemId=144242

VICTORIA by Barnaby McIlrath

Cattle grazing in alpine national parks ruled 'clearly unacceptable'

The Federal Environment Minister the Hon Tony Burke MP recently ruled that the Victorian Government's proposed alpine grazing trial would have a 'clearly unacceptable' impact on the national heritage values of the Alpine National Park, and would not receive approval under the EPBC Act 1999.

The Victorian Government had referred the trial to Minister Burke in late 2011, after failing to do so in relation to the first stage of the trial, January – April 2011, when the federal minister ordered the cattle out of the park.

The minister's decision, and his reasons, can be found in the EPBC Act website. The minister's decision that the alpine grazing trial is 'clearly unacceptable' is the strongest possible rejection that the minister can make under the Act, and is rarely exercised.

More frequently, the minister will conduct a more detailed assessment of the possible impacts of the proposal. In this case, however, the minister decided that there was clear scientific and historical literature to support the conclusion that alpine grazing has unacceptably damaging impacts on the ecology and species diversity of the park, and also on its aesthetic and recreational values. See also the Federal update on p7.

VCEC inquiry into a state-based reform agenda

The Victoria Competition and Efficiency Commission (VCEC) is conducting an inquiry into a State-based reform agenda for Victoria, and on 10 November 2011 released its draft report: *Securing Victoria's Future Prosperity: A Reform Agenda*.

Draft recommendation 16 is as follows:

- That the Victorian Government improve the overall business environment in Victoria by reforming major project approval processes to:

- minimise the required number of project approvals and approvals bodies, and run approval processes concurrently
- reform the Environment Effects Statement (EES) process, having regard to the Commission's recommendations in *A Sustainable Future for Victoria* and the report of the Parliamentary Environment and Natural Resources Committee into the EES process
- integrate and streamline approvals for all major public and private projects by creating an inter-agency strategic project approvals committee with the authority to issue all relevant approvals.

The draft report also hints at the need to review the operation of landfill levies in Victoria. VCEC was required to deliver its final report to the Government on 27 January 2012. All documents relating to the inquiry can be found on the VCEC website.

A Government response to the Inquiry into the Environment Effects Statement Process is due to be finalised by 1 March 2012: see http://www.parliament.vic.gov.au/enrc/article/1491

Code of Practice for Timber Production 2007

Submissions on the Victorian Government's proposed changes to the Code of Practice for Timber Production 2007 were open until 1 February 2012. The Victorian Government proposes to alter the Code to give the Secretary of the Department of Sustainability and Environment the power to exempt certain logging practices from complying with Action Statements applicable to species listed as threatened under the *Flora and Fauna Guarantee Act 1988 (*VIC*)*. The requirement for VicForests to comply with Action Statements was one of the key factors that allowed Environment East Gippsland to protect threatened species habitat at Brown Mountain in its 2010 Supreme Court case.

Management of contaminated waste

The Victorian Auditor-General's report into the management of contaminated land in Victoria was tabled in Parliament on 7 December 2011: http://www.audit.vic.gov.au/publications/20111207-Contaminated-Sites/20111207-Contaminated-Sites.html#s60

Of note, the report made various findings:

<u>The contaminated sites regulatory framework</u>

The framework's regulatory instruments, established and updated over a 20-year period, have evolved separately and have been implemented on an ad hoc basis by the Environment Protection Authority (EPA) and the department of Planning and Community Development (DPCD) in response to specific issues and circumstances.

In several instances, the instruments and their interplay have made the framework unnecessarily complex and unclear. This is particularly so for the Environmental Audit Overlay, Ministerial Direction No 1 for Potentially Contaminated Land and Potentially Contaminated Land: General Practice Note in relation to the requirements for, and guidance around, environmental audits and assessments.

In addition, there are many gaps in the framework — most of which have been known to DPCD and the EPA since at least 2000—that have affected the operation of the framework. These gaps relate primarily to the coverage of the regulatory framework, and the lack of any requirement to report contaminated sites to regulatory agencies; even if risks to human health and the environment are known. Actions to address these gaps only commenced in late 2010.

Governance of the contaminated sites system

<u>Oversight and accountability</u>

With around 100 entities involved in regulating and managing contaminated sites, clear accountability for the development, operation and effectiveness of the overall system is critical. Single point accountability, where one entity oversees the system and processes, and is accountable for its performance, is an effective approach to good governance.

There is, however, no single entity responsible for oversight of the planning and management of potentially contaminated and contaminated sites, or for assessing the effectiveness of the system or framework. The contaminated sites regulatory system operates instead in an uncoordinated way, with each entity managing contamination issues in isolation from the others. As a consequence, there is not a cohesive state-wide

strategic approach to the planning and management issues associated with potentially contaminated and contaminated sites.

Roles and responsibilities

Clear roles and responsibilities minimise the risk of overlap and duplicated effort. They also establish accountability and attribute responsibility for the success or failure of initiatives. While roles have been established under legislation and the contaminated sites framework, these are not clearly understood or agreed by all stakeholders. In addition, there are gaps in the roles where no agency is accountable or responsible.

The EPA is responsible for regulating contaminated sites where the contamination poses an imminent danger to human health or the environment, and it has issued either a pollution abatement notice or clean-up notice. It also regulates contaminated sites owned or managed by entities that it licenses.

However, there is no agency responsible for oversight of the system in relation to sites that are known to be contaminated and where the risks to human health and the environment may be long-term rather than imminent. Nor does any one entity have oversight of the management of orphan sites.

Issues around the management of orphan sites have been known for at least 11 years, particularly in relation to the lack of responsibility and gaps in the legislation, and there has been a range of recommendations made to address them. Very little action has been taken and many of the issues remain, especially the ongoing risks to human health and the environment.

Risk management

Risk management is fundamental to effective public sector administration. It enables entities to systematically identify and manage risks and opportunities, and also to prioritise actions. Risks can apply at an organisation or state-wide level.

For the management of potentially contaminated and contaminated sites, key inputs into managing risks include knowing where these sites are, whether they are contaminated, the extent and type of contamination and the potential impact on human health, the environment or amenity.

There is no systematic approach within the three councils audited, the EPA and across the state public sector generally, to identify and assess the risks from potentially contaminated and contaminated land. Risk management activities are limited and do not take a state-wide perspective—even though this is a state-wide issue.

An absence of information about contamination across Victoria means that risk management activities are not adequately informed. As a consequence, there is no assurance that the current regulatory approach is the appropriate approach to manage risks associated with site contamination.

The report made the following recommendations:

1. The Department of Planning and Community Development, assisted by the Environment Protection Authority and in consultation with councils, should:

- undertake a systematic and coordinated review of the entire regulatory framework for the management of potentially contaminated and contaminated sites to improve clarity and address gaps, including:
    - the wording, application and use of the Environmental Audit Overlay
    - the application of the framework for planning permits and planning scheme amendments, and the types of use to which it applies the use, content, guidance material and peer review of environmental site assessments establishing mandatory reporting requirements
    - establish processes to capture information about framework and system issues, and processes to address issues in a timely way
    - establish a performance framework to assess the efficiency and effectiveness of the contaminated sites framework and system.

2. The Department of Planning and Community Development should:

- assume responsibility and accountability for the leadership, coordination and oversight of the contaminated sites framework
    - establish mechanisms and processes to improve the leadership, coordination,

oversight and accountability of, and for, the contaminated sites framework and system

- clarify and communicate responsibilities within the framework so that they are clear and understood.

3. The Environment Protection Authority should:

- develop mechanisms and processes that enable the identification and recording of contaminated land
- assess the risks of these sites
- prioritise high-risk sites and actions to manage the associated risks.

4. Councils, with the support of the Department of Planning and Community Development, should:

- develop systems to capture ongoing site conditions to inform their compliance monitoring activities around the development, management and clean-up of contaminated sites
- develop compliance monitoring programs and enforcement processes, consistent with better practice, and perform these activities on a routine basis
- assess the level of expertise and financial resources required to accurately manage and clean up high-risk sites.

PCL Advisory Committee issues and options paper

An issues and options Paper prepared by the Potentially Contaminated Land Advisory Committee appointed by the Minister for Planning was open for comment between September and November 2001. The paper outlines some potential options for reform. A draft revised Environmental Audit Overlay was included as an attachment, which, notably, introduces a planning permit requirement for sensitive land uses within the overlay area. If adopted, this approach would represent a marked shift in the application of the Environmental Audit Overlay in Victoria: http://www.dpcd.vic.gov.au/planning/panelsandcommittees/current#Contaminated

The final report of the Advisory Committee was due to be received by the Minister for Planning in December 2011 but is yet to be made public.

VICTORIA

Land Management Surveys v Strathbogie SC (Red Dot) **[2012] VCAT 77**

In November 2011, the Victorian Planning Provisions were amended by Amendment VC83. The amendment included the introduction of the Bushfire Management Overlay (BMO) which is to replace the former Wildfire Management Overlay in bushfire sensitive areas. The decision of VCAT in *Land Management Surveys v Strathbogie Shire Council*[1] highlights the need for increased assessment of bushfire risks to be conducted prior to the issue of subdivision permits, in light of the 2009 'black Saturday' bushfires.

