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In this issue:

The National Environmental Law Association of Australia is a company limited by guarantee. It 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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Cover photo: National capital rural lease wildflowers (*Stellaria pungens)* in Aranda, ACT – discussed in 'Recent developments – ACT.
Photo: Jean Geue.

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Also in this issue:

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INTERNATIONAL
by Kathryn Walker

Deliberative democracy on crises facing nature

More than 180 motions were deliberated on in the Members' Assembly component of the World Conservation Congress in Jeju, Republic of Korea, 6–15 September 2012.[1] The Congress is a unique global environmental parliament convened every four years by the International Union for the Conservation of Nature (IUCN). A new President was elected for a four-year term: Mr Zhang Xinsheng, of China. IUCN's work programme for 2013–16 was also approved. Penelope Figgis AO, the Director of the Australian Committee for IUCN, discusses some of the highlights of the Congress later in this issue.[2]

NELA is one of the 17 NGO members of the Australian membership of the Oceania region in the IUCN. About 120 delegates attended the WCC from Oceania. The IUCN, headquartered in Gland, near Geneva in Switzerland, has more than 1 200 member organizations, including more than 200 that are government and 900, non-government. It has six Commissions across approximately 160 countries and almost 11 000 volunteer scientists and experts. It has more than 1 000 staff in 45 offices. The IUCN is funded by governments, bilateral and multilateral agencies, foundations, member organizations and corporations.

Rio+20 Summit on Sustainable Development disappoints

The 'outcomes document' of the Rio +20 Summit on Sustainable Development, 20–22 June 2012, disappointed many who hoped for better for future generations and nature. The Global Financial Crisis impacted on donor pledges, and no major new commitments were agreed in important issue areas such as energy and water. One of the few highlights of 'The Future we Want' outcomes document was the agreement to replace one of the institutions established after the 1992 Earth Summit – the Commission on Sustainable Development –with a stronger United Nations Environment Program (UNEP) that will be expanded to have universal membership. Governments also agreed to establish an inclusive and transparent intergovernmental process to develop new 'sustainable development goals' (SDGs) for adoption by the United Nations General Assembly, whilst also affirming the Millennium Development Goals. Some progress was also made on oceans, including an agreement to develop under the United Nations Convention on the Law of the Sea an implementing agreement that will address the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction.[3]

Clean Development Mechanism Policy Dialogue

The Clean Development Mechanism (CDM) is established under the Kyoto Protocol to the United Nations Framework Convention on Climate Change (Article 12). The CDM allows Annex 1 Parties to the Protocol to implement emission-reduction projects in developing countries. Such projects can earn saleable certified emission reduction (CER) credits, each equivalent to one tonne of CO2, which can be counted towards meeting Kyoto targets. By September 2012 the CDM had fostered more than 4 500 project in 75 developing countries but its future was threatened by a price collapse in the carbon credit market.

In September 2012 the independent high-level panel established to review the CDM released its report. The CDM Policy Dialogue recommended 51 actions across 12 areas aimed at encouraging nations to address the crisis in the carbon market and increase the level of ambition for greenhouse gas emission reductions.

To improve the CDM's reputation and performance going forward, the panel recommended:

- more systematic reporting, monitoring, and verification of sustainable development impacts
- greater access for under-represented regions through simplified procedures
- revised criteria for the composition of the CDM Executive Board to reflect not only regional distribution, but also professional knowledge and experience
- implementation of standardised methods, such as performance benchmarks and positive lists, for assessing additionality.

1 The motions can be accessed at <http://portals.iucn.org/2012motions/>.
2 IUCN, 'Green gets gold at nature's Olympics', IUCN's closing statement on the 2012 World Conservation Congress', 15 September 2012 <www.iucn.org/?11087/Green-gets-gold-at-Natures-Olympics>.
3 *Report of the United Nations Conference on Sustainable Development, Rio de Janeiro, Brazil, 20–22 June 2012*, UN Doc A/CONF.216/16 <www.uncsd2012.org/content/documents/814UNCSD%20REPORT%20final%20revs.pdf>.

The panel also suggested that nations take measures to enhance the CDM's role, recommending:

- that new approaches be implemented, such as sectoral crediting or national programs for reducing emissions from deforestation and forest degradation while taking account of conservation, sustainable management of forests and enhancement of forest carbon stocks (REDD+ programs)
- that robust standards be set to enable the linking and harmonisation of current and emerging carbon markets
- the rapid implementation of the Green Climate Fund
- that new projects that reduce HFC-23 or N2O from adipic acid plants be phased out.[4]

Protected Planet Report 2012

Protected Areas – parks, nature reserves and other natural areas – assist in reducing deforestation, habitat and species loss, and support the livelihoods of over one billion people, while containing 15 % of the world's carbon stock.

The *Protected Planet Report 2012*, launched in September 2012, finds that protected areas comprise 12.7% of the world's terrestrial area, and 1.6% of the global ocean area.

From 1990 to 2010, global protected area coverage increased from 8.8% to 12.7% in terrestrial areas (including inland waters), and from 0.9% to 4% in marine areas under national jurisdiction.

The report measures progress against the Aichi Targets, a set of goals released two years ago under the Convention on Biological Diversity (CBD) that included the objective of at least 17% of the world's terrestrial areas and 10% of the world's marine areas be effectively and equitably managed and conserved by 2020.

The current numbers are well behind the Aichi targets, with under 13 % of the world's terrestrial areas protected today, and just 1.6 % of the world's ocean areas protected.

Protected areas are diversifying rapidly in areas critical to their success, such as management and governance arrangements. According to the report, nearly half of the world's protected areas are within sustainable-use areas and protected landscapes / seascapes, and nearly a quarter are managed by non-governmental actors or under co-management arrangements, often with indigenous peoples or local communities.

The *Protected Planet Report 2012* was produced through a collaborative effort between IUCN and the UNEP World Conservation Monitoring Centre (WCMC), with other partners.[5]

Penny Figgis also discusses this report in her article.

EU greenhouse gas emissions fall

Greenhouse gas emissions from the European Union (EU) fell by 2.5% in 2011 despite a higher level of coal consumption and increasing gross domestic product. Fifteen of the EU member states who share a common commitment under the Kyoto Protocol registered an even greater reduction of 3.5% for 2010–11. The latest reductions take EU emissions to 17.5% below 1990 levels, with the 15 EU states being 14.1% below the base year level under the Kyoto Protocol.

The reduction is being attributed to milder winters resulting in lower heating demands, and increasing renewable energy production. Interestingly, the economic sectors not covered by the EU's emissions trading scheme also reduced emissions by approximately 3.1%.[6]

Air pollution falls in the EU

In 2011 there was a general fall in emissions of most air pollutants in the EU, but 11 countries exceeded the 2010 ceilings for four air pollutants regulated under the 1999 Gothenburg Protocol to the Convention on Long Range Transboundary Air Pollution: (NO_x, NMVOC, SO_x and NH_3. Denmark and Spain exceeded three ceilings, Germany exceeded two, and Austria, Belgium, France, Ireland, Luxemburg, the Netherlands, Sweden and Finland each exceeded one ceiling.

On the back of the increases, in May 2012 the 1999 Protocol was amended to include stricter limits for four pollutants, new limits for particulate matter, and national and sectoral emission reduction commitments to be achieved by 2020.

4 CDM Policy Dialogue, Climate Change, Carbon Markets and The CDM: A Call To Action, Report of the High-Level Panel on the CDM Policy Dialogue (2012) <www.cdmpolicydialogue.org/report/rpt110912.pdf>

5 <www.iucn.org/about/work/programmes/gpap_home/gpap_biodiversity/gpap_protectedplanet/?10866/ProtectedPlanet-Report>

6 'European Union's total greenhouse emissions down 2.5 % in 2011' (2012) <www.eea.europa.eu/highlights/european-union2019s-total-greenhouse-emissions>.

Clean air improves and extends people's lives, and delivers huge socio-economic benefits, including health expenditure savings.[7]

EU Action to Fight Environmental Crime (EFFACE)

The aim of the organisation European Action to Fight Environmental Crime (EFFACE) is to propose and assess effective and feasible policy options and recommendations for the EU to combat environmental crime.

Environmental crime is a threat to environmental, social and economic sustainability and is in conflict with key commitments and strategies of the EU, including the Europe 2020 Strategy. The EU's Environmental Crime Directive, Ship-Source Pollution Directive, and provisions of the Lisbon Treaty have created new opportunities for increasing the effectiveness of EU measures against environmental crime through harmonisation and co-ordination. However, the utilisation of these opportunities suffers from a serious lack of information on environmental crime.

EFFACE will help to address this gap by generating relevant information. Drawing on quantitative and qualitative approaches and data, and an in-depth investigation of different types of environmental crime, EFFACE will provide an assessment of the main costs, impacts and causes of environmental crime in the EU, including those linked to the EU but occurring outside its territory. Feasible policy options for the harmonisation of approaches, and better co-ordination of actors, will be developed using different approaches to harmonisation, sanctioning and strategic enforcement. These policy options will consider the use of policy mixes and innovative approaches to govern such mixes. Stakeholder involvement in EFFACE through interactive policy analysis will promote mutual learning with and amongst a broad range of stakeholders.

The EFFACE Project is supported by a grant from the European Commission Seventh Framework Programme from December 2012 through March 2016. For further information contact: Christiane Gerstetter, Ecologic, email <envcrime@ecologic.eu>.

Greenland-EU environment-related health agreement

Earlier this year Greenland's Ministry of Health signed an agreement with the European Environment Agency (EEA) to exchange personnel, share knowledge, data and other expertise on environment related health issues such as long-range pollution, waste management, and climate change. The agreement aims to contribute to the quality and timeliness of assessing environmental impacts on human health in the European region and the Arctic region. The agreement acknowledges Europe's footprint in the Greenlandic and Arctic environment on human health.[8]

Fracking and endangered species – could changes be on the way?

The Centre for Biological Diversity in the United States has issued a notice of intent to sue the Bureau of Land Management for alleged failures by the Bureau to reinitiate consultation under the *Endangered Species Act of 1973* in connection with alleged risks to listed species caused by hydraulic fracturing (fracking) in California. Fracking involves blasting millions of litres of water sand and chemicals deep into the ground.

Under the *Endangered Species Act*, federal agencies are required to consult with the federal fish and wildlife services to ensure that any action that the agency authorizes, funds or carries out is not likely to jeopardize the continued existence of any species listed as threatened or endangered, based on the best scientific and commercial data available, unless exempted under the Act.

The notice alleges that the grant of gas and oil leases and drilling permits for fracking is based on out-dated science, does not evaluate the true impacts of the fracking, and may endanger species such as California condors and San Joaquin kit foxes. The notice argues that new information about the impacts of fracking on native species had not been considered. While some consultation was undertaken, the notice alleges that the Bureau is required to consult again because new drilling techniques have so increased the economic feasibility and environmental risks of drilling that the action may have effects not previously considered.[9]

7 European Environmental Agency, 'Eleven Member States exceed air emissions limits under LRTAP Convention' (2012) <www.eea.europa.eu/highlights/eleven-member-states-exceed-air>.

8 'Greenland's Health Ministry signs cooperation agreement with EEA' (2012) <www.eea.europa.eu/highlights/greenland2019s-health-ministry-signs-cooperation>.

9 Centre for Biological Diversity, 'Lawsuit launched to protect endangered species from fracking in California: risky drilling technique threatens condor, other wildlife on Monterey Shale (2012) <www.biologicaldiversity.org/news/press_releases/2012/fracking-08-29-2012.html>.

Insurers to foot the bill for the Stringfellow Acid Pits clean up

The State of California created a waste disposal facility for industrial waste at the Riverside County quarry in 1956, which came to be known as the Stringfellow Acid Pits. It closed the facility in 1972 after groundwater contamination was discovered. The clean-up bill was expected to reach $700m. The State sought to claim against its general liability insurance policy to cover its liability.

In August 2012, in a unanimous decision in *State of California v. Continental Insurance Company* (Cal Sup Ct, S170560, 9 August 2012) the California Supreme Court affirmed a Court of Appeal decision that held the insurer liable for the full amount of the loss up to an insurer's policy limit. The Court also approved 'stacking', which means that all triggered policies are regarded as one coverage up to the combined value of the policy limits. The Court noted that insurers could have relied on express 'antistacking clauses to avoid this outcome. The Court held that the insurers must pay 'all sums' due on each policy issued over a 12-year period, a figure restricted only by individual policy limits.

The insurers had sought a ruling that:

- the state could only collect a single year's worth of its policy limit
- no insurer could be made to pay more than a 'pro rata' percentage of the total liability on its time on risk
- the insured should bear the majority of the percentage of loss to reflect of the fact that it was uninsured for some period.

The Court rejected these arguments, finding instead on the wording of the policies, that:

- a general liability insurer must pay the entirety of the insurance liability for a covered loss (up to the policy limit) even if most of the ongoing damage occurs outside the policy period
- the insurer is entitled to collect the combined limits of all successive years of insurance policies
- the insured does not have to pay for any part of the loss as long as it had applicable insurance, even if it was uninsured for many years while the covered damage continued.[10]

The implications of the decision could be broad in terms of the application of policies of the nature involved and long term ongoing contamination and damages claims.

US Supreme Court asked to review 'pro' environmental decisions

The United States Supreme Court has considered applications for certiorari (judicial review) in respect of four decisions delivered by the Ninth Circuit District Court that were considered 'pro-environment'.[11]

On 25 June 2012 the Supreme Court denied certiorari in *Pacific Merchant Shipping Association v Goldstene* US 10-1555 (2012). The shipping industry had challenged Californian Air Resources Board (ARB) regulations requiring marine vessels to use low sulphur fuels within 24 miles of the Californian coast. The District Court rejected the industry's claims that the ARB regulation pre-empted the federal *Submerged Lands Act*, contravened dormant commerce clause principals and were otherwise unlawful, and impermissibly regulated navigation and foreign and domestic commerce as delegated to the United States Congress.

In *Decker v Northwest Environmental Defence Centre* US 11-338 (2012), and *Georgia-Pacific West Inc v Northwest Environmental Defence Centre* US 11-347 (2012), petitions were filed against the Ninth Circuits decisions that channelled storm water runoff from logging roads, that eventually flows into streams and rivers, requires a permit from federal regulators under the *Clean Water Act*. As a result, the EPA's 'silviculture rule' does not exempt logging related runoff from the Act's permit requirements. Certiorari was granted and the Supreme Court will review both decisions, with oral argument scheduled for 3 December 2012.

In the case of *Los Angeles County Flood Control District v Natural Resources Defence Council* a petition was filed challenging the Court's interpretation of the requirements of National Pollutant Discharge Elimination System (NPDES) permits issued under the Clean Water Act. The US Court of Appeals for the Ninth Circuit interpreted the provisions expansively, finding that the LA County must obtain permits for urban runoff that collects in channelized river systems maintained and improved by county flood control agencies. The Ninth Circuit Court upheld the district court's decision that the County was not liable with respect to the Santa Clara River and the Malibu Creek, but reversed

10 DA Scullion, A Schwartz and LH Smith, '*Insurance: The State of California v. Continental Insurance Company et al.* – California Supreme Court Adopts 'All-Sums-With-Stacking' for Continuous Injury Claims', Gordon and Rees LLP (2012) <www.gordonrees.com/publications/viewPublication.cfm?contentID=2791>.

11 Supreme Court of the United States <www.supremecourt.gov/>

the decision with respect to the San Gabriel River and the Los Angeles River. The Supreme Court granted certiorari. Oral arguments will be heard in December 2012 on the question 'can the transfer of water from one portion of a river to another portion via a manmade improvement for the purpose of controlling storm water runoff still be considered a 'discharge' under the Clean Water Act'.

Three of the decisions under review concern the *Clean Water Act* and its scope. The *Clean Water Act* regulates discharge of pollutants from, amongst other things, municipal stormwater sewer systems. The previously 'pro environmental' decisions of the Ninth Circuit were seen as a wide interpretation of the objectives of the Act. The decision by the Supreme Court to grant the petitions for judicial review will determine at the highest level the scope of the *Clean Water Act*.

FEDERAL

Shol Blustein and Felicity Deane

Alpha Coal mine and rail project approved

Despite opposition from environmentalists, farmers and parts of the fishing industry, on 23 August 2012, the $6.4bn Alpha coal mine and rail project in Queensland was approved under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), subject to 19 conditions.[12] The approval relates to the proposed construction and operation of an open-cut coal mine and 495km railway line to Abbott Point.

The conditions are directed at ensuring that matters of national environmental significance are protected. They require comprehensive management and monitoring arrangements and the project proponents to:

- submit a Caley Valley Wetland Management Plan for the Minister's approval and to ensure that coal dust impacts on the Caley Valley Wetland are minimised through various measures including covered wagons or equivalent
- prepare a Matters of National Environmental Significance Management Plan to maximise the ongoing protection and long term conservation of EPBC-listed threatened fauna
- prepare several management plans to manage potential impacts on the values of the Great Barrier Reef World Heritage Area and species including dugongs, turtles and migratory birds
- undertake significant and comprehensive land offsets to protect listed threatened ecological communities and species
- create a trust, with initial funding of $2m, to conduct research on the black-throated finch and the squatter pigeon, with provision for a more strategic approach to protect all key species in the Galilee Basin in the event that any further mines are approved in the basin
- prepare management plans covering mine rehabilitation, vegetation, water quality and regional impacts on water quality
- identify threshold limits and management measures for any coal dust impacts on the Great Barrier Reef World Heritage Area and reporting to the Great Barrier Reef Marine Park Authority every six months.[13]

On a related matter, NELA has recently issued a submission to the Council of Australian Governments' in relation to its environmental regulation reforms. A copy of this submission has been reproduced later in this issue.

Strategic assessment of the Great Barrier Reef

In August 2012, the final terms of reference for the strategic assessment of the Great Barrier Reef were approved.[14] The strategic assessment under s 146 of the EPBC Act is designed to enable a 'big-picture' approach to environment and heritage protection that provides certainty in the long term, by determining where sustainable development can go, the type of development that will be allowed and the conditions under which development may proceed. This will be achieved by:

12 Minister for Sustainability, Environment, Water, Population and Communities, the Hon Tony Burke MP, 'Alpha Coal mine and rail project approved, Commonwealth marine reserves: media release (23 August 2012) <www.environment.gov.au/minister/burke/2012/mr20120823.html>.

13 Minister for Sustainability, Environment, Water, Population and Communities, the Hon Tony Burke MP, Approval Decision: Alpha Coal Mine and Rail proposal, Galilee Basin Queensland <www.environment.gov.au/epbc/notices/assessments/2008/4648/2008-4648-approval-decision.pdf.

14 Department of Sustainability, Environment, Water, Population and Communities, 'Strategic assessment: Great Barrier Reef' (28 September 2012) <www.environment.gov.au/epbc/notices/assessments/great-barrier-reef.html>.

- investigating the adequacy of the existing management arrangements for the Great Barrier Reef World Heritage Area, and
- assessing current and future development policies and planning in the Great Barrier Reef World Heritage Area and the adjacent coastal zone and analysing likely direct, indirect and cumulative impacts.

Commonwealth marine reserve network

On 14 June 2012, the Federal Minister for Sustainability, Environment, Water, Population and Communities announced the details of the proposed network. If proclaimed, Australia's Marine Reserve Network will cover more than a third of Commonwealth waters.[15]

The proposed National Marine Network consists of five regions:

- *the Coral Sea Region:* an area of more than half the size of Queensland. The network includes protection for all reefs in the Coral Sea
- *the South-West Marine Region:* extending from the eastern end of Kangaroo Island in South Australia to Shark Bay in Western Australia
- *the Temperate East Marine Region:* running from the southern boundary of the Great Barrier Reef Marine Park to Bermagui in southern New South Wales, including the waters surrounding Lord Howe and Norfolk Islands
- *the North Marine Region:* including only the Commonwealth waters of the Gulf of Carpentaria, Arafura Sea and the Timor Sea extending as far west as the Northern Territory-Western Australian border
- *the North-west Marine Region:* stretching from the Western Australian - Northern Territory border through to Kalbarri.

The Government previously invited comments on its proposed marine network. This consultation process closed on 10 September.[16]

The World Conservation Congress in the Republic of Korea in September 2012 adopted a motion sponsored by the Australian Conservation Foundation, which NELA and other NGOs co-sponsored, that congratulated the Australian Government for its landmark announcement on marine reserves. The motion noted that the proposal is one of the most significant advances for marine environmental protection in Australia's history, and urged the Australian Government to proclaim the network swiftly. The motion also urged the global community to support similar initiatives that establish networks of marine reserves, informed by sound science and in accordance with IUCN's vision and mission.

Giant kelp marine forests to be protected

In August 2012 the giant kelp marine forests of South East Australia were listed as an endangered ecological community under the EPBC Act.[17]

Giant kelp marine forests are diverse, structurally complex and highly productive components, and foundation species of cold-water rocky marine coastlines around the world.[18] These kelp forests provide a haven for a variety of marine life, protect coastlines from severe storm damage and are important carbon sinks.

The Federal Environment Minister claims that the listing in the EPBC Act is necessary as the giant kelp forests are being progressively lost due to warming of the sea surface temperature caused by climate change. These forests are also being threatened by invasive species and changing land use and coastal activities that contribute to increased sedimentation and runoff and biodiversity loss.

Consequently, any actions likely to have a significant impact on the giant kelp marine forests must now be referred for assessment under national environment law.

15 Minister for Sustainability, Environment, Water, Population and Communities, the Hon Tony Burke MP, 'Final consultation on Commonwealth marine reserves begins: media release' (11 July 2012) <www.environment.gov.au/minister/burke/2012/mr20120711.html>.

16 Minister for Sustainability, Environment, Water, Population and Communities, the Hon Tony Burke MP, 'Gillard government creates the world's biggest marine reserves network: media release' (14 June 2012) <www.environment.gov.au/minister/burke/2012/mr20120614.html>; and 'Final Commonwealth marine reserves network proposal' (2012) <www.environment.gov.au/coasts/mbp/reserves/index.html>.

17 Minister for Sustainability, Environment, Water, Population and Communities, the Hon Tony Burke MP, 'Giant Kelp Marine Forests to be protected: media release' (18 August 2012) <www.environment.gov.au/minister/burke/2012/mr20120818.html>.