The decision involved a review of several conditions attached to a permit issued by the Strathbogie Shire Council for subdivision of the subject land. In particular contention were conditions 5 and 6 which required the applicant to upgrade sections of the road for up to 9km alongside and to the north of the land. For 6 lot rural subdivision, this can be seen a quite onerous requirement, costed at in excess of $1 million, even thought it was intended to enhance access in the event of a fire.

The Tribunal found conditions 5 and 6 to be excessive and invalid.[2] The Tribunal also cancelled the permit because it was satisfied that the permit would not have been granted without conditions 5 and 6. Consequently, the conditions could not be severed.

The Tribunal considered the responsibility for broader road-works beyond the subject land to lie with the council.[3] The Tribunal's analysis underscores some teething problems with the administration of the new BMO in light of the recent findings of the Bushfires Royal Commission and raises questions about the access to remote parcels of land in future.

The Tribunal called for a more holistic approach to be adopted by planning decision makers in tackling bushfire risk and suggested that the creative use of permit conditions might not be sufficient.[4]

It said:

> Whilst this type of proposal may raise some awkward and strongly contested bushfire safety issues, all stakeholders need to tackle these issues head on, rather than ducking the fundamental issue. Just because a particular landholding might be capable of having a dwelling built on it or is big enough to potentially be more intensively subdivided should not make these outcomes a *fait accompli*. There may be some locations with a very high inherent bushfire risk where the Royal Commission report indicates that the planning framework should be strongly discouraging further development. In the particular circumstances here, there also seems a fundamental debate to be had about how the re-subdivision of the subject land from four to six lots will advance the objectives of the Farming Zone, as opposed to potentially creating hobby-farm style lots with a likely rural-residential type of future use.
>
> Finally, the circumstances of this case reinforce that the Black Saturday bushfires and the resulting Royal Commission report have been a game-changer in terms of how the planning process must deal with permit applications involving land in more remote locations affected by a WMO/BMO. While each case needs to be assessed on its own merits, it cannot just be assumed that the relevant bushfire risks can be adequately dealt with by way of the creative use of permit conditions. Rather, planning decision makers need to recognise the new paradigm we are all working in and be very mindful of the need for greater emphasis on the protection of human life, as per the Royal Commission report.

1 [2012] VCAT 77.
2 Ibid., 30.
3 ibid., 32.
4 ibid., 59.

NELA essay competition winner and runner up

The essays in this issue were entered in the 2011 Environmental Law Essay Competition. Kate Browne's essay, 'Climate change and statelessness: the disappearance of small island states' was scored highest by the judging panel of the nearly 20 entries received. Congratulations Kate! For her efforts, Kate has been awarded $1 000 and a year's membership of the National Environmental Law Association commencing 1 July 2012.

Glen Wright's analysis of the national electricity market and the environment was ranked second, and was highly commended by the judging panel. Congratulations Glen!

The essay competition was open to any student enrolled at an Australian tertiary institution (including undergraduate and postgraduate programs). Essays of 3000–5000 words that had been submitted for assessment in a unit on environmental law were eligible, and encouraged. Essays could be on any topic in the discipline of environmental law provided they related broadly to the theme 'are we headed in the right direction?''

Here is Kate's essay, with Glen's following:

CLIMATE CHANGE AND STATELESSNESS: THE DISAPPEARANCE OF SMALL ISLAND STATES

by Kate Browne

> We live in constant fear of the adverse impacts of climate change. For a coral atoll nation, sea level rise and more severe weather events loom as a growing threat to our entire population. The threat is real and serious, and is of no difference to a slow and insidious form of terrorism against us.
>
> Saufatu Sopoanga, Prime Minister of Tuvalu, at the 58th Session of the United Nations General Assembly New York, 24th September 2003[1]

Introduction

Climate change is already occurring, and those who will suffer the most from the effects of it are overwhelmingly those who carry the least responsibility for the causes of it.[2] There is perhaps no greater example of this inequality than in the case of those small island states whose very existence is threatened by the effects of climate change, particularly sea level rise.[3] There is a strong possibility that some of the residents of these island states may become effectively stateless, as the territory of their nation-state becomes uninhabitable or completely inundated due to the effects of climate change.[4] While migration is generally regarded as an 'option of last resort', and mitigation and adaption measures are currently the focus of the states under threat, it is important to examine the legal issues in order for forward planning to occur.[5] International law, as it currently stands, offers little guidance as to the legal

1 Saufatu Sopoanga, *Tuvalu and Global Warming* (20 November 2010) Tuvalu Online <http://www.tuvaluislands.com/warming.htm>.

2 Mimura et al, 'Small islands' in M.L. Parry et al (eds), *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change,* (Cambridge University Press, 2007) 687.

3 It is acknowledged that climate change is 'not the sole contributing factor to island states' vulnerability', as it is also due to a combination of 'socio-economic conditions…natural resource and space limitations…and the impact of natural hazards': Jane McAdam and Ben Saul, 'An insecure climate for human security? Climate-induced displacement and international law' in Alice Edwards and Carla Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press, 2010) 357, 367.

4 Elizabeth Burleson, 'Climate Change Displacement to Refuge' (2010) 25(1) *Journal of Environmental Law and Litigation* 19, 29.

5 Ben Farrell, *Pacific Islanders face the reality of climate change… and of relocation* (14 December 2009) United Nations Human Rights Commission for Refugees <http://www.unhcr.org/4b264c836.html>.

status of these potentially stateless persons and the nature of the rights protections they are owed by the states in which they seek asylum, and the international community as a whole. As a result, these individuals may find themselves in a form of 'legal limbo' with no guarantee of anything more than basic rights entitlements.[6]

This essay begins by examining the legal status and rights these individuals may hold under international law, in particular under the various refugee and statelessness conventions. It briefly explores the concept of 'statehood' and the legal status of the state, if it becomes uninhabitable. The ways in which current refugee and statelessness law could accommodate, or be expanded to include, the individuals rendered stateless in this manner, are then discussed. Next, the essay examines other, less settled, possibilities under current international law to provide for the rights protection of these individuals, including: international human rights law and the right to self-determination; complementary protection; the responsibility to protect; and international environmental law. The inadequacy of the current international (and national) rights protections for these individuals will be highlighted by a case study considering Australia's current responsibilities and plans for protection of those persons left stateless by climate change induced events. Finally, some of the possible solutions to the problem, or ways of dealing with it, will be canvassed.

This essay argues that those who may be left stateless as a result of their state's territory becoming uninhabitable due to the effects of climate-change are not left with adequate human rights protections or mechanisms under current international law. However, the complexities of the problems that will arise from this situation mean that they are unlikely to be solved by one homogenous solution. It may be best to address this deficiency with a combination of different approaches. One method would be to create a treaty or protocol explicitly setting out the legal status of those left stateless by climate-change and, to a wider extent, climate change-displaced persons more generally, guaranteeing 'basic human rights protections and humanitarian aid' and setting out the responsibilities of states.[7] A second, more practical solution may be to focus on regional agreements, or bilateral agreements, that could include long-term planning for the management of the movement and resettlement of those who may become displaced or stateless. Both of these methods will require cooperation and displays of political will by the international community generally, and recognition by individual states of their responsibility to those left stateless. They will need to include forward-planning to allow for the peaceful transfer of people and to ensure that they are not rendered stateless and without adequate rights protections. Ideally, communities will be able to remain together in the event of migration or displacement and there are ways in which this can occur, but it may also be necessary, as a last resort, for individuals to seek asylum separately.

The issue of statelessness

The point at which a state ceases to exist may have important consequences for the legal status of those individuals seeking protection, in particular, whether they fall under the protection of the international statelessness regime. The very idea of statelessness, 'which is the reverse of nationality, is a negative concept and therefore difficult to prove and define'.[8]

6 Jane McAdam, 'From Economic Refugees to Climate Refugees? Review of *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* by Michelle Foster' (2009) 10(2) *Melbourne Journal of International Law*, 579, 589.

7 Burleson above n 4, 35.

8 Nehemiah Robinson, *Convention Relating To The Status of Stateless Persons: Its History and Interpretation* (1997) UN High Commissioner for Refugees, Part 2, art 1, para 3 <http://www.unhcr.org/refworld/docid/4785f03d2.html >.

States have traditionally been viewed as being dependent upon the existence of 'territorial space and its habitability'.[9] Assuming that this remains the case, it is quite likely that those states that disappear or become uninhabitable will lose their claim to statehood. Article 1 of the *Montevideo Convention* supports this definition of statehood as requiring a 'defined territory'.[10] Yet it is by no means decided that an island that loses its territory will no longer be viewed as a state. Instead, the islanders may find themselves 'in the unprecedented situation of being citizens of a state that no longer has territory'.[11] One possibility that has been raised for continuing the existence of a state in these circumstances is to acquire territory from another state.[12] While this solution has its appeal, in particular for the rights protections of the inhabitants, this is a rather 'radical' method that has practical limitations, in particular the willingness of a state to cede some of its territory and the cost barriers to the islanders.[13] In addition, even if the state continued to exist relocated to another nation's territory, it is unclear whether the government would be able to 'ensure the rights which flow from citizenship', including such basic rights as adequate identification papers.[14] In that instance, issues of statelessness would remain cogent. Whether or not the state continues to exist after the disappearance of its territory is crucial for determining whether it can provide rights protections to its citizens. Whatever the outcome, it is likely that the state will be greatly weakened by the loss of its territory and so it is important to consider what rights protections its former citizens will hold under international law more generally.

Universal rights entitlements

The individuals who become stateless may be left 'without a legal status' and may risk the 'enjoyment of basic human rights'.[15] In the most extreme circumstances their very right to life[16] may be threatened by rising sea levels; at any rate it is certain that their right to a nationality will be compromised.[17] Under international law all human beings are entitled to basic human rights, regardless of their status as citizens or stateless persons.[18] However, the problem often lies with the practical protection of those rights and the mechanisms available to individuals at state level.[19] The degree of protection that these stateless persons would receive depends very much upon the laws of the particular state they seek refuge in, and which treaties have been ratified and implemented. It is unclear as to whether states have a duty to 'actively protect' the rights of non-citizens within their territory, though they are obviously not able to violate those rights.[20] Within any state, those who are nationals have stronger rights protections than those who are not, in particular the right not to be expelled from the state.[21] In order to prevent violations of the rights of these persons rendered stateless, therefore, it is crucial for them to be able to either be recognised as refugees or become nationals of a new state.

9 McAdam and Saul, above n 3, 366.

10 *Montevideo Convention on the Rights and Duties of States*, opened for signature 26 December 1933, 49 Stat. 3097 (entered into force 26 December 1934) art 1.

11 Stephen Humphreys, 'Conceiving Justice: articulating common causes in distinct regimes' in Stephen Humphreys (ed), *Human Rights and Climate Change* (Cambridge University Press, 2009) 299, 301.

12 Selma Oliver, 'A New Challenge to International Law: The Disappearance of the Entire Territory of a State' (2009) 16(2) *International Journal on Minority and Group Rights* 209, 214.

13 McAdam and Saul, above n 3, 374.

14 UN High Commissioner for Refugees, *Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective* (14 August 2009) 5 <http://www.unhcr.org/refworld/docid/4a8e4f8b2.html>.

15 Mark Manly and Laura Van Waas, 'The value of the human security framework in addressing statelessness' in Alice Edwards and Carla Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press, 2010) 49, 50.

16 See, eg, *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 3.

17 Ibid art 15.

18 See, eg, ibid art 1: 'All human beings are born free and equal in dignity and rights.'; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2, para 1: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) art 2(2).

19 Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007) 202.

20 Oliver, above n 12, 216.

21 Ibid.

Will they be protected under the refugee regime?

One method of ensuring greater rights protections for the islanders in the event of statelessness would be for them to be recognised as refugees able to claim asylum. This would mean they would have the extensive rights protections guaranteed under the *1951 Convention Relating to the Status of Refugees*.[22] At first glance, however, there appear to be many obstacles that would prevent them from being recognised as refugees under the Convention. The *Refugee Convention* defines a refugee as an individual who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[23]

The first issue is the meaning of 'persecution'. While this term is not defined in the *Refugee Convention* itself, a general meaning has been developed under international law.[24] While the effects of rising sea levels on the islanders 'may be harmful',[25] it lacks the element of ''motivation' on the part of those who persecute'.[26] In addition, the persecution must be by reason of the individual's 'race, religion, nationality, membership of a particular social group or political opinion'.[27] The problem with climate change-induced statelessness falling into this category is that the sea-level rise and other factors are 'inevitably indiscriminate'.[28] It is highly unlikely, therefore, that these islanders would be able to fall within the strict definition of a refugee.

Some academics have argued that what is required is a fundamental re-thinking of what a refugee is, away from a focus on persecution and towards a broader conception to do with the 'absence of state protection of the citizen's basic needs'.[29] This definition would most likely include those individuals left without state protection as a result of territory loss. An example of a more wide-ranging definition of those who qualify as refugees is present in several regional refugee conventions, such as the Organization of African Unity's ('OAU') *Convention Governing the Specific Aspects of Refugee Problems in Africa*[30] and the Latin American agreement, the *Cartagena Declaration on Refugees*.[31] The *OAU Convention* extends the definition of refugee to include those who, owing to 'events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge'.[32] This definition could cover islanders who have experienced sea level rise that had clearly seriously disturbed the 'public order' in their country. However, it is unlikely that the *Refugee Convention* will be broadened in the near future, given the fact that states are generally unwilling to 'accept any formal extension' of the definition.[33]

22 Opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) ('*Refugee Convention*').
23 Ibid art 1A(2).
24 See Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 90-130.
25 McAdam and Saul, above n 3, 371.
26 Goodwin-Gill and McAdam, above n 24, 91.
27 *Refugee Convention*, art 1A(2).
28 McAdam and Saul, above n 3, 372.
29 Andrew E. Shacknove, 'Who Is a Refugee?' in Hélène Lambert (ed), *International Refugee Law* (Ashgate, 2010) 163, 166.
30 Opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974) ('OAU *Convention*').
31 *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama* (22 November 1984) Conclusion 3.
32 OAU *Convention*, art 1(2).
33 Goodwin-Gill and McAdam, above n 24, 134.

Will they be protected under the statelessness regime?

The international community has recognised that there will be some vulnerable individuals lacking state protections who are not able to fit within the narrow category of refugees, and are therefore left without the special rights protections refugees have as a result of the *Refugee Convention*.[34] This includes those individuals left stateless for various reasons. As a result, two international agreements were formed in an attempt to improve the rights protections of stateless persons: the *Convention Relating to the Status of Stateless Persons* ('*1954 Convention*'),[35] and the *Convention on the Reduction of Statelessness*.[36] The *1954 Convention* is mainly concerned with providing a status for these stateless individuals, and ensuring basic rights protections. Of particular importance is the right to obtain identity documents,[37] along with the requirement for state parties to 'as far as possible facilitate the assimilation and naturalization of stateless persons'[38] and the limitations on the rights of states to expel non-citizens.[39]

The status of their nation-state (as discussed above) will have an impact on whether the individuals left effectively stateless will be able to claim the rights protections under these conventions. Under art 1(1) of the *1954 Convention*, a stateless person is someone who is 'not considered as a national by any State under the operations of its law'. This definition does not encompass the situation where a person may remain the national of a state, but may be unable to exercise that nationality due to the state's territory becoming uninhabitable or disappearing completely. This definition only extends to *de jure* statelessness, as it is a 'purely legal definition'.[40] The plight of the individuals left effectively stateless by the disappearance of their territory is more likely to fall under the definition of *de facto* statelessness, which is not covered by the statelessness conventions. *De facto* statelessness covers those individuals who 'have a nationality according to the law, but either this nationality is not effective or they cannot prove or verify their nationality'.[41] Given the difficulties of classifying the status of their nation-state in the event of it becoming uninhabitable, it may be difficult for these individuals to qualify as stateless persons under the *1954 Convention*. Perhaps the only way to ensure that these individuals would fit within the definition would be if the state 'formally withdrew nationality'.[42]

Even if the individuals effectively rendered stateless were able to fit within the definition of the *1954 Convention*, they would still only be granted 'a limited set of rights and protections'.[43] Neither of the statelessness conventions guarantee what is most required, the assumption of a new nationality, and, hence, rights protections under a new state.[44] In many states 'nationality is a practical prerequisite for accessing political and judicial processes and for obtaining economic, social, and cultural rights'.[45] In addition, there have been relatively few accessions or ratifications to the two conventions, diminishing the practical availability of the protections available under them.[46] It is important, therefore, to ensure that these individuals do not become stateless and hence lose important rights protections. This

34 *Convention Relating to the Status of Stateless Persons,* opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) preamble.
35 Ibid.
36 *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975).
37 1954 *Convention*, art 27, 28.
38 Ibid art 32.
39 Ibid art 31.
40 David Weissbrodt, *The Human Rights of Non-Citizens* (Oxford University Press, 2008) 84.
41 Ibid.
42 McAdam and Saul, above n 3, 374.
43 Weissbrodt, above n 40, 82.
44 Ibid 103.
45 Ibid 97.
46 There are currently 65 parties to the 1954 *Convention* and 37 parties to the *Convention on the Reduction of Statelessness.*

could be done through 'acquisition of an effective nationality' before the possible dissolution of their state, or even a flexible form of dual nationality for a 'transitional period'.[47]

Other possibilities for protection – a global responsibility?