18 'Advice to the Minister for Environment Protection, Heritage and the Arts from the Threatened Species Scientific Committee (the Committee) on an Amendment to the List of Threatened Ecological Communities under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) 1. Name of Ecological Community: Giant Kelp Marine Forests of South East Australia' (2012) <www.environment.gov.au/biodiversity/threatened/communities/pubs/107-listing-advice.pdf>.

Proposed amendments to the EPBC Act to stop super trawler

On 4 September 2012, the Government imposed new conditions on the management regime for the Small Pelagic Fishery. These conditions prevented the 'super trawler' *FV Abel Tasman* from fishing in Australian waters until its operators had taken all reasonable steps to ensure that listed threatened species, listed migratory species, cetaceans and listed marine species are not killed or injured through trawling operations. The conditions were initially imposed for a two week period.[19]

The Government has since proposed to amend the EPBC Act to make the new conditions permanent. This amendment is set out in the *Environment Protection and Biodiversity Conservation Amendment (Declared Fishing Activities) Bill 2012* (Cth), which was introduced into the House of Representatives on 11 September 2012.[20] The amendments propose to prevent super trawlers from engaging in a declared fishing activity in Commonwealth waters until an assessment is completed by an expert panel. Currently the EPBC Act does not include any general powers to prevent new fishing vessels from fishing whilst an assessment is being conducted.

Carbon Farming Initiative updates

Since June 2012, the Domestic Offsets Integrity Committee (DOIC) – which is the body charged with administering the Carbon Farming Initiative (CFI) – has released for public comment a number of proposed methodologies that are to operate under the CFI.

The proposed methodologies provide that Australian Carbon Credit Units (ACCUs) may be able to be created by landowners and farmers in the following circumstances:

- improved waste management practices by dairy farmers
- the establishment of trees on agricultural land that was previously clear of woody vegetation
- the capture and combustion of methane generated by the decomposition of piggery manure
- the diversion of waste from a landfill site to an alternative waste treatment facility
- the diversion of waste from a landfill site through a composting alternative waste treatment technology
- human-induced native forest re-growth
- permanent tree plantings on certain agricultural land using prescribed techniques
- avoiding emissions at landfill sites.

Public comment for these methodologies has now closed. Each is now being considered by DOIC or, alternatively, by the methodology proponent.[21]

The Federal Government has also amended the *Carbon Credits (Carbon Farming Initiative) Regulations 2011* (Cth). The amended regulations now include provisions relating to: the issuance of ACCUs; variations to project declarations; auditing, reporting, notification and record-keeping requirements for project proponents; variations to methodology determinations; and clarification of when the relinquishment of ACCUs is required.[22]

Carbon Pricing Mechanism updates

On 15 June 2012, the Clean Energy Regulator published a list of the local council landfill sites that will be liable under Australia's Carbon Pricing Mechanism for the greenhouse gas emissions produced at these sites. Of the 559 council landfill sites across Australia, the Regulator determined that only 32 will be liable under the Carbon Pricing Mechanism.[23]

On 28 August 2012, the Federal Government announced that Australia and the European Union will link their respective carbon pricing mechanisms. To give effect to this decision, the Federal Government proposed three changes to the current design of Australia's Carbon Pricing Mechanism. These are:

- the $15 per tonne floor price will not take effect from 2015
- from 1 July 2015, there will be a 12.5% cap (reduced from 50%) on the amount of eligible units created under the Kyoto Protocol that can be surrendered to meet an entity's annual liability

19 Australian Government, Australian Fisheries Management Authority (AFMA), 'Small Pelagic Fishery map including zones' (2012) <www.afma.gov.au/managing-our-fisheries/fisheries-a-to-z-index/small-pelagic-fishery/maps/>.

20 Australian Parliament, 'Environment Protection and Biodiversity Conservation Amendment (Declared Commercial Fishing Activities) Bill 2012' (2012) <www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4883>.

21 Australian Government, Department of Climate Change and Energy, 'Carbon Farming Initiative: Methodologies under consideration' (2012) <www.climatechange.gov.au/en/government/initiatives/carbon-farming-initiative/methodology-development/methodologies-under-consideration.aspx>.

22 Australian Government, Department of Climate Change and Energy, *CFI eNews*, June 2012 <www.climatechange.gov.au/government/initiatives/carbon-farming-initiative/subscribe/2012-06.aspx#N02>.

23 The Hon Mark Dreyfus QC MP, Parliamentary Secretary for Climate Change and Energy Efficiency, 'Clean Energy Regulator Determination on Local Government List' (15 June 2012) <www.climatechange.gov.au/minister/mark-dreyfus/2012/media-releases/June/MR-12-25-2.aspx>.

- from 1 July 2015, Australia will start one-way linking with the EU Emissions Trading Scheme (ETS). In 2018, this will become two-way.

To give effect to these changes, the Federal Government introduced into the House of Representatives the *Clean Energy Amendment (International Emissions Trading and Other Measures) Bill 2012* (Cth) together with six related bills.[24] These bills were referred to the House Standing Committee on Economics and the Senate Economics Legislation Committee, whose reports were due by 29 October 2012.

Kathryn Walker discusses the carbon price at p43.

Review of Renewable Energy Target

On 18 July 2012, the Climate Change Authority (the Authority) began its review of Australia's Renewable Energy Target (RET).[25] The Authority released an Issues Paper in August 2012 which set out the parameters of the review and the timetable for the review process.[26] Initial responses were due by 14 September 2012. The Authority has since issued a discussion paper with the final report due to be issued by 31 December 2012. The Review is the first study to be conducted by the Authority, which began operation on 1 July 2012.

Several articles in this issue discuss the RET in more detail.

ARENA funding strategy

On 26 July 2012, the Australian Renewable Energy Agency (ARENA) released its draft funding strategy for the period 2012–13 to 2014–15, seeking stakeholder feedback on the principles proposed to guide its support of renewable energy technologies in Australia.[27] The public consultation period for the strategy closed on 27 August 2012.

Climate change adaptation

A report prepared by AECOM for the Department of Climate Change and Energy Efficiency, titled *Economic framework for analysis of climate change adaptation options*, was released in August 2012. The report provides cost benefit analyses of case studies of climate adaptation of settlements and infrastructure for:

- coastal inundation at Narrabeen Lagoon
- securing long-term water supply for Central Highlands Water
- temperature impacts on Melbourne's metropolitan rail network.[28]

National Water Commission amendments

On 21 June 2012, Federal Parliament passed the *National Water Commissions Amendment Bill 2012* (Cth) to amend the *National Water Commission Act 2004* (Cth). The effects of the amendments are to:

- continue the National Water Commission (NWC) beyond its sunset date of 30 June 2012
- revise the functions and operations of the NWC
- close the Australian Water Fund (AWF) Account and remove the NWC's ability to administer any AWF funds
- reduce the number of NWC commissioners
- provide for a review of the NWC's performance by the end of 2017, with further reviews every five years.[29]

The Parliamentary Secretary for Sustainability and Urban Water, the Hon Senator Don Farrell, noted that the Act represented the delivery of the Federal Government's promise to continue the operation of the NWC in order to work towards reform for more sustainable management and use of Australia's water resources through the National Water Initiative.[30]

24 Australian Government Clean Energy Future, *Implementing links to overseas emissions trading schemes - Draft legislation Clean Energy Legislation Amendment (International Emissions Trading and Other Measures) Bill 2012 and related bills: Explanatory Note* (31 August 2012)<www.climatechange.gov.au/government/clean-energy-future/~/media/government/clean-energy-future/CELA-ExplanatoryNote-and-DraftBills-20120831.pdf>.

25 Australian Government Climate Change Authority, 'Renewable Energy Target scheme review gets under way' (18 July 2012) <http://climatechangeauthority.gov.au/news/20120718>.

26 Australian Government Climate Change Authority, *Renewable Energy Target Review Issues Paper* (August 2012) <http://climatechangeauthority.gov.au/sites/climatechangeauthority.gov.au/files/RET-Review-20120820.pdf>.

27 Australian Government, Minister for Energy and Tourism, 'ARENA Funding Strategy out for consultation' (26 July 2012) <http://minister.ret.gov.au/MediaCentre/MediaReleases/Pages/ARENAFundingStrategyConsultation.aspx> and www.arena.gov.au/_documents/funding-strategy/consultation-draft-general-funding-stratetgy.pdf.

28 AECOM, *Economic framework for analysis of climate change adaptation options: Framework specification* (17 August 2012) <www.climatechange.gov.au/~/media/publications/adaptation/economic-framework-adaptation-options-20120817-pdf.pdf>.

29 Australian Parliament, 'National Water Commission Amendment Bill 2012', <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:legislation%2Fbillhome%2Fs873>.

30 Parliamentary Secretary for Sustainability and Urban Water, Senator the Hon Don Farrell, Parliament passes National Water Commission Amendment Bill, Media release DF12/033 (21 June 2012) <www.environment.gov.au/minister/farrell/2012/pubs/mr20120621.pdf>.

Water efficiency labelling and standards scheme enhanced

In June 2012, the *Water Efficiency Labelling and Standards Amendment (Scheme Enhancements) Act 2012* (Cth) was passed by Federal Parliament. The Act amends the Water Efficiency Labelling and Standards (WELS) Scheme which requires washing machines, dishwashers, showers, toilets and tap equipment to be registered and labelled with a water efficiency rating of between zero to six stars. The Scheme, which is part of the National Water Initiative, also sets minimum water efficiency standards for toilets and washing machines.

A key amendment is that the Federal Minister for Sustainability, Environment, Water, Population and Communities is able to determine the details of the scheme, including the registration of certain products. The Explanatory Memorandum suggests that this will make it easier for the scheme to be modified to improve its efficiency and effectiveness, without the need to amend supporting state and territory legislation.[31] Any changes will continue to require agreement from a majority of state and territory governments. The Act also introduces a range of new civil penalties, many of which complement existing criminal offences. [32]

Next phase of Caring for our Country

In June 2012, the Federal Government invited community feedback on the next phase of the Caring for our Country program. According to the report, *An Outline for the Future*, the next phase will incorporate funding of $2.2bn for the five year period from 1 July 2013.[33] The funding will be divided between sustainable environment and sustainable agriculture. The sustainable environment stream will focus on protecting and managing nationally significant flora and fauna, ecological communities, ecosystems, land and seascapes. It will also focus on enhancing the capacity of Indigenous communities to conserve and protect natural resources. The sustainable agriculture stream will focus on increasing the sustainability of agricultural production.[34]

Following the release of *An Outline for the Future* there was an eight week period of public consultation which closed on 15 August 2012. [35]

Notice by Murray-Darling Basin Ministerial Council under s43A(7) of the *Water Act 2007* (Cth)

The Murray-Darling Basin Ministerial Council has issued a notice to the Federal Minister for Sustainability, Environment, Water, Population and Communities asking him to advise on comments of various aspects of the Altered Proposed Basin Plan that was received by the Council on 6 August 2012.[36] This notice specifies the views of the Council on the Proposed Basin Plan in accordance with s 43A(7) of the *Water Act 2007* (Cth). The Murray–Darling Basin Authority must now consider the information in order to progress the draft plan. [37]

Savage River tailings dam wall

In June 2012, the Minister for Sustainability, Environment, Water, Population and Communities approved a proposal to raise the existing Main Creek tailing dam wall at Savage River Iron Ore Mine in Tasmania without any further environmental assessment. The approved project will increase the capacity of the existing tailings dam that services the Savage River Iron Ore Mine.

The proposal was approved on the understanding that it would not have an impact on threatened species or any other matters protected under national environmental law. The Minister noted the importance of 'adequately containing tailings' to protect the downstream environment. [38] The decision was made under s 75 of the EPBC Act.

31 Australian Parliament, House of Representatives, Water Efficiency Labelling and Standards Amendment (Scheme Enhancements) Bill 2012 Explanatory Memorandum (2012) <http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4823_ems_3a4ad269-4073-4e77-8c19-249707146697/upload_pdf/368739.pdf;fileType=application%2Fpdf#search=%22legislation/ems/r4823_ems_3a4ad269-4073-4e77-8c19-249707146697%22>.

32 Parliamentary Secretary for Sustainability and Urban Water, Senator the Hon Don Farrell, 'Water efficiency labelling and standards scheme enhanced' Media release DF12/034 (28 June 2012) <www.environment.gov.au/minister/farrell/2012/mr20120628.html>.

33 Minister for Sustainability, Environment, Water, Population and Communities, the Hon Tony Burke MP, and Senator the Hon Joe Ludwig, Minister for Agriculture, Fisheries and Forestry, 'Public consultation opens for next phase of Caring for our Country: Joint media release' (21 June 2012) <www.environment.gov.au/minister/burke/2012/mr20120621a.html>.

34 Australian Government, *Caring for Our Country: An Outline for the Future 2013–2018* (2012) <www.nrm.gov.au/about/caring/review/pubs/c4oc-outline-future.pdf>.

35 Australian Government, 'Let's continue the conversation' (2012) <http://caringforourcountryreview.com.au/>.

36 'The Murray-Darling Basin Ministerial Council' (2012) <www2.mdbc.gov.au/about/murraydarling_basin_ministerial_council.html>.

37 Australian Government, Murray–Darling Basin Authority, 'Statement from the Chair' (28 August 2012) <www.mdba.gov.au/media_centre/media_releases/statement-from-the-chair_28-aug-2012>.

38 Minister for Sustainability, Environment, Water, Population and Communities, the Hon Tony Burke MP, 'Decision made on Savage River Tailings dam wall' (20 June 2012) <www.environment.gov.au/minister/burke/2012/mr20120620a.html>.

ACT
by Camilla Taylor

Inner hills protected areas may be expanded

Canberra's inner hills have 'hills, ridges and buffers' protection in the National Capital Plan and nature reserve status in the ACT Territory Plan. They form valuable wildlife corridors with significant components representative of the biodiversity of the Southern Tablelands bioregion. The ACT has outstanding examples of endangered ecological communities of Yellow Box/Red Gum grassy woodland, remnant natural temperate grasslands,[39] and the species and genetic complexes that contribute to the diversity of those ecosystems. In 2012 the Australian Heritage Council is considering a nomination of the central national area and the inner hills *area* to the National Heritage List, along with another Canberra-wide nomination.

The Aranda Bushland abuts a rural lease that extends across to the greenfield development areas of the Molonglo Valley. The ACT Government advised the Friends of Aranda Bushland Inc (FoAB) in September 2012 that it had reached an agreement with the rural lessee, prior to the caretaker period for the ACT October 2012 election, that it would resume the rural lease area (with compensation to the lessee). The rural lease blocks in Aranda include some high conservation value areas, and the nationally endangered small Purple Pea (*Swainsona recta*). Parts of the rural lease have become significantly degraded, however, due to the widespread invasion of weeds such as St John's wort, Paterson's curse and serrated tussock. Images of wildflowers from the rural lease are on the front cover of this issue, courtesy Jean Geue of FoAB.

Established in 1990, FoAB is a ParkCare group dedicated to conserving and promoting the bushland areas adjacent to the suburb of Aranda. The area forms a biodiversity corridor from Black Mountain to Mount Painter, the Pinnacle and Kama nature reserve, and is part of Canberra Nature Park (CNP) and the National Capital Open Space System (NCOSS).

For nearly a decade FoAB has been attempting to have the ACT Government expand CNP to include the rural lease blocks, or more recently, to create a new type of conservation lease. For many years FoAB has undertaken an annual workparty to remove woody weeds on parts of the rural lease, and has advocated that the lessee be required to comply with the land management agreement (LMA) and the Conservator's Directions, which are intended to protect the significant conservation values of the site. FoAB's concern is that despite the LMA and Conservator's Directions, the endangered biodiversity of the south Aranda woodland is becoming more critically compromised due to the lack of weed and rabbit control. Beyond the issue at Aranda, there is a general concern among ACT ParkCarers and environmental groups that there is a low level of compliance with, and enforcement of, LMAs.

In August 2012 FoAB lodged an application pursuant to the *Freedom of Information Act* 1989 (ACT) regarding the rural lease. The details of the LMA were not disclosed, as the LMA was said to contain material deemed commercial in confidence, the disclosure of which would constitute a breach of confidence that could compromise 'business affairs'.

The importance and fragility of this area are largely accepted. The use of the land once resumed will be a matter for the incoming ACT Government. In the interim, the Department of Territory and Municipal Services is to consult with FoAB regarding priority land management activities, and liaise with the lessee in a bid to settle an appropriate course of action. The cost of weed management of one 15 ha block could be $63 000 over the first six years of a ten-year restoration program. This compares with no cost to the Government when the land is managed under a rural lease and the Conservator's (largely ignored) Directions and LMA, which may partly explain the delay in resuming the land.

FoAB is of the view that weed control and stocking rates in areas of conservation value should be in the public domain. LMAs have been contentious for many years. In 1999 Greens MLA Ms Kerrie Tucker supported LMAs being publicly available disallowable instruments, approved by the Conservator and ACT Heritage Council, and overseen by a Board and with increased penalties for non-compliance. The current Attorney-General, Simon Corbell MLA, then in Opposition, also supported the conservation clauses of MLAs being publicly available.

39 Nature Conservation (Species and Ecological Communities) Declaration 2012 (No 1) DI2012—11. Under the Environment Protection and Biodiversity Conservation Act 1999 (Cth), the ecological community of *White Box-Yellow Box-Blakely's Red Gum grassy woodland and derived native grassland*, is listed as critically endangered and the *Natural temperate grasslands of the Southern Tablelands of NSW and the ACT* is listed as endangered.

Weathering the Change: Action Plan 2 (AP2)

On 13 September 2012 the ACT Government released its new climate change strategy, *Weathering the Change: Action Plan 2* (AP2).[40] The plan updates the Government's response to climate change and responds to the targets set by the *Climate Change and Greenhouse Gas Reduction Act* 2010. The legislated targets are a 40% reduction below 1990 levels by 2020, 80% reduction below 1990 levels by 2050, carbon neutrality by 2060 and a determination setting renewable energy targets of 15% by 2012, and 25% by 2020. These emission reduction targets require a revision of the renewable energy targets. The AP2 details the revised target, which is now 90% renewables by 2020.

In summary, the plan is to achieve the 2020 reduction target by reducing emissions from electricity, gas, transport fuel and landfill sites, with a large reduction achieved by changing the mix of electricity supply. The AP2 proposes that the Territory will develop approximately 690 megawatts of large-scale renewable energy, delivering approximately 1 900 GWhours of emissions-free electricity each year by 2020.

The plan identifies five sectors responsible for the majority of the ACT's emissions and outlines how each sector can contribute to the target by pledging eighteen actions across each sector, aimed at cutting emissions by approximately 2024 000 tonnes of CO2 by 2020.

Climate change adaption, monitoring and reporting are also included in AP2, but it is the taking of Canberra's mix of renewables to more than 90% by 2020 that is the major focus, with large-scale renewables accounting for 72% of the potential targeted emissions.

AP2 explains how each of its 18 actions will be subject to regulatory impact assessments, implementation and risk planning, along with normal budgetary processes. An assessment of potential social equity and cost of living impacts will be completed each year and reported to the Assembly.

A change in commuter behaviour is required for the goals to be achieved, with the expectation that 30% of the journeys around the national capital will be taken on public transport within eight years.

The plan contains details of the expected costs and savings across each sector, with savings resulting from improvements in household energy efficiency and costs from renewable energy investments. Combining the two, net savings are expected at around $30 per household per year from 2013–17. Net costs are estimated to grow from zero in 2018, peaking at around $60 per household in 2020 before again declining. The costs of transport fuel savings are not included in this net savings calculation.

The plan acknowledges climate change and that investing in climate change mitigation often means paying now for benefits that will accrue over the medium to long term. AP2 describes the benefits of acting on climate change at both the local and global levels.

Our Future, Our Environment Conservation Forum

With the ACT Legislative Assembly elections due to be held on 20 October 2012, there was a large gathering at the ACT Conservation Council's *Our Future, Our Environment Forum* on 21 September 2012. The forum gave the three main political parties the opportunity to describe their environmental policies, how they plan to make Canberra a more sustainable city, and what they will do to ensure the ACT's biodiversity is protected. Simon Corbell MLA, Minister for Environment and Sustainable Development, spoke for the ALP; Vicki Dunne MLA, Shadow Minister on Nature Conservation and Water, spoke for the Canberra Liberals; and Shane Rattenbury MLA participated as the Greens spokesperson on Environment, and on Energy. An expert panel also put a range of questions to the MLAs.

In summary, all parties committed to making a priority the long overdue completion of the review of the *Nature Conservation Act* 1980 (ACT). Both the ALP and the Greens stated their commitment to protect the proposed greenfield development area of Kinlyside in North Gungahlin from urban development. The Liberals did not rule out protection but noted they had insufficient information to be able to commit to any detail. The area includes 120 hectares of critically endangered Yellow Box/ Red Gum woodland. It was flagged in the 2004 'woodlands strategy'[41] as a priority area for conservation. Simon Corbell also committed to a strategic environmental assessment of North Gungahlin. The Liberals expressed their preference for integrating biodiversity and conservation administration into a single agency covering research, policy, monitoring and regulatory functions.

40 www.environment.act.gov.au/__data/assets/pdf_file/0004/254947/AP2_Sept12_PRINT_NO_CROPS_SML.pdf

41 ACT Government, *Woodlands for Wildlife: ACT Lowland Woodland Conservation Strategy*, Action Plan no 27 (2004).

All parties showed a strong commitment to improving active transport measures so that walking and cycling in the ACT might be safer and easier. The Liberals emphasised the need for improving the road infrastructure and explained their reasoning behind this.

Both the ALP and the Greens had announced their climate change policies prior to the Forum, including their strategies for achieving a 40% greenhouse gas reduction target by 2020. See: <www.environment.act.gov.au/__data/assets/pdf_file/0004/254947/AP2_Sept12_PRINT_NO_CROPS_SML.pdf and http://act.greens.org.au/sites/greens.org.au/files/CLIMATE-ENERGY_PACKAGE.pdf>

New South Wales

Dr Nicholas Brunton

NSW Planning Reform Green Paper

by Janet Mckelvey[42] and Anneliese Korber[43]

The NSW Government's Green Paper, *A New Planning System for NSW,* proposes the replacement of the *Environmental Planning Assessment Act 1979* (NSW) with a Sustainable Planning Act, and a shift of emphasis from development assessment to strategic plan preparation. A codes-based assessment system and assessment tracks are also proposed. The reforms are designed to reduce complexity and costs, increase strategic planning and focus on better economic outcomes. They also aim to encourage community engagement early in the process, streamline development assessment, and improve infrastructure funding and integration.