There are a number of other, less settled, principles of international law that may provide some method of protection to these islanders, generally by recognising a form of global responsibility for the issue and its effects. These options may be useful in forming obligations for states to provide protection to these individuals or in re-thinking the way in which we approach the problem. This essay does not have the space to examine potential avenues of litigation, but those too may be able to play a role in creating a greater awareness of the rights and vulnerabilities these communities and individuals are facing.

The right to self-determination

One of the most important rights in international human rights law is the right to self-determination. This principle has taken form in many international rights agreements, such as the *International Covenant on Civil and Political Rights*,[48] the *United Nations Declaration on the Rights of Indigenous Peoples*[49] and the *International Covenant on Economic, Social and Cultural Rights*, where it is stated that:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'[50]

Those individuals and states at risk from losing their territory to climate change may have their right to self-determination threatened. This is perhaps the most important rights violation they may face and it would 'seem unreasonable for a nation that has enjoyed well-established self-determination' for so long to be suddenly deprived of this right.[51] Despite being a central concept in international law, there have been many 'differing interpretations' of the meaning of self-determination and its application extends beyond simply self-governance.[52] While it may prove practically difficult to continue the existence of a state on the ceded territory of another, and while, as Selma Oliver points out, the right to self-determination 'cannot be used to back a claim to the acquisition of territory', this right may still be useful in providing some protection to the islanders.[53] If the islanders were to settle in and become nationals of a new state, this right may become extremely important in ensuring that they could continue their cultural traditions and integrity with some degree of self-governance, albeit within the boundaries of the new state.[54]

Complementary protection

Complementary protection encompasses the various protections granted by states to individuals who do not fulfil the legal definition of 'refugee', on the basis of some other international treaty or need.[55] Unlike their obligations under

47 UN High Commissioner for Refugees, *Climate Change and Statelessness: A Overview* (15 May 2009) 3 <http://www.unhcr.org/refworld/docid/4a2d189d3.html> .
48 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1.
49 GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/Res/61/295 (13 September 2008) art 3-5.
50 Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) art 1.
51 Oliver, above n 12, 223.
52 S. James Anaya, *International Human Rights and Indigenous Peoples* (Wolters Kluwer, 2009) 73-74.
53 Oliver, above n 12, 223.
54 *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 51st sess, Supp No 18, UN Doc A/51/18 (30 September 1996) 125.
55 McAdam, above n 19, 21.

the *Refugee Convention*, however, these protections are generally 'loosely defined, *ad-hoc*, and not regulated'.[56] Jane McAdam argues for the existence of an extended application of the principle of non-refoulement under international human rights law in an effort to provide a stronger basis for complementary protection, suggesting that this imposes two obligations on states:

> to refrain from removing persons to territories where they face a substantial risk of particular kinds of ill-treatment; and to provide such persons with a legal status equivalent to that of Convention refugees.[57]

The rights guaranteed under complementary protection are again, however, at the discretion of states and their willingness to 'adequately implement their international legal obligations'.[58] In addition, currently, it appears that climate-induced displacement would not fall within the scope of even an expanded notion of complementary protection, as it does not involve a breach of the right to protection from torture or inhuman or degrading treatment.[59] It is true, however, that informal or ad-hoc processes do exist in some states that allow some individuals to be provided with protection for varying humanitarian reasons. Due to the discretionary nature of this protection, however, it is not a reliable option for those left stateless, though it could form part of a more legally-binding regional or bilateral agreement.

Responsibility to protect

It has also been suggested that the paradigm of human security may be a useful tool to protect the rights of these stateless persons, through recognising an international 'responsibility to protect' 'R2P'.[60] The concept of R2P encompasses an international duty to protect individuals whose states have failed to uphold their basic obligations.[61] The scope and content of this international responsibility, however, remains somewhat 'ambiguous'.[62] In particular, if it is a general international responsibility then it may not fall on any state in particular and would therefore be rendered practically ineffective. It has been noted, however, that where there is an agent who has a close relationship with the individuals seeking protection, or is clearly the 'most capable' agent to carry out the protection, the responsibility to protect may fall on specific states or actors.[63] This situation could arguably apply to the relationship Australia has with various pacific island states which are potentially at risk. While the 'legal dimension' of R2P remains uncertain, this concept may have a role to play in increasing pressure on the international community more generally, and also particular states, to ensure the rights protections of the islanders.[64]

International environmental law

Other than the potential for litigation (which this essay will not be examining), international environmental law does provide some basis for international action to provide aid and protection to those individuals and states threatened

56 Weissbrodt, above n 40, 120.
57 McAdam, above n 19, 252.
58 Ibid 254.
59 McAdam and Saul, above n 3, 379.
60 Ibid 401.
61 Luke Glanville, 'Chapter Eight: The International Community's Responsibility to Protect' in Sara E. Davies and Luke Glanville, *Protecting the Displaced: Deepening the Responsibility to Protect* (Martinus Nijhoff, 2010) 185.
62 Ibid.
63 Ibid 195.
64 Ibid 196.

by the effects of climate change.[65] If the island states do decide to attempt to purchase or rent land in other nations in order to continue their existence this will be a costly exercise, requiring both the funds to purchase the land and to develop new infrastructure. It is possible that certain provisions in the *United Nations Framework Convention on Climate Change* '*UNFCCC*' may be used to enable island states to receive aid and some form of protection for their inhabitants, from the international community more generally.[66] Article 4(1)(e) states that parties to the *UNFCCC* agree to 'Cooperate in preparing for adaptation to the impacts of climate change', while art 4(8) states:

> In the implementation of the commitments in this Article, the Parties shall give full
>
> consideration to what actions are necessary under the Convention, including actions related to funding, insurance and the transfer of technology, to meet the specific needs and concerns of developing country Parties arising from the adverse effects of climate change and/or the impact of the implementation of response measures, especially on
>
> (a) Small island countries

These provisions appear to form a solid basis for small island states to expect to receive adequate funding, at the very least, to provide for the circumstances of their forced removal. However, it is important not to read these provisions too widely or optimistically, and the adaptation programs and funding that have taken place so far under the convention have been limited to 'transfer of technology, support programmes, policy reform and other on-site changes', rather than long term funding and protection measures for those who may be displaced.[67] Again, while the *UNFCCC* may be a useful tool to raise awareness and form political will, it does not contain any binding obligations to provide aid or protection to these islanders.

Case Study – Australia's role and responsibilities

As can be seen from the above discussions, the legal status of these islands and their inhabitants in the event of a loss of habitable territory is unclear. The implications of this uncertainty for the rights protections of these individuals can be examined through Australia's reaction to the issue to date and the plans it is making for future assistance.

Australia has a close connection with many of the Pacific Islands at risk, and is 'in no small way responsible' for climate change, the results of which may have devastating consequences for many island states.[68] Pacific islands located quite close to Australia, such as Kiribati and Tuvalu, are among those nations threatened with 'whole-nation displacement' due to the effects of climate change.[69] Australia has a clear moral duty to help protect the rights of these individuals, but whether as a country it will recognise this duty and choose to offer long-term protection, flexible migration options and the possibility of nationality is so far unclear, and depends to a large extent on political will.

Australia is a dualist state, which means that international treaties will only have effect within Australia if they are implemented into domestic law after ratification.[70] Although Australia is a signatory to the two statelessness conventions as well as the *Refugee Convention*, not all the commitments under these conventions have been implemented into domestic law. Even if these conventions were fully adopted in Australia, it is unlikely that they

65 Oliver, above n 12, 225.
66 Opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994).
67 Oliver, above n 12, 226.
68 Jon Barnett, 'Security and Climate Change' (2003) 13(1) *Global Environmental Change* 7, 12.
69 McAdam and Saul, above n 3, 366.
70 McAdam, above n 19, 204.

would be of great use to the Pacific Islanders in a climate change-displacement scenario. In New Zealand, a number of Tuvaluans have sought refugee status and have been rejected, on the basis that they cannot prove a well-founded fear of persecution. As the Refugee Status Appeals Authority notes, 'All Tuvalu citizens face the same environmental problems and economic difficulties living in Tuvalu', they are all 'unfortunate victim[s]' of the environmental forces, but do not qualify as refugees within the convention definition.[71] It is likely to be the same situation in Australia. In addition, some of the island states themselves have rejected the label of refugee, believing that it connotes 'victimhood, passivity, and a lack of agency' and that it might lead to a loss of culture and national identity.[72]

Stateless persons in Australia are aliens and able to be deported. The case of *Al-Kateb v Godwin* illustrates the vulnerability of the rights of stateless persons under Australian law.[73] Mr Al-Kateb was a stateless Palestinian who was held in immigration detention in Australia after failing to gain a protection visa. He was unable to be deported because the Australian authorities were not able to find a country to accept him, so he remained in detention for a number of years. The Australian High Court upheld this continued detention as constitutionally valid, regardless of whether it contravened basic human rights.[74] Statelessness would render the islanders open to human rights abuses, and, even if granted a basic set of human rights, their culture and identity would be at risk.