A key driver of the reforms is the promotion of economic development and competition. There is a clear agenda to attract development back to NSW. A new 'Enterprise Zone' allows a broad range of uses to encourage innovation with few development controls, and the 'Future Urban Release Area' is proposed for high priority growth areas within a council area.

The Green Paper proposes 23 'transformative changes' to the planning system. These changes broadly address the following areas:

- plan making
- development assessment
- reviews
- delivery and funding of Infrastructure
- implementation and monitoring.

The NSW Government is considering submissions responding to the Green Paper. The Green Paper will be followed by a White Paper, and then an exposure draft Bill in 2013.

Plan making

The Green Paper proposes the establishment of a 'Public Participation Charter' and methods of community engagement through the development of evidence-based strategic plans and the use of technology to provide the public with access to planning information. The aim is to engage communities early in the strategic planning stages so that they may participate in setting broad planning outcomes for any particular area. The Green Paper focusses on strategic planning which will be implemented via the development of a range of new planning documents that are intended to be vertically integrated. The hierarchy of plans includes NSW Planning Policies, Regional Growth Plans, Sub-Regional Delivery Plans including Growth Infrastructure Plans, and Local Land Use Plans.

The 47 existing State Environmental Planning Policies will be abolished and replaced by NSW Planning Policies. The Green Paper specifies that approximately 10–12 NSW Planning Policies will be introduced to give effect to the Government's policies in a range of sectors, such as employment, mining, retail development, regional development and infrastructure. The NSW Planning Policies will not be statutory planning instruments, but will be updated and approved by Cabinet as required to set priorities and broad strategies for the delivery of development across the state.

42 Senior Associate, Henry Davis York Lawyers.
43 Senior Associate, Henry Davis York Lawyers.

Regional Growth Plans (RGPs) will be introduced to outline a spatial planning framework to guide regional development over a 20 year period within various regions across NSW. In this way, RGPs are not unlike the old Regional Environmental Plans. RGPs are intended to be strongly evidence-based and will detail actions required to provide for, and implement, the strategies established in the NSW Planning Policies. The RGPs are to be a mechanism for aligning future land use changes and planning with programmed infrastructure and services, however, an RGP will not have the status of a statutory planning instrument either.

Beneath RGPs in the plan hierarchy is a series of plans that will be known as Sub-Regional Delivery Plans (SDPs). The SDPs will focus on strategic planning at a level higher than the local government area but will be more detailed than RGPs. SDPs will be the principal planning tool for effecting land use changes and for setting development considerations within a specified region. The Green Paper notes that SDPs will be prepared for areas in metropolitan Sydney, the Hunter and the Illawarra. Continuing the vertical integration of plans, targets set in RGPs for implementing policies outlined in NSW Planning Policies will be taken into account and distributed through the SDPs. An SDP will identify the infrastructure needed for a particular sub-region and inform the preparation of the Growth Infrastructure Plan for that region. Growth centres, precincts and corridors will also be identified in SDPs along with key rezonings to assist and ensure streamlined development assessment.

SDPs are championed as being able to deliver greater certainty to developers and the community by introducing statutory planning controls at a sub-regional level that incorporate both strategic objectives and local matters regarding how an area will grow over time. The future proofing of the SDPs is supposed to be sufficient to capture and remove the need for any concurrences in relation to proposed development. The SDPs are also said to be the vehicle by which community consultation will be brought in in the early stages of strategic planning for any particular region with the community being incentivised to participate by the 'real changes on the ground' provided by an SDP.

To be prepared in conjunction with the SDPs, the new Growth Infrastructure Plans (GIP) will inform the need for and delivery of infrastructure for high growth areas in the state and will be based on recent development activity and market evidence. The GIPs will be prepared by the Department of Planning and Infrastructure (the Department) in consultation with infrastructure providers and are intended to remove the uncertainty regarding the timing and delivery of infrastructure in NSW.

The bottom rung in the hierarchy of plans will be the Local Land Use Plan (LLUP) for each local government area. Essentially, the LLUP will be akin to a Local Environmental Plan under the current system, but the LLUP will be in part the product of the strategic plans above it in the hierarchy.

LLUPs will be divided into 4 parts: strategic spatial land use plans, infrastructure and services, development guidelines and performance monitoring. The first part of a LLUP will provide a simple explanation of the strategic framework that the LLUP is aiming to implement. The operative provisions including zoning, titled Infrastructure and Services, will contain an outline of the infrastructure required for the local government area. LLUPs will be linked closely to the local infrastructure funding plan. LLUP provisions concerned with development guidelines and performance monitoring will incorporate and replace existing development control plans, thereby making development guidelines fully integrated with the statutory planning controls in the LLUP.

The Green Paper also foreshadows the introduction of a number of new zones, two of which are clearly aimed at encouraging investment. The new Enterprise Zone will be characterised by 'very little, if any, development controls' and will allow a broad range of uses to encourage innovation. SDPs will also include a new zone for high priority growth areas within a council area to be known as the Future Urban Release Area zone. This new zone is, however, designed to be an interim zoning which will provide an indication as to a council's intentions without actually committing to an infrastructure investment.

Timing and delivery of the plans

Given the number of levels in the strategic planning and development of new controls, the obvious concern is the time and resources that will be required to implement the new plans. The only hint as to timing in the Green Paper is an indication that SDPs will be given the 'highest priority' within the Department of Planning and Infrastructure, which will be introduced within two years of introduction of the relevant RGP. Unfortunately the timing for introduction of the RGPs is not yet specified.

Development Assessment

In terms of changes to the regime of development assessment, the Green Paper proposes to depoliticise the assessment process, to permit strategically compliant development and to promote a shift in emphasis from merits based assessment to a system of complying development. It also proposes to retain the Planning Assessment Commission (PAC) and to enhance the role of the Joint Regional Planning Panel (JRPP).

The politicisation of the planning system has been a common complaint in recent years. The Green Paper proposes that each council be required to appoint a panel of experts to complete the assessment and determination of development applications that would currently be determined by elected councillors. Essentially, the system of Independent Hearing and Assessment Panels already adopted by a number of councils looks to be given broader application in the new planning system.

Larger regionally significant developments will still be determined by the JRPP but the JRPP will be involved in the assessment of those larger developments also. This is designed to ensure that applicants are made aware of any issues that the JRPP may have (that differ from issues raised by the council) so that they are able to be addressed prior to any meeting for the determination of the development application. It is hoped that the process will be an iterative process delivering good planning outcomes.

State significant development will still be determined by the PAC and it appears that the identification and assessment of state significant infrastructure will be completed in much the same way as it is now.

Critical State Significant Infrastructure is essentially being rebadged as 'Public Priority Infrastructure' and will be determined by the Minister for Planning and Infrastructure. It is proposed that the identification of required infrastructure will be completed as part of the plan making system described above.

A shift to a codes-based assessment system and the development of assessment tracks are key proposed changes. This codes-based system will remove community consultation from the assessment of a lot of development as the scope of permissible development will have already been set as part of the plan making process.

The Green Paper proposes three assessment streams for 'ordinary' development (i.e. development that would be assessed by a council):

- Code Assessment
- Code/Merit Assessment
- Full Merit Assessment.

Code Assessment essentially adopts the complying development system that exists in the current planning system. It is proposed, however, that a lot more development will be code assessable. This continues the trend evident under the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*. If a development complies with the standards in a code, it cannot be refused. It is suggested that code assessable development could be approved in as little as 10 days.

Under the current system, where a development is partially non-compliant with a code, this development would need to undergo a full merits assessment. Under the proposed system, the compliant part of the development may undergo code assessment and only non-compliant parts would be subject to a merits assessment. This brings a degree of flexibility to the otherwise rigid system of complying development. Development assessed under this hybrid code/merit track should be approved within 25 days.

If a development is wholly non-compliant with a code, it will need to undergo a merits assessment much the way it would now. It is expected that this assessment, which will have an element of public consultation, will take 50 days.

The Code Assessment track and Merits Assessment track may also be pursued when a development complies with an SDP but does not comply with an LLUP (such as where the LLUP has not been updated following the amendment of the SDP). An applicant will be able to apply for a Strategic Compliance Certificate which will permit a scheme under the SDP to prevail over the LLUP.

Reviews

The Land and Environment Court

The Green Paper proposes the retention of the Land and Environment Court. It is expected that merit appeals will continue to be available for ordinary development, that there will be some restriction on third party appeals against infrastructure projects, and that there will continue to be open standing for judicial review matters.

New reviews

Review of rezoning decisions will be permitted pre-gateway and at the gateway stage. The pre-gateway review will be completed by the JRPP. The gateway determination reviews will be completed by the Director-General of the Department with the advice of the PAC.

Other proposed changes

Infrastructure funding

The Green Paper contains broad policy statements regarding the re-design of the system for the funding of infrastructure. There is provision for the development of (even more) strategic plans to identify necessary infrastructure. The method of calculating funding is not as developed in the Green Paper however. Further detail will be required to understand how the need for infrastructure will be balanced with other investment considerations to ensure housing affordability is achieved. In addition, it is unclear how transparency can be injected in the current system to account for the calculation, collection and spending of any contributions. The system of voluntary planning agreements also appears to be under threat.

Delivery

The Green Paper proposes to establish a Chief Executive Officer's Group to integrate and drive the implementation of the new planning system under a 'whole of government' approach. Regional Planning Boards will also be established to advise on the making of RGPs and SDPs as well as GIPs.

Environmental Planning and Assessment Amendment Bill 2012 (NSW)

On 24 October 2012, the NSW government introduced a bill to amend the *Environmental Planning and Assessment Act 1979 (NSW)* to facilitate the growth in housing supply by removing some of the impediments that currently exist in the planning system. The primary way the bill sets out to achieve this is by clarifying the purpose, status and content of development control plans (DCPs).

Currently, DCPs present a two-fold problem to the issue of housing supply:

- Court decisions have placed greater importance on DCPs that are applied consistently. As a result, councils have given determinative weight on DCPs when assessing development applications and are less willing to depart from the guidance provided in the DCPs.
- The controls in DCPs are complex and prescriptive and make it hard for projects to comply with the controls.

To address these issues, the bill clarifies that the principal purpose of DCPs is to only provide *guidance* and will serve the purpose of implementing Environmental Planning Instruments (EPIs) (Local Environmental Plans or State Environmental Planning Policies).

Thus, the consent authority is to give less weight and significance to DCP provisions than is given to EPIs and cannot have regard to how those provisions have been applied previously or might be applied in the future.

Furthermore, the bill provides that DCPs will have no effect, to the extent that it is inconsistent or incompatible or is the same or substantially the same as an EPI. The DCP will also have no effect if it prevents or unreasonably restricts development that is otherwise permissible under an EPI.

Overall, the amendments significantly reduce the status and importance of DCPs when it comes to development applications, with more weight to be given to EPIs. Consent authorities will still be able to assess development against their existing DCPs, but now must adopt a more flexible performance-based approach. The Minister has stated that the reforms are not an opportunity for councils to include unnecessary development controls in their local environmental plans (LEPs), or to delay the preparation of their LEPs.

Coastal Protection (Amendment) Act 2012 (NSW)

The *Coastal Protection (Amendment) Act 2012* (NSW), after commencement, will expand the opportunities for landowners to temporarily protect their land. Arrangements are continued whereby a private landowner does not require regulatory approval under the Act or any other law for temporary coastal protection works that comply with the requirements of the Act. This means that landowners will continue to not require development consent under the *Environmental Planning and Assessment Act 1979* (NSW) for those temporary works.

In the past, a landowner could take action only when coastal erosion was imminent or actually occurring. The Act replaces the term 'emergency coastal protection works' with the new term 'temporary coastal protection works', to emphasise that these works should no longer be placed in an emergency, when erosion is occurring on a beach and the impacts of waves mean that can be hazardous to anyone working on a beach. Current restrictions that limit private landowners to placing these works on their land only once, and only for 12 months, will be lifted to give landowners the opportunity to reinstate works if needed.

The Act makes it clear that temporary protection works on private land are no longer required to be authorised by a pre-existing certificate issued by an emergency works authorised officer from council or the Office of Environment and Heritage. Landowners will still need to obtain a certificate for works to be placed on public land. This is to ensure appropriate use of public land for these purposes. The Act makes a number of amendments relating to the use and occupation of public land for placing temporary coastal protection works. Landowners will continue to not require a lease, licence, permit, or an easement or right-of-way when placing these works on private land, provided they meet all of the requirements under the Act. That will ensure that landowners will continue to avoid the need to obtain permission under public land management legislation, including the Crown Lands Act. The Act also continues the current requirement that a certificate allowing the works to be placed on public land cannot be issued unless the issuing authority is satisfied that all reasonable measures have been taken and will be taken to avoid using the public land and to ensure reasonable public access to the beach is maintained.

QUEENSLAND

Dr Justine Bell

Greentape reduction legislation

The Queensland NELR Update in December 2011 discussed the Environmental Protection (Greentape Reduction) and Other Legislation Amendment Bill 2011 (Qld). This legislation was passed on 2 August 2012, introducing a number of streamlining measures.

Temporary State Planning Policy 2/12 – Planning for Prosperity

The Temporary State Planning Policy (TSPP 2/12) came into effect on 24 August 2012. State Planning Policies are an instrument used in Queensland in areas where the state government has an interest. State Planning Policies last for 10 years and require public consultation, whereas Temporary State Planning Policies are an interim measure which only last for one year, and do not require public consultation.

The TSPP 2/12 governs state agencies and local government, and applies to the creation of planning schemes, regional plans, and the designation of land for community infrastructure. It does not apply to an assessment manager's assessment of a development application, or the assessment of a master plan application.

TSPP 2/12 clearly reiterates the Newman Government's commitment to growing the Queensland economy, and the purpose of the TSPP 2/12 is to ensure that economic growth is facilitated by local and state plans, and is not adversely impacted by planning processes. The TSPP seeks to promote economic growth in four main sectors:

- agriculture – by preserving good quality land for food production, protecting it from incompatible development (such as residential), and providing necessary infrastructure
- tourism – by protecting tourism attractions and facilitating tourism projects
- mineral and extractive resources – by preserving these industries, resolving land use conflicts, and providing for development supporting the industry (such as ports)
- construction – by facilitating development and associated infrastructure, removing impediments to land supply, and ensuring an efficient, effective and accountable planning and development system.

In addition, the TSPP seeks to cut the costs of development through planning reform, by providing a more efficient development assessment process.

The TSPP acknowledges that there may be conflicts between facilitating development in these sectors. It encourages conflicts to be resolved at the strategic planning level, but where conflict arises at the decision-making stage of a development application, the decision should give additional weight to:

- agricultural uses in areas zoned for agricultural uses;
- urban uses in areas zoned for urban uses;
- tourist development which can be shown to be complementary to an area's environmental, scenic and cultural values; and
- mineral and extractive resources development which can be shown to be complementary to an area's primary intended land use.

The TSPP will be followed by a permanent State Planning Policy, to commence in 2013. The government has indicated that it intends to use this SPP to replace all of the previous SPPs created over the past 20 years. Although some streamlining of the SPPs would be welcome, it is unclear to what extent the new SPP will address the important environmental issues covered in existing SPPs,

including coastal protection, koala conservation, and wetlands of high ecological significance. Also, it is unclear how the interim TSPP interacts with existing SPPs, as there are likely to be conflicts between them.

Mines Legislation (Streamlining) Amendment Act 2012

The *Mines Legislation (Streamlining) Amendment Act* 2012 was introduced as a bill on 2 August 2012, and was passed, and given royal assent on 29 August 2012. The main objectives of the Act are to clarify the rules regarding compulsory acquisition of land in resource development situations, and to implement part of the Queensland government's Streamlining Approvals Project.

The Streamlining Approvals Project commenced in January 2009 under the Bligh government, with the objective of reducing the time taken to process resource development applications. The *Mines Legislation (Streamlining) Amendment Act 2012* implements some of the recommendations of the project, including measures to introduce common terminology and assessment processes for the key resource legislation in Queensland (the *Mineral Resources Act 1989* (Qld), *Petroleum and Gas (Production and Safety) Act 2004* (Qld), *Petroleum Act 1923*, *Greenhouse Gas Storage Act 2009* (Qld) and *Geothermal Energy Act 2010* (Qld)). It also introduces an online service delivery platform to allow industry to interact with Government.

TASMANIA

by Jessica Feehely and Tom Baxter

Gunns loses legal challenge against pulp mill security for costs

In April 2012, the Supreme Court dismissed an application by Gunns Limited (Gunns) for an order that the Tasmanian Conservation Trust (TCT) provide security for costs in its proceedings alleging that works at the site of the proposed pulp mill are unlawful.[44] Gunns appealed against the decision on a number of grounds, including:

- there was no evidence that TCT would have abandoned the litigation had security for costs been required, which ought to be a determining factor
- in considering the availability of funds to TCT (based on litigation pledges and an undertaking that their current litigation fund would not be used for any other purpose until the matter was finalised) the judge had failed to consider whether there was any certainty that Gunns could recover those funds if successful
- the fact the TCT matter was determined to be a public interest litigation should not immunise the organisation from an obligation to provide security for costs
- the judge had taken an irrelevant matter into account in considering the proportionality of the anticipated costs against Gunns' anticipated profits from the pulp mill.

In August 2012, Blow J dismissed the appeal and awarded costs against Gunns: *Gunns Limited v Tasmanian Conservation Trust Inc* [2012] TASSC 51. His Honour was satisfied that Holt AJ had properly accepted evidence that the litigation fund would be available to meet an order for costs and was aware of the risk that the pledges would not be honoured when making his decision.

Justice Blow held that there was no rule that security for costs must be paid, or that proportionality was irrelevant, unless there is a risk that requiring security will result in discontinuance of the litigation. His Honour was satisfied that Holt AJ had properly considered the public interest nature of the case, along with the potential prejudice to Gunns if no security was given and the fact that the anticipated costs were 0.018% of the anticipated profits from the project, in the range of factors to be balanced in the exercise of his discretion.

Forestry Tasmania to be restructured

A strategic review of Forestry Tasmania commissioned by the Tasmanian Government was released in August 2012. An earlier report by consultants URS identified problems with Forestry Tasmania's financial sustainability and predicted ongoing losses of up to $25m per year for the next five years.[45]

In its Stage 2 report, URS undertook a strategic assessment of three potential models for the government business entity:

- retaining the existing forest management structure (subject to minor procedural changes)
- separating Forestry Tasmania's commercial and non-commercial functions into two separate entities
- transferring Forestry Tasmania's functions to an existing government department.

44 See Associate Judge Holt's decision at <www.austlii.edu.au/au/cases/tas/TASSC/2012/18.html>.

45 URS, Strategic Review of Forestry Tasmania: Stage 1 Report. February 2012 <www.forestrytas.com.au>.

The report recommended the separation option and outlined a process to achieve the restructure by June 2013.[46] The Tasmanian Government has accepted the recommendation and announced that:

- Forestry Tasmania will remain as a GBE responsible for commercial wood production
- most non-commercial functions, including management of reserves, will be transferred to separate Government agencies (principally, the Parks and Wildlife Service). The government will liaise with Forestry Tasmania to determine how and when these functions would be transferred.[47]

Senior executives within Forestry Tasmania were critical of the decision, with a leaked email to staff referring to the restructure as 'a public execution for Forestry Tasmania' and suggested that the Minister for Forests had been 'rolled' by the Greens.[48]

Tasmanian Forests Agreement update

As outlined in the last edition, the Tasmanian Government introduced framework legislation to Parliament on 21 June 2012 to fulfil its commitment under the Tasmanian Forests Agreement to introduce legislation before the end of the financial year. The *Tasmanian Forests Agreement Bill 2012* (the Bill), does not directly create any new reserve areas. Instead, the Bill establishes a process for the proclamation of reserves to accommodate the variety of possible outcomes from the ongoing negotiations. The process established by the Bill involves:

- A Protection Order is to be introduced by the Minister within 6 months of the Act commencing, identifying reserve areas agreed as part of the negotiations. From the date that the Protection Order is passed by both Houses, no forest practices can occur on the land, the land may not be sold and no leases for more than 12 months can be granted without the consent of the Environment Minister. Other existing rights (such as mining leases) are not affected by the Protection Order.
- The Protection Order can be disallowed by either House of Parliament (and the Legislative Council has already indicated that it is unlikely to support the outcome of the forest negotiations).
- Within 12 months of the making of the Protection Order, the Minister may (but is not required to) introduce a Proposed Reserves Order identifying the final reserves proposal. Before introducing the Proposed Reserves Order, the Minister must prepare a 'durability report' assessing the proposed reservations in line with commercial commitments and obtain advice regarding the application of the Carbon Farming Initiative to the proposed reserves.
- If the Proposed Reserves Order is rejected by either House of Parliament, the Minister may introduce another Proposed Reserves Order within a further 12 months. If no further Proposed Reserves Order is made, or if the second Proposed Reserves Order is also rejected, the original Protection Order is revoked.
- If the Proposed Reserves Order is passed by both Houses, the Environment Minister is to determine the formal boundaries of the proposed reserves and the proposed status of the reserved areas under the *Nature Conservation Act 2002*. If the boundaries to be declared differ substantially from those identified in the Proposed Reserves Order, both Houses of Parliament must approve the changes.
- Once declared, the reserves will be managed under the *National Parks and Reserves Management Act 2002*.

The Bill amends the *Nature Conservation Act 2002* to include 'removal of carbon dioxide from the atmosphere and avoided emission of greenhouse gases' as an additional purpose for reserve areas.

The Bill also amends the minimum annual sawlog quota under the *Forestry Act 1920* to 155 00 cubic metres (as set out in the IGA), but provides for the quota to revert to 300 000 cubic metres in the event that the Protection Order or the Proposed Reserves Order fails to pass either House of Parliament.

The Bill is available at <www.parliament.tas.gov.au/bills/pdf/30_of_2012.pdf>.

The Reference Group of Signatories established under the IGA (including forestry and environmental interest groups) have yet to reach a final agreement. However, on 15 August 2012, the group released an *Interim Agreement*

46 URS, Strategic Review of Forestry Tasmania: Stage 2 Report. 10 August 2012 <www.treasury.tas.gov.au>.
47 Minister Bryan Green, press release, 29 August 2012. <www.premier.tas.gov.au/media_room/media_releases/reforms_to_secure_forestry_tasmanias_future>.
48 ABC. 28 August 2012. 'Leaked email reveals Forestry Tas Split'. <www.abc.net.au/news/2012-08-28/leaked-email-reveals-forestry-tas-split/4227572>.

on Tasmanian Forests Wood Supply and Conservation (the *Interim Agreement*)[49], affirming their commitment to the negotiations, outlining an agreed vision for management of Tasmania's forests and identifying shared objectives and those areas where agreement was yet to be reached.