Australia appears not to have a flexible migration policy for these islanders at present. Instead, they are subject to the same 'non-discriminatory' policy as every other applicant.[75] Unfortunately, due to the generally 'low-skill' levels of the majority of Pacific Islanders, this has resulted in quite low levels of migration to date.[76] New Zealand, in contrast, has a number of policies in place to favour migration from the Pacific Islands, including the Pacific Access Category program, which currently allows '75 citizens of Kiribati, 75 citizens of Tuvalu and 250 citizens of Tonga to be granted residence in New Zealand each year'.[77] This is still a limited policy, however, which only accepts able-bodied adults between 18–45 years old.[78] Australia has helped to create the Asian Pacific Technical College, which aims to improve the vocational skill level of Pacific Islanders and hence increase their migration options, which is an important beginning.[79]

Some of the Pacific Islands at risk have expressed a desire for progressive migration programs to countries such as New Zealand and Australia. Kiribati, for example, aims to 'slowly build up I-Kiribati communities abroad through the gradual, transitional resettlement of Kiribati citizens' so as to be able to build up a new community abroad and enable the continuation of their cultural identity and family networks.[80] Unlike most refugee situations, climate-change displacement for these Pacific Islanders will most likely not be sudden, but gradual, and hence can, and should, be planned for in advance.[81] While everything needs to be done to attempt to prevent displacement from occurring, it must also be recognised that migration may be the only option for some of these island states. It is in Australia's best

71 *Refugee Appeal No. 72316/2000* (Unreported, Refugee Status Appeals Authority, New Zealand, C Parker (Member), 19 October 2000) [13].
72 Jane McAdam and Maryanne Loughry, *We Aren't Refugees* (30 June 2009) Inside Story: Current Affairs and Culture <http://inside.org.au/we-aren't-refugees/>.
73 (2004) 219 CLR 562.
74 *Al-Kateb v Godwin* (2004) 219 CLR 562, 595 (McHugh J).
75 Jane McAdam, 'Swimming against the Tide: Why a Climate Change Displacement Treaty is Not *the* Answer' (2011) 23(1) *International Journal of Refugee Law* 2, 22.
76 Charles W. Stahl and Reginald T. Appleyard, *Migration and Development in the Pacific Islands: Lessons from the New Zealand Experience* (April 2007) Australian Government: AusAID, v <www.ausaid.gov.au/publications/pdf/migration.pdf>.
77 *Pacific Access Category* (29 November 2010) Immigration New Zealand <http://www.immigration.govt.nz/migrant/stream/live/pacificaccess/>.
78 Burleson above n 4, 27.
79 Stahl and Appleyard, above n 76, v.
80 Jane McAdam, 'From Economic Refugees to Climate Refugees?', above n 6, 583.
81 McAdam and Saul, above n 3, 570.

interest to ensure that these islanders do not become stateless, as 'the presence of large numbers of stateless persons in a given region can often produce regional instability'.[82] The potential for conflict where displacement occurs has already been highlighted in the case where a 'program to relocate Palau residents has met with resistance as residents of larger islands forced newcomers back to submerging islands'.[83] Regional organisations like the Pacific Islands Forum are perfectly situated for creating regional plans and policy which will enable residents of threatened states to peacefully and orderly relocate to other states, with their human rights protected and their cultural identity intact.[84]

Conclusion – future possibilities

Current rights protections are clearly inadequate to deal with these new international problems. The disappearance of an entire state's territory raises important questions in international law, both theoretical and practical, that remain unanswered. Conventional rights protections for those who are displaced, such as the refugee and statelessness conventions, fail to deal with this particular situation, or with climate change-displacement more broadly. In this scenario 'the traditional Western approach of individualized decision-making about protection on technical legal grounds seems highly inappropriate' to the scale of displacement, and the range of rights vulnerabilities at issue, including those of self-determination and nationality[85]

It is clear that the complicated circumstances and myriad issues raised by the potential disappearance of these states' territory cannot be easily dealt with or solved. What is required is flexibility and support, especially at a regional level. Countries located close to these threatened islands are obviously the most able to provide basic rights protections to these potentially vulnerable individuals and to ensure that their cultural rights are not irrevocably harmed by the loss of their state. Countries such as New Zealand and Australia have the means, and the responsibility, as high carbon polluting nations, to begin planning for the possible displacement of these states and individuals. More wide scale and flexible migration programs need to be implemented to allow for greater movement between the Pacific Islands and New Zealand and Australia, so as to ensure that skill levels are increased and a peaceful transfer of persons can occur steadily, minimizing cultural disruption. Organisations like the United Nations High Commissioner for Refugees also have a role to play in ensuring continuing rights protections and facilitating cooperation between the various states and other actors. While an international treaty setting out the basic rights protections of those left stateless or displaced by climate change would be helpful, its international scope would bring issues of its own, and would require strong international support that does not appear forthcoming.[86] It would also be unlikely to address the particular circumstances of these threatened states.

It is, perhaps, dangerous in this situation to view international law as the solution to all of these issues.[87] It can play a role, and an important one, in laying out the basic rights and protections of these individuals, but what is required to ensure full protection of their cultural identity and issues of self-determination is a cooperative approach, based at a regional level. Essentially, what is needed is a political response to grapple with these complex problems, a response that will require a great deal of forward-planning, flexibility and understanding.[88] This will require recognition on the part of the international community of a sense of shared responsibility for these individuals who may be left stateless and without adequate rights protections as a result of human induced climate change.

82 Weissbrodt, above n 40, 107.
83 Burleson above n 4, 29.
84 *Pacific Islands Forum Secretariat* < http://www.forumsec.org.fj/index.cfm>.
85 McAdam and Saul, above n 3, 380.
86 Jane McAdam, 'Swimming against the Tide', above n 75, 16.
87 McAdam and Saul, above n 3, 403.
88 Ibid.

THE NATIONAL ELECTRICITY MARKET AND THE ENVIRONMENT: ARE WE HEADING IN THE RIGHT DIRECTION?

by Glen Wright

Introduction

The national electricity market (NEM) is the wholesale electricity market and physical network connecting Australia's eastern states.[1] Greenhouse gas (GHG) emissions from the NEM constitute approximately 31% of Australia's GHG emissions.[2] Australia's electricity sector is 'unusually emissions-intensive' due to heavy reliance on coal for stationary energy generation.[3]

However, Australian policy to curb those emissions and transition to a low-carbon economy has begun: a renewable energy target (RET) and legislation to implement a carbon price is in place. A number of reports have found that the NEM has not driven positive environmental outcomes to date.[4] Given the current policy context, it is pertinent to assess whether the regulatory and policy frameworks of the NEM are heading in the right direction so as to accommodate future electricity generation in a carbon-constrained Australia.

This essay will provide a brief outline of the NEM,[5] before assessing the appropriateness of the national electricity objective (NEO), by which all NEM policy and rule-making is guided. It will continue by asking: 'what is the right direction for a low-carbon electricity system?'. The future holds a mixture of three broad options: demand side participation (DSP), distributed generation (DG), and large scale renewables (LSR). Accordingly, this essay will identify the key barriers to implementation of these options and assess whether recent and proposed changes to the national electricity rules (NER) will alleviate these barriers. It will conclude by drawing together the analysis of the NEM framework, and assess whether it is heading in the right direction from an environmental perspective.

The national electricity market

The NEM was established in 1998 under nationally consistent electricity law (NEL).[6] The NEM is governed by national electricity rules (NER) and four core regulatory bodies: the Ministerial Council on Energy (MCE),[7] the Australian Energy Market Commission (AEMC),[8] the Australian Energy Regulator (AER)[9] and the Australian Energy Market Operator.[10] These bodies are responsible for market policy,[11] market rules,[12] enforcement[13] and physical operation of the market[14] respectively.

1 Queensland, New South Wales and the Australian Capital Territory, Tasmania, Victoria and South Australia. Western Australia and the Northern Territory are not part of the NEM, due to geographic distance and have their own regulatory regimes: ABARE, *Energy In Australia 2010* (Canberra, 2010) 19.

2 Department of Climate Change and Energy Efficiency, *Australian National Greenhouse Accounts - National Inventory Report 2009* (Volume 1, Canberra 2011).

3 R Garnaut, *The Garnaut Climate Change Review* (Cambridge University Press, Melbourne 2011) Chapter 11.

4 See for example: I MacGill, 'The Australian National Electricity Market' (Presentation for EVN Training Program, University of New South Wales, Sydney 2007); McDonnel, G., 'COAG's Quandary: What to do with the Energy Markets Reform Program?' (Total Environment Centre and the Alternative Technology Association 2005); L Chin, R Gawler, and W Gerardi, 'NEM Market Failures and Governance Barriers for New Technologies: Final Report to Garnaut Climate Change Review' (McLennan Magasanik Associates 2008).