Under the Interim Agreement, the Signatories agreed to a detailed work program to be undertaken before the consideration of the final legislation by the Tasmania Parliament in late September 2012. The program included:

- implementation of a Voluntary Industry Restructure program (including support for voluntary exit by sawmillers and buyback of contracts)
- ongoing detailed modelling and rescheduling work by Forestry Tasmania and independent experts
- finalisation of additional durability mechanisms and exploration of options for utilisation of forest residues.

Despite this commitment, the Forest Industries Association of Tasmania suspended its involvement in the negotiations in protest over the announcement of plans to restructure Forestry Tasmania (discussed above), and has yet to rejoin the talks. The Tasmanian Aboriginal Centre has also opposed moves to transfer management responsibility for forest reserve areas to government agencies.

Amendments proposed to streamline heritage works approvals

Legislation was introduced to parliament in late August to clarify the criteria for entry of places into the Tasmanian Heritage Register, and to introduce a more integrated process for the assessment of developments affecting heritage places.[50]

Currently heritage works require both a planning approval from the local council, and a works approval from the Tasmanian Heritage Council. The proposed legislation provides for one heritage works permit to be granted by the planning authority, following consultation with the Tasmanian Heritage Council. A planning authority is bound to refuse an application if the Heritage Council recommends refusal.

The proposed legislation also imposes significantly higher fines for breaches of permit conditions relating to heritage works.

Interim Aboriginal Heritage Council to be established

Efforts to update Tasmanian Aboriginal heritage legislation have been ongoing for over six years, but appear to be close to finalization with a discussion paper expected to be released before the end of 2012. In preparation for the new Aboriginal heritage legislation, the Heritage Minister announced the establishment of an interim Aboriginal Heritage Council to provide him with advice and recommendations on Aboriginal heritage matters.

The Interim Council is expected to be a trial to determine the best structure for such an advisory body to facilitate a stronger role for the Aboriginal community in the protection and management of Aboriginal heritage.

Expressions of interest for the Chairperson and members of the interim council closed in September, and appointments are likely to be made soon.[51]

Forest Carbon Study released

The Tasmanian Forest Carbon Study final report was released on 6 September 2012. The report, commissioned by the Tasmanian Government, provides a comprehensive analysis of carbon stocks in Tasmania's forests. Using a custom-built 'Forest Carbon Modelling Framework' the report estimates carbon stocks to be between 3 000 and 4 400Mt CO_2e across all forest types and land tenures. Over 95% of the carbon is stored in native forests, including live vegetation, debris and in soil.

The Study is intended to assist landowners and the Tasmanian and local governments to evaluate the impacts of changes in forest and land management practices. The report compared a business-as-usual baseline with a number of scenarios, including complete cessation of native forest harvesting, reservation in accordance with the IGA commitments, regenerating native forest areas, increased conversion to plantations and introducing longer rotation lengths for existing plantations. The Study took into account a range of bushfire and climate change scenarios.

49 Available at <www.forestsagreement.tas.gov.au/wpcontent/uploads/2012/08/Signatory_Interim_Agreement_2012_08_15-Final1.pdf>.

50 The *Historic Cultural Heritage Amendment Bill 2012* and the *Land Use Planning and Approval (Historic Cultural Heritage) Amendment Bill 2012* are available at <www.parliament.tas.gov.au/bills/pdf/33_of_2012.pdf> and <www.parliament.tas.gov.au/bills/pdf/34_of_2012.pdf>.

51 See <www.aboriginalheritage.tas.gov.au/Pages/Interim-Aboriginal-Heritage-Council.aspx> for more information.

Having regard to current and predicted carbon stocks, the Study outlines potential market opportunities for carbon sequestration and avoided emissions. The report estimates the current value of Tasmania's carbon stocks under voluntary markets as $3b, but noted that this did not take into account opportunity costs of reduced forestry activities. The report also noted that the estimated value could increase by a factor of 10 if commitments were made under Kyoto Protocol Article 3.4 to recognise carbon credits generated by activities relating to agricultural soil, land use changes and forest practices. The Tasmanian Forest Carbon Study is available at <www.dpac.tas.gov.au>.

Opposition to hazardous waste dump

Community opposition is mounting after Tasmania's first hazardous waste facility received approval in July 2012. Currently, there is no approved facility for hazardous waste in the state, with materials being transported interstate for disposal. The Category C facility, proposed by joint council authority, Southern Waste Solutions, was intended to receive hazardous materials and address legacy waste issues, including lead paint residues, contaminated soil and jarosite (a by-product of zinc production comprising various heavy metals).

The proposal received approval from the Environment Protection Authority and Sorell Council under the statutory approval process, having received only two representations during the public comment period. However, wider awareness of the proposal came when an article appeared in the *Mercury* newspaper after approval was granted. Local community members have since mobilized active opposition to the proposal.

Zinc producer, Nyrstar, has indicated that it no longer intends to dump its jarosite waste at the site, and Southern Waste Solutions has stated that Nyrstar's decision could jeopardise the business case for the proposal.

Southern Waste Solutions has conceded that more public consultation could have been done, and has announced that it will suspend work on the facility for one month to give the community an opportunity to raise concerns regarding the proposal. However, the authority has resisted calls from the community to relinquish the permit, stating that it is hopeful that community concerns can be addressed through amendments to management conditions.

Animal Welfare Act to be reviewed

A discussion paper on the review of the Animal Welfare Act 1993 is available for public comment until 16 November 2012. The discussion paper outlines a range of possible amendments to enhance investigation and enforcement powers of authorised officers and to clarify offence provisions. The discussion paper also proposes imposing significantly higher penalties for cruelty offences as a deterrent measure and to reflect the seriousness of such crimes. The discussion paper is available at <www.dpipwe.tas.gov.au>.

Whale Watching Guidelines to be applied in Tasmania

Earlier in 2012, deficiencies in Tasmania's *Whale Protection Act 1988* were identified when two people who had driven jet skis around a pod of dolphins were unable to be successfully prosecuted. Minor amendments to the legislation passed in August 2012 will allow regulations to be made to manage human interactions with whales and dolphins. The amendments create the legislative capacity needed to implement the National Guidelines on Whale and Dolphin Watching in Tasmania.

VICTORIA
by Barnaby McIlrath and Felicity Millner

Review of Native Vegetation Management Framework

The Department of Sustainability and Environment released a consultation paper in September 2012 entitled *Future directions for native vegetation in Victoria*, proposing reform of Victoria's Native Vegetation Management Framework (NVMF). The NVMF was introduced in 2002 as the principal policy for managing Victoria's native vegetation, including the removal of native vegetation.

In recognition that the NVMF has not led to a 'net gain' in the extent of vegetation, and that losses are still occurring across the landscape, one of the paper's key recommendations is that the state clarify the 'no net loss' objective for permitted clearing.

The paper identifies a number of priority areas for reform of the current system, including that the Victorian Government:

- clarify and amend the objective for permitted clearing in the state
- improve how the biodiversity value of native vegetation is defined and measured
- ensure offsets provide appropriate compensation for the environment.

The paper also proposes a better coordinated approach to state and local government regulatory and planning roles in order to facilitate better regulatory performance in relation to the NVMF.

The consultation paper can be found at <www.dse.vic.gov.au/land-management/land/native-vegetation-home>.

New invasive species laws?

The Department of Primary Industries (DPI) released a discussion paper in late August 2012 regarding the development of a new stand-alone invasive species management Bill to replace the noxious weeds and pest animals provisions of the *Catchment and Land Protection Act 1994* (Vic).

The discussion paper provides a framework for the management of the risks posed by invasive species to Victoria's economy, communities and environment. DPI's stated objective for the project is to develop an effective Invasive Species Management Act that is in accordance with the Biosecurity Strategy for Victoria and the Invasive Plants and Animals Policy Framework.

The paper proposes the creation of a number of legislative instruments, in addition to the Invasive Species Management Act, including:

- 'Management Plans' to be used in relation to established or widespread invasive species or suites of species
- control orders used to declare an area for control and to specify the prohibitions
- industry funding schemes to help industry manage the threat of invasive species

The consultation period for the discussion paper closed on 5 October 2012. It is anticipated that a further round of public consultation will take place before an Invasive Species Management Bill is drafted. The discussion paper can be found at <www.fga.net.au/secure/downloadfile.asp?fileid=108621>

Contaminated Environments Discussion Paper

EPA Victoria released a Contaminated Environments Discussion paper in July 2012. The discussion paper can be found at <www.epa.vic.gov.au/en/our-work/publications/publication/2012/july/1462>.

This paper, along with further submissions relating to the paper received during the consultation process in July/August 2012, will be used to inform EPA's approach to managing contaminated environments over the next four years through EPA's Contaminated Environments Strategy.

'Streamlining' Victorian forestry legislation

The Department of Primary Industries (DPI) has announced a review of the *Sustainable Forests (Timber) Act 2004* (Vic) (the Act). The legislation regulates the way the state logging agency – VicForests – carries out logging in native forests. DPI has released a draft report detailing the proposed changes to the Act, including:

- the amendment of the objects of the Act to add two new objects: to 'enable long term access to timber resources in state forests for timber production' and 'to provide mechanisms that ensure resource security for timber production'
- streamlining the process by which the government allocates forests to VicForests for logging, by making the allocation unlimited in time, and removing any conditions on the allocation
- removing the need for Governmental approval of Timber Release Plans, which set out in detail the areas of forests that VicForest plans to log
- removing the need for logging operators to hold a Timber Harvesting Operators Licence.

DPI expects to present the final report to the Minister for Agriculture and Food Security in late 2012.

The draft report can be found at <www.dpi.vic.gov.au/forestry/about-forestry/projects-and-initiatives/review-of-the-sustainable-forests-timber-act-2004>.

Planning and Environment Amendment (VicSmart Planning Assessment) Act 2012

The *Planning and Environment Amendment (VicSmart Planning Assessment) Act 2012* (the Act) received assent on 18 September 2012. The Act amends the *Planning and Environment Act 1987* to introduce a new assessment process for specified permit applications. As the explanatory

memorandum attached to the original bill explains, '[t]he new assessment process will reduce the time taken to consider and decide straightforward, low impact permit applications'. The Act enables a new assessment process to be set up in planning schemes that will set out the operational aspects of the new process. The Act will come into operation on 20 May 2013 if not earlier proclaimed.

In summary, the Act provides:

- for a different set of procedures for particular classes of applications for planning permits
- exemptions for some applications from Requests for Further Information for specified classes of application
- removes certain 'exempted matters' from the purview of Responsible Authority decisions and Tribunal review for specified classes of application.

Planning zones reform

The Minister for Planning, the Hon Matthew Guy MLC, has announced proposals for sweeping changes to Victoria's planning zones. The changes include creating new residential zones to distinguish between low-density and high-density areas, and allowing more types of development (including agriculture) in Green Wedge zones.