5 The NEM is an incredibly complex instrument. This paper will not dwell on the NER in detail and will instead focus on giving a broad overview of the aspects of the NEM relevant to an environmental perspective.

6 The NEL is a schedule to the *National Electricity (South Australia) Act 1996* (SA) subsequently adopted in the other NEM jurisdictions through implementing legislation.

7 Council of Australian Governments (COAG), 'Australian Energy Market Agreement' (2004).

8 *Australian Energy Market Commission Establishment Act 2004* (SA).

9 Part IIIAA *Trade Practices Act 1974* (Cth).

10 *National Electricity (South Australia) (National Electricity Law - Australian Energy Market Operator) Amendment Act 2009* (SA).

11 Section 4, COAG, 'Australian Energy Market Agreement' (2004).

12 Sections 6(a)&(b) *Australian Energy Market Commission Establishment Act 2004* (SA).

13 Part IIIAA, *Trade Practices Act 1974* (Cth).

14 AEMO, 'Organisation Structure & Operations' <http://www.aemo.com.au/corporate/org.html>.

What is the right direction?

Asking if we are heading in the right direction begs the question 'what is the right direction?'. As Australia's electricity generation mix will undergo significant changes as a result of the proposed cap-and-trade system for GHG emissions and the RET, it is likely that a shift away from the current model for meeting Australia's electricity demands will soon occur.[15]

This shift requires an electricity system based on a combination of three options. Firstly, lowering the demand for electricity through DSP measures. Secondly, decentralising generation and generating more electricity locally from renewable sources (DG). Thirdly, commissioning large-scale, centralised wind and solar power plants (LSR)[16] to directly replace coal.[17] In order to ensure that Australia efficiently and effectively transitions to a sustainable electricity system, the NEM must pursue each of these options equally, ensuring that there are no barriers to implementation.

The national electricity objective

The NEO is the guiding principle of the NEM: all NEM rules must be made in accordance with the NEO.[18] The NEO, as it currently stands, is to ensure:

> efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of electricity with respect to—
> (a) price, quality, safety, reliability and security of supply of electricity; and
> (b) the reliability, safety and security of the national electricity system.[19]

Although precursors to the NEO included consideration of the environment,[20] lamentably, the existing NEO does not explicitly include any such reference. This is an unfortunate oversight: the Australian Energy Market Agreement (2004)[21] mentioned environmental concerns, but failed to allocate responsibility to any of the NEM's governing bodies.[22] Thus the current NEO was promulgated in 2005[23] without an environmental component.

Although a range of actors have called for the NEO to be reformed,[24] and environmental objectives feature in similar objectives in other OECD countries,[25] no serious effort has been made to date to address the issue.

Reducing demand through demand side participation

Reducing demand for electricity is the most environmentally sustainable way of meeting demand into the future, yet

15 'The introduction of a carbon price will change the choice of fuel sources, move investment decisions toward low-emissions forms of generation and unlock the possibilities of new technologies by driving innovation'. R Garnaut, 'Transforming the Electricity Sector' (Garnaut Review, Update Paper 8, 2011) 5.

16 Biomass generation is also likely to increase, though such plants are generally smaller and can easily be located close to the network, and therefore do not fall within the discussion of connection of LSR to the network below. Geothermal energy and marine (wave and tidal) energy are also under development, but are not yet at the commercial viability stage. Much of the discussion of LSRs will apply to geothermal, whereas marine energy is likely going to require specific policy measures.

17 And, following a transition period, gas.

18 NEL, s 32.

19 NEL, s 7.

20 See National Grid Management Council, National Grid Protocol (First Issue 1992); COAG, Energy Policy Details (8 June 2001); MCE, Communiqué (Melbourne, 7 December 2001).

21 Available at <http://www.ret.gov.au/Documents/mce/_documents/IGA_FINAL_(30JUNE2004)20040713100323200411121628 49.pdf> accessed 21 October 2011.

22 The regulatory bodies at that time were the AEMC, AER and the National Energy Market Management Company (NEMMCO), which was subsequently replaced by AEMO.

23 As an amendment to the *National Electricity (South Australia) Act 1996*. See <http://www.legislation.sa.gov.au/LZ/C/A/NATIONAL%20ELECTRICITY%20(SOUTH%20AUSTRALIA)%20ACT%201996/2007.12.31/1996.44.UN.PDF> for the 2005 amended version of the Act.

24 See for example: Total Environment Centre et al., 'Power for the People Declaration' (2007) 1 (coalition of civil society organisations calling for changes to the regulatory regime to 'require regulators to consider the environment when making decisions and to contribute to the achievement of ecologically sustainable development').

25 See for example: the UK (Department of Energy and Climate Change, 'Electricity Market Reform: Consultation Document' (The Stationery Office, December 2010)), the US (Federal Energy Regulatory Commission, 'About Us' <http://www.ferc.gov/about/about.asp> accessed 15 October 2011) and Canada (National Energy Board, 'Strategic Plan' (2011) available at <http://www.neb-one.gc.ca/clf-nsi/rthnb/whwrndrgvrnnc/strtgcpln-eng.html> accessed 15 October 2011).

it has long been overlooked in the NEM, and mobilisation of DSP has historically been very low.[26] In any electricity system, as demand for electricity increases there is a need to ensure a steady supply: either production can be increased (supply side), or demand can be reduced (demand side). Using less electricity ultimately means less GHG emissions are produced.

The NEM was originally intended to be a two-sided market where both supply and demand side measures would be on an equal footing in meeting Australia's electricity needs. The first outline design of the NEM included a strong statement about DSP.[27] Unfortunately, this even-handed approach was not subsequently implemented by the NER: when the NEM commenced operation, there were no provisions that ensured equal opportunities for DSP,[28] resulting in a bias toward the supply side.[29]

Some provisions were subsequently implemented which refer to consideration of DSP options in network planning, however, these still do not require anything beyond nominal consideration of DSP measures.[30] In short, DSP is simply not yet part of the 'mindset' of the NEM.

Barriers to demand side participation

A recent Institute for Sustainable Futures (ISF) report surveyed NEM stakeholders and found that the four main reasons cited for the lack of DSP in the NEM were:

- lack of national/state level policy coordination (policy coordination problem)
- lack of environmental aspect to the NEO
- poor reflection of true cost in consumer electricity prices (pricing problem)
- bias of utility companies toward centralised electricity supply (utility bias problem).[31]

There are many other issues for DSP[32] but this article discusses these four main barriers.

The lack of an environmental objective has been already been discussed above, and the ISF report simply adds further weight to the notion that the NEO should be reformed. The other three issues require further attention.

The policy coordination problem

As there is no national DSP policy, a range of disconnected initiatives have been implemented across Australia. There are energy savings schemes in NSW, SA and Victoria,[33] as well as initiatives at the federal level.[34] Third party aggregators[35] are not able to participate in the wholesale market for electricity,[36] and in any case find it difficult to

26 The recorded energy saving from DSP in 2010/11 was 51.3 gigawatt hours of electricity, 0.02% of energy used in that year. The equivalent percentage in the US was 4.4%.C Dunstan, N Ghiotto, K and Ross, 'Report of the 2010 Survey of Electricity Network Demand Management in Australia' (Australian Alliance to Save Energy and the Institute for Sustainable Futures, University of Technology, Sydney 2011) vi. These figures refer to reduction of summer peak, not overall, demand: DSP is generally focused on reducing peak demand as this demand drives infrastructure development. Note that the US figure includes contributions by retailers and integrated utilities.

27 National Grid Management Council, National Grid Protocol (First Issue 1992) iii.

28 D Crossley, 'Demand-Side Participation in the Australian National Electricity Market: A Brief Annotated History' (Regulatory Assistance Project 2011) 8.

29 The Prime Minister's Task Group on Energy Efficiency noted that a quarter of the submissions it received argued that the NEM is 'excessively supply-side focused', and that it 'fails to effectively balance the incentives and obligations for supply and demand solutions'. Prime Minister's Task Group on Energy Efficiency, *Report of the Prime Minister's Task Group on Energy Efficiency* (Canberra 2010) 166.

30 The current provisions regarding DSP in the NER are contained in the following rules: 5.6.2(a) and (b)(4); 5.6.2A(4)(vi) and (6)(iv); 5.6.5A(c)(3)(v); 5.6.6(c)(5); 5.6A.3(3)(ii); 6A.6.6(e)(12); and 11.27.4(c)(7).

31 C Dunstan, K Ross, and N Ghiotto, 'Barriers to Demand Management: A Survey of Stakeholder Perceptions Australia' (Australian Alliance to Save Energy and the Institute for Sustainable Futures, University of Technology, Sydney 2011) 4.

32 Such as competing priorities within utilities companies (this is discussed below in relation to DG) landlord-tenant relationships, and the difficulty of capturing the benefits of DSP in a disaggregated market (I.e. there is a difficulty in establishing which NEM participants will reap the benefit of DSP actions)

33 New South Wales Energy Savings Scheme, the South Australian Residential Energy Efficiency Scheme the Victorian Energy Efficiency Target.

34 For example the Energy Efficiency Opportunities program, the National Home Energy Rating Scheme, Minimum Energy Performance Standards and the National Framework for Energy Efficiency.

35 So called because they aim to aggregate disparate reductions in energy usage in order centralise the capacity so as to enable to sale of this capacity.

36 There is no provision for their participation in the NER.

pull together the capacity provided by these programs due to their fragmented nature.[37] The disparate nature of these initiatives also makes it difficult for other participants in the NEM, including policymakers, to keep track of DSP and monitor progress. There is also an argument that a lack of a policy is symptomatic of a lack of enthusiasm. In the absence of a national-level or otherwise coordinated DSP policy, it is perhaps unsurprising that the uptake of DSP opportunities has been low.

The pricing problem

The NEM does not provide direct pricing signals for consumers that could encourage greater DSP. Retail price regulation and the lack of interval metering means that there is little use of time-differentiated retail prices.[38] This means that the price of electricity for consumers does not reflect the true cost of producing that electricity and therefore provides little incentive for demand reduction at times when the cost of producing electricity is at its highest.

The utility bias problem

The utility bias problem refers to systemic biases in the NER that cause transmission and distribution network service providers (TNSPs and DNSPs)[39] to prefer expansion of the electricity system rather than reduction of demand.[40] TNSPs and DNSPs are regulated businesses. The level of revenue that a TNSP is allowed to make is determined based on its level of capital expenditure (capex). As such, TNSPs have an incentive to increase their capex, and in some cases overinvest,[41] rather than utilise DSP. Similarly, DNSPs derive their revenue from energy throughput. DSP, in reducing demand, reduces revenue received by DNSPs. As a result, distribution businesses have an incentive to discourage DSP.[42]

Demand side participation reform

Although some minor changes have been introduced to the regulatory framework in recent years,[43] these changes have failed to increase the uptake of DSP opportunities. Recent reports state, 'the level of demand-side participation has been, and currently remains, quite low'[44] and that DSP is still 'applied much less often and extensively… than economic efficiency would warrant'.[45]

Since late 2007 the AEMC has been reviewing DSP in the NEM.[46] Unfortunately, in spite of the systemic biases noted above,[47] the AEMC concluded in stage 2 of its review that the current NER do not materially bias against DSP.[48] The

37 For an overview of third party aggregators in the NEM, see M Zammit, 'Submission to AEMC Issues Paper: Power of Choice – giving consumers options in the way they use electricity EPR0022; Demand Side Participation (DSP) Stage 3 Review' (Enernoc 2011).

38 Chin *et al*, n 4, 24. Electricity companies generally provide a flat tariff, or a usage or time of use tariff that does not accurately reflect the true cost of electricity on the wholesale market at a given time. Note that this is somewhat different in Victoria, where retail prices have been deregulated.

39 The companies responsible for delivering electricity from generators to customers via the electricity transmission and distribution networks.

40 It may be though that there would be strong toward supply bias on the part of generators and retailers, which are profit-driven commercial enterprises and therefore generally seek to increase electricity consumption. However, this bias was very low on the list of concerns expressed by stakeholders. This is perhaps because generators are less affected by a reduction in peak demand than NSPs, as their growth is more closely tied to overall electricity consumption, while retailers have some incentive to undertake DSP as they can use DSP capacity as a hedge against high wholesale prices.

41 Sometimes referred to as 'gold plating' the network. A recent example is the revenue proposal of Queensland TNSP Powerlink, who have come under fire for allegedly greatly overstating the level of investment in infrastructure required for efficient operation of their transmission network. See Total Environment Centre, 'Submission to the AER Powerlink Revenue Determination 2013–17: Response to Powerlink's Initial Revenue Proposal' (2011) and Powerlines Action Group Eumundi Inc., 'Submission to the AER review of the Powerlink revenue reset application for 2012 –17' (2011).

42 Chin *et al*, n 4, 24.

43 Ibid.

44 D Crossley, 'Demand-Side Participation in the Australian National Electricity Market: A Brief Annotated History' (Regulatory Assistance Project 2011) 49.

45 C Dunstan, K Ross, and N Ghiotto, 'Barriers to Demand Management: A Survey of Stakeholder Perceptions Australia' (Australian Alliance to Save Energy and the Institute for Sustainable Futures, University of Technology, Sydney 2011) 3.

46 See AEMC, 'Review of Demand Side Participation in the National Electricity Market' <http://www.aemc.gov.au/Market-Reviews/Completed/Review-of-Demand-Side-Participation-in-the-National-Electricity-Market.html> accessed 10 October 2011.

47 As well as by numerous stakeholders. See, for example, M Zammit, 'Submission to AEMC Issues Paper: Power of Choice – giving consumers options in the way they use electricity EPR0022; Demand Side Participation (DSP) Stage 3 Review' (Enernoc 2011); Fraser, R., Submission to Australian Energy Market Commission Review of Demand-Side Participation in the National Electricity Market, Stage 2: Issues Paper' (Energy Response 2008) and Mather, G., 'SUBMISSION to AEMC Review of demand-side participation in the National Electricity Market Stage 2: Issues Paper' (Total Environment Centre 2008).

48 AEMC, 'Final REPORT, Review of Demand-Side Participation in the National Electricity Market' (2009) vii.

AEMC has now moved to stage 3 of the review, which is focussed on a NEM-wide approach to DSP and on giving consumers choice, particularly through pricing structure reform.

Assuming the review process identifies a suitable approach to DSP, this review should go some way to alleviating the policy coordination and pricing problems discussed above. However, it is clear that this process will not alleviate the utility bias problem, nor is reform of the NEO within its scope. Although the DSP review is likely to lead to some positive change, the extent to which this will increase DSP, especially in the absence of more ambitious changes to the NER, remains to be seen.

Distributed generation[49]

In the context of constant technological improvements and a pending price on carbon, distributed generation, whereby electricity is generated by smaller, decentralised generating units,[50] will become increasingly important.[51] DG is, in a sense, a subset of DSP,[52] and many of the institutional and regulatory barriers for DG are the same as those for DSP.[53]

The ISF report asked relevant stakeholders additional questions regarding barriers to DG. The four main barriers identified were:

- the policy coordination problem (discussed above in relation to DSP)
- competing priorities within utilities (the competing priorities problem)
- the lack of an environmental aspect to the NEO
- complexity in arranging connection of DG (the connection complexity problem).

Again the lack of an environmental objective for the NEM is highlighted as a barrier to better environmental outcomes, as is the policy coordination problem.

The competing priorities problem

To some extent, all commercial enterprises have competing priorities. However, the NER creates priorities that compete with DG and DSP for resources. For example, potentially excessive state-based reliability standards encourage investment in supply side infrastructure investment rather than DSP and DG.[54] Ensuring that electricity constantly flows to meet demand consumes resources that could be used elsewhere.[55]

The utility bias problem, discussed above in relation to DSP is a major NER-induced competing priority. Professor Garnaut notes that there is a 'conflict between the desire to over-invest in one's own assets, and connecting and contracting with distributed generation' and states that curtailing the ability of NSPs to gold plate their assets would encourage NSPs to be more facilitative of DG.[56]

The connection complexity problem

The NER reflect the electricity system that led to their creation. The rules regarding connection of generators to the network are set up to connect large scale generators, commissioned and operated by large power companies, and are therefore not designed to efficiently connect multiple disparate generators, nor to be readily intelligible to small customers wishing to initiate the process themselves. The Energy Networks Association has developed guidelines for connection application, which highlights the layers of complexity involved, even when the process is simplified.[57]

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49 Sometimes the related term 'embedded generation' is used. DG is 'embedded' in the NEM in that it is connection to the distribution network at the point of load, rather than connected to the transmission network distant from the point of load.

50 Such as solar panels on rooftops and micro-wind.

51 R Garnaut, above n 15, 44.

52 In that involves generation that does not take place on the traditional supply side of the electricity system.

53 Such as the landlord-tenant relationship and the difficulty of capturing the benefits of DSP in a disaggregated market.

54 Garnaut, above n 15.

55 See for example NSW Industry & Investment, 'NSW Electricity Network and Prices Inquiry' (Final Report 2010) 32.

56 Garnaut, above n 15, 45.

57 Energy Networks Association, 'Guideline for the preparation of documentation for connection of Embedded Generation within Distribution Networks' (Demand Management and Embedded Generation Committee, Energy Networks Association 2011).

Reforms of the NER in relation to distributed generation

A number of regulatory reforms are pending with the AEMC. There is a rule change that would allow operators of DG to benefit from the avoided use of the network resulting from their generation[58] and a rule change that would expand the Demand Management Incentive Scheme[59] to include research into DG.[60] However, as there are no plans to significantly reform the complexity of the NER to be better suited to generation, the NER will continue to reflect a supply side mindset.

Large scale renewable energy generation

As Garnaut notes, the electricity industry has developed in its current centralised form for good reason, as it allows remote fuel resources to be exploited and provides substantial economies of scale.[61] The World Resources Institute notes that large scale renewables (LSR) are 'likely to be the most economic low-carbon option in many electricity markets'.[62] It therefore seems likely that LSR will play a significant role in the energy mix in a carbon-constrained Australia.

Reviewing all barriers to LSR would be a very large task indeed. This article will therefore focus on a recent rule change considered by the AEMC that was intended to overcome one of the most critical barriers for LSR development: connection of remote LSR generators to the transmission network.

Location of the network and renewable energy sources

Renewable energy resources can be conceptualized as being present in distinct 'basins' which are generally far from the network,[63] which is built around the coal basins that currently form the backbone of electricity generation in Australia.[64]

As generation from LSR increases, there is a need to augment the network to transmit this additional electricity,[65] and such augmentation is extremely capital intensive. It is expected that numerous generators will seek to develop LSR and connect to the network in close proximity to each other over time.[66] However, the existing regulatory regime regarding connection to the Network was developed to support traditional generation investment[67] and therefore does not provide a mechanism for coordinating the connection of a number of LSR generators in an area over time.

Noting that substantial efficiencies could be gained by anticipating increased LSR generation and augmenting the network in advance to 'unlock' an area's resources,[68] the AEMC initiated the 'scale efficient network extensions' (SENEs) rule change.

58 See AEMC, 'Network Support Payments and Avoided TUoS for Embedded Generators' <http://www.aemc.gov.au/Electricity/Rule-changes/Open/Network-Support-Payments-and-Avoided-TUoS-for-Embedded-Generators.html> accessed 10 October 2011.

59 Promulgated by the AER under Chapter 6 of the NER. See AER, 'Demand Management Incentive Scheme' (Final Decision 2008).

60 AEMC, 'Inclusion of Embedded Generation Research into Demand Management Incentive Scheme' <http://www.aemc.gov.au/Electricity/Rule-changes/Open/Inclusion-of-Embedded-Generation-Research-into-Demand-Management-Incentive-Scheme.html> accessed 10 October 2011.

61 Garnaut, above n 15, 44.

62 Tawney, L., Bell, R. and Ziegler, M., 'High Wire Act: Electricity Transmission Infrastructure and its Impact of the Renewable Energy Market' (World Resources Institute, Washington DC 2011) v.

63 E.g. the strongest winds are offshore and on the Eyre Peninsula (300km west of Adelaide); solar radiation is strongest in the far northwest of New South Wales and mid- to north-Queensland. Geoscience Australia and ABARE, *Australian Energy Resource Assessment* (Canberra 2010) 240 and 262 respectively. Even where the resource is close to the existing network, connection of clusters of LSR generation is challenging. See AEMO, 'Connecting Generation Clusters to the Victorian Electricity Transmission Network: A Technical Perspective' (2010) 5.

64 See Geoscience Australia and ABARE, *Australian Energy Resource Assessment* (Canberra 2010) 133. This problem occurs in other countries also: see Tawney, L., Bell, R. and Ziegler, M., 'High Wire Act: Electricity Transmission Infrastructure and its Impact of the Renewable Energy Market' (World Resources Institute, Washington DC 2011) for an American, Chinese and European perspective.

65 This is happening more rapidly due to the Renewable Energy Target and is likely to be further affected by the price on carbon. AEMC, 'Review of Energy Market Frameworks in light of Climate Change Policies' (Final Report, 2009) 11.

66 In the same manner that multiple coal-fired power stations have developed and connected over time in close proximity to coal basins.

67 AEMC, 'National Electricity Amendment (Scale Efficient Network Extensions) Rule 2010' (Options Paper, 2010) 13

68 For examples, see NERA Economic Consulting, 'Case Study of the Network Extension' (Public Report, Grid Australia, 2010) and AEMC, 'Review of Energy Market Frameworks in light of Climate Change Policies' (Final Report, 2009) 151-6.

Scale efficient network extensions

A SENE is a network augmentation that is efficiently sized so as to provide capacity for future generators, thus taking advantage of economies of scale. The AEMC's SENEs Options Paper[69] suggested five options for a SENEs rule. Broadly, these options all involve the construction of a SENE funded by numerous generators over time, with excess capacity being funded by consumers.[70] The AER would have certain powers of regulatory oversight.

Unfortunately, the AEMC ultimately adopted an alternative rule that, instead of incentivising and de-risking investment in SENEs, simply allows generators to request that TNSPs undertake studies for SENEs.[71]

The SENEs rule[72] thus does little to address problems with the pre-existing framework for constructing SENEs. Specifically, the rule:

- does not spread the high cost of augmentation or provide any certainty for investment[73]
- does not address the underlying reason for under-investment in SENEs, i.e. that a generator that can build a dedicated augmentation for their project is unlikely to run the risk of asset stranding[74] by building excess capacity
- does not give control or rights to a generator that invests in an augmentation, [75] which is crucial to ensuring that the investor can recoup their costs from generators that subsequently connect to the Network via that augmentation[76]
- provides information to facilitate coordination, despite the reality that 'potential generators are unlikely to be in a position to achieve simultaneous financial close, let alone come to a decision on the required transmission infrastructure'[77]
- does not acknowledge that generators are unlikely to be willing to tie their schedule to others' projects
- assumes a that a study alone will guarantee investment and coordination of connections, an assumption which Australia's largest owner of wind farms calls 'heroic'.[78]

In short, the rule makes no significant change to the position of the existing framework and seems unlikely to materially affect the construction of efficiently sized network infrastructure to connect LSR generators to the NEM.

Conclusion: is the NEM heading in the right direction?

This essay has offered a brief overview of some of the key issues facing the current regulatory framework of the NEM in its attempt to transition to a low-carbon future. DSP is currently receiving some much needed attention after long being neglected, though it is questionable how effective any reforms will be in the absence of a reformed NEO or an

69 AEMC, 'National Electricity Amendment (Scale Efficient Network Extensions) Rule 2010' (Options Paper, 2010).

70 With some risk of underuse being borne by consumers. The AEMC noted that this was a particular point of contention amongst stakeholders. AEMC, 'National Electricity Amendment (Scale Efficient Network Extensions) Rule 2011' (Draft Rule Determination, 2011) iv.

71 See *National Electricity Amendment (Scale Efficient Network Extensions) Rule 2011*.

72 Ibid.

73 Allocating asset stranding risk and cost to generators, rather than consumers as the MCE had envisaged (see MCE, 'Rule Change Request to AEMC' (2010) available at <http://www.aemc.gov.au/Media/docs/MCE%20Rule%20change%20request-80fa97f6-8444-470d-94d7-ec85b2c9bd46-0.pdf> accessed 31 October 2011), means that the cost of augmentation will continue to act as a deterrent to investment.

74 I.e. the risk of investing in an augmentation that is subsequently underutilised.

75 Under Section 2.5.1(a) of the NER, a person must not own, operate, or control a part of the Network without registering as a NSP: generators generally build the infrastructure and gift it to a Transmission NSP (See Grid Australia, submission to AEMC National Electricity Amendment (Scale Efficient Network Extensions) Rule 2010 (Consultation Paper, 2010) 6 and AEMC, 'National Electricity Amendment (Scale Efficient Network Extensions) Rule 2010' (Options Paper, 30 September 2010) 47).

76 See, for example, AEMO, Submission to AEMC National Electricity Amendment (Scale Efficient Network Extensions) Rule 2011 (Draft Rule Determination, 2011) (2011) 3 and National Generators Forum, Submission to AEMC National Electricity Amendment (Scale Efficient Network Extensions) Rule 2011 (Draft Rule Determination, 2011) (2011) 3.

77 Origin Energy, Submission to AEMC National Electricity Amendment (Scale Efficient Network Extensions) Rule 2011 (Draft Rule Determination, 10 March 2011) (2011).

78 Infigen, Submission to AEMC National Electricity Amendment (Scale Efficient Network Extensions) Rule 2011 (Draft Rule Determination, 2011) (2011) 1.

attempt to mitigate the effects of utility bias toward supply side solutions. While there has been some movement toward improving the utilisation of DG, the NEM and NER are centred on large scale generation, which is likely to cause ongoing difficulties for the proponents of small, distributed renewables. Finally, the SENEs rule appears have done little to progress LSR.

Overall, there is some cause for hope, as the NEM and NER slowly reform and adapt to accommodate future methods of meeting electricity demand. However, there is legitimate concern that the piecemeal rule changes being made are not addressing the concerns of stakeholders nor the institutional bias toward traditional modes of meeting electricity demand. This, compounded by the lack of an overarching environmental objective, may mean that change will come too slowly and will restrict the uptake of more environmentally sustainable methods for meeting Australia's future electricity needs.

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