WESTERN AUSTRALIA

by Joe Freeman, Ainsley Reid and Anthony Graham

Browse LNG EPA report –244 appeals lodged

On 16 July 2012, the Environmental Protection Authority (EPA) released its report on the Browse liquefied natural gas (LNG) precinct at James Price Point, recommending that the West Australian Minister for Environment approve the proposal, subject to strict conditions. The EPA Report was finalised by a sole person, after the four of the five EPA board members declared conflicts of interest and abstained from the assessment. During the EPA Report's two week appeals period, 244 appeals were received against the EPA's recommendations. Appeals against EPA Reports generally take six weeks for the Appeals Committee to resolve, although this can take longer in the case of more complex matters. During the process the identities of appellants and their grounds are revealed only to the proponent and relevant agencies. Once finalised, a report outlining the details of each appeal, including the names of the appellants and a summary of the nature and grounds of the appeals, is made available.

An unsuccessful challenge to a Shire of Broome Local Interim Development Order, related to the Browse LNG development: *Hunter v The Minister for Planning* [2012] WASC 247, is discussed in the casenotes section.

Outcome of appeals lodged against the EPA report on Toro Energy's Wiluna uranium project

The Minister for Environment has finalised his determination in respect of the nine appeals that were lodged against the EPA's recommendation that he approve Toro Energy's Wiluna uranium project, subject to certain conditions. The appeal determination, released on 19 September 2012, states that the appeals were allowed in part, but only to the extent the conditions originally recommended by the EPA were amended as recommended by the Appeals Committee. The determination stated that the Minister was satisfied that the regulation of uranium mining in Western Australia could be adequately managed by the Department of Mines and Petroleum (DMP), the Department of Environment and Conservation (DEC) and the Radiological Council of WA, subject to improved coordination and understanding between agencies. The Minister is still required to make a final determination on the project and, if this is granted, the proposal will also require federal environmental approval under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) before it can proceed.

Margaret River coal exploration banned

The West Australian Minister for Mines has effectively prevented all future coal mining in the Margaret River region. In July 2012 the Minister made the decision to cancel all pending applications for coal exploration activities within a zone of 230km^2 around the Margaret River township. Pursuant to the *Mining Act 1978* (WA), the Minister is able to terminate or refuse applications where he is satisfied that it is in the public interest to do so. The Minister's decision was made based on advice that had previously been received from WA's EPA that coal mining in the region presented an 'unacceptable environmental risk'. That EPA advice had been the basis for the government's rejection earlier in the year of a Vasse Coal Management Pty Ltd proposal to mine in the area.

Lead shipments to resume from Magellan Metals' Wiluna mine

The Minister for Environment has allowed Magellan Metals to recommence transporting lead carbonate concentrate through Fremantle Port from its operations in Wiluna. Magellan Metals had ceased its operations at Wiluna, and the transportation of lead concentrate through Fremantle Port, in April 2011 following concern over lead levels, and several breaches of transportation conditions. The company has been permitted to recommence transporting to the port under strict conditions which require it to test for lead carbonate concentrate along the transport route, transport lead in sealed bulk bags inside steel shipping containers, and allow audits of operations to be conducted by an independent third party.

The green-light to transport lead to Fremantle Port comes as the Western Australian (WA) Government project to clean up the Esperance township, which was contaminated by lead carbonate dust originally transported from Magellan Metals' mine in 2007, has been completed and satisfactorily audited. The clean-up cost $25.7m, took three years, and involved the cleaning of 1 775 homes and other buildings. The Minister for Transport, the Hon Troy Buswell, said the project was the state's biggest-ever environmental clean-up.

Mining Rehabilitation Fund

The West Australian Government is set to overhaul its mining securities system with the creation of its Mining Rehabilitation Fund (MRF). Rather than the previous mine rehabilitation system whereby bonds were lodged against mining tenements and drawn upon where an operator did not meet its environmental obligations, tenement holders would be required to make annual contributions to the MRF based on a percentage of the holder's total closure liabilities – then, similarly, the MRF would be drawn upon where an operator has not met its obligations in respect of mine rehabilitation. At the discretion of the Department of Mines and Petroleum some operations (for example, those that are high-risk) would still be required to lodge bonds. The MRF has been introduced to mitigate concerns that the mining bonds system left it too exposed to the cost of rehabilitating the state's abandoned mines. The Mining Rehabilitation Fund Bill 2012 is currently being considered by the Parliament and, if passed, is expected to establish the MRF by 1 July 2013.

Western Australia's 20-year strategic energy initiative blueprint

The West Australian Government has released *Energy2031*, a long-term development strategy for the state's energy sector. The strategic energy initiative is based around five 'pathways' that lead toward an energy vision based on affordable, secure, reliable and cleaner energy. Those pathways are:

- diverse and secure energy supply
- pro-active energy planning
- effective and efficient energy delivery
- informed and responsible energy use
- capacity building.

Energy2031 was developed through consultation with industry, government and community.

New unconventional gas regulations for Western Australia

Under new WA regulations companies will be required to publicly disclose any chemicals they introduce into wells and formations in petroleum exploration and production activities. The new regulations will have particular impact on operators engaging in the process known as 'fracking', which involves injecting chemicals, water and other materials into wells to release unconventional gases. The information that is disclosed by companies pursuant to the new regulations will be published on DMP's website. The new regulations also increase operator obligations in respect of their Environment Plans, by including requirements that operators provide regular reports of their performance against objectives contained in their Environment Plan and that Environmental Plans be revised every five years.

BHP sells WA uranium asset

BHP Billiton has sold its Yeelirrie uranium mine to Canadian miner Cameco Corp for US$430m. Located approximately 650km northeast of Perth, the mine is one of Australia's largest undeveloped uranium deposits. The sale of the mine remains subject to approval from the Foreign Investment Review Board and the WA Government.

Marina development at Point Grey given environmental approval

A new 300-berth marina and channel has been given conditional environmental approval to be developed at Point Grey, Western Australia, south of Perth. The proposed marina and channel would be located on the western front of Point Grey peninsula, which separates the Peel Inlet and Harvey Estuary – sites protected under the Ramsar Convention.[52] In providing his approval, the Minister for Environment imposed strict conditions on the construction and operation of the proposed marina, including measures to protect the local environment, and restrictions on dredging of the channel, limiting operations to the winter and spring months to avoid the breeding times of particular local animal species.

Draft Forest Management Plan 2014–23 for south-west WA

The Conservation Commission of Western Australia has released a draft *Forest Management Plan 2014—23* for 2.5 million hectares of forest between Lancelin, north of Perth, and Denmark, in the south-west of the state. The plan is structured around the five principles of ecologically sustainable forest management, which the Conservation Commission is to advise the Minister for Environment on the application of, described in the *Conservation and Land Management Act 1984* (WA):

- that the decision-making process should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations
- that if there are threats of serious or irreversible environmental damage, the lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation
- that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations
- that the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making
- that improved valuation, pricing and incentive mechanisms should be promoted.

The plan will be available for public consultation for 12 weeks, ending in November 2012.

Jail term in land clearing case upheld

Farmer Maxwell Szulc will return to prison following an unsuccessful appeal against contempt of court findings in the WA Court of Appeal. Mr Szulc was convicted by the Supreme Court on two counts of contempt of court in November 2011 for breaching interim clearing injunctions (issued under the *Environmental Protection Act 1986* (WA)) that restrained him from clearing native vegetation on his property. Mr Szulc had previously been jailed for three months in 2010 for a similar finding of contempt of court.

52 The Convention on Wetlands of International Importance, especially as Waterfowl Habitat, opened for signature 2 February 1971, [1975] ATS 48 (entered into force 21 December1975).

Queensland

Peabody West Burton Pty Ltd & Ors v Mason & Ors [2012] QLC 0023

by Dr Justine Bell

This is the first case concerned with compensation for land access under the *Mineral Resources Act 1989* (Qld) (MRA). Under the MRA, the holder of an exploration permit can enter private land to carry out authorised activities, but must first enter into a conduct and compensation agreement with the landholder. Under the agreement, the landholder must be compensated for several impacts, including deprivation of possession of land surface, diminution of value, and diminution of use of the land. If the parties are unable to agree of the terms of a conduct and compensation agreement, then the matter may be referred to the Land Court for determination.

In this case, the applicants sought to undertake drilling on the landholder's property, which is used for pastoral activities. The drilling would be carried out over several weeks. The parties disputed whether compensation was payable for 'diminution of value'. The respondents argued that the drilling activities would cause prospective purchasers to perceive a risk which would reduce land value, due to a perception that there are likely to be coal deposits under the land. This risk was heightened by the existence of heavy mining activities around the land, and significant government investment in mining-related infrastructure in the area.

Ultimately, Member Smith of the Land Court was not convinced that the drilling activities would result in a diminution in the value of the land. The respondents could not establish a link between diminution of value and the actual exploration activities – the argued diminution related to prospective activities. The range of circumstances in which drilling activities would cause diminution of value are narrower than contemplated by the respondent, with Member Smith noting that:

> In my view, it is easy to conceive of circumstances where the activities undertaken under an EPC [exploration permit for coal] may lead to a diminution in value of the land. One example springs readily to mind. I am of course speaking hypothetically, but if during the course of drilling activities an explorer inadvertently caused a fracture in an aquifer which was the major source of water supply for the subject property, and as a result of that fracture the capacity of that aquifer to hold water was severely diminished, then I would have no doubt that such hypothetical exploration activities would cause an actual diminution in the value of the subject land.

The respondents were awarded compensation for deprivation of possession of the surface of the land, diminution of use of the land, and other costs, totaling $3220.

Brisbane City Council v Brywell Pty Ltd and others [2012] QPEC 49

by Dr Justine Bell

This case considered when indemnity costs will be payable in the Queensland Planning and Environment Court. The second respondent was a building certifier employed by the first respondent and engaged by the third respondent to certify building work in relation to a proposed development. Under the *Building Act 1975* (Qld), a certifier must not grant this approval unless they are satisfied that the relevant approvals under the *Sustainable Planning Act 2009* (Qld) have been obtained. The applicant brought proceedings against the second respondent alleging that they had contravened this provision, but proceedings were ultimately dismissed on a technicality.

Later, the applicant brought proceedings under the *Sustainable Planning Act*, alleging that the respondents had carried out assessable development without a permit. The respondents sought a strike out application, as they had not carried out any 'development' within the definition under the *Sustainable Planning Act*. The applicants eventually agreed to the strike out order, and agreed to pay costs. However, the respondents sought indemnity costs, which the applicants did not agree to.

Under the *Sustainable Planning Act*, each party must bear the party's own costs of proceedings, except in certain circumstances, including where a part of the proceeding is frivolous and vexatious. In these circumstances, the Court can award costs. Andrew DCJ noted that the *Sustainable Planning Act* does not indicate a preference for these costs to be awarded on a standard or on an indemnity basis, leaving discretion to the Court. In an earlier case of *Copley v. The Logan City Council and Anor (No 2)* [2012] QPEC 43, the Court had elected not to award indemnity costs, but Andrews DCJ distinguished that case, as it involved an inexperienced litigant, and did not involve allegation of an offence.

Andrews DCJ noted that:

> the pleader is an experienced litigant, the Brisbane City Council. The circumstances under which the Brisbane City Council made its allegations were such that I conclude it had ample time to consider the statutory basis for making its allegations. It had commenced in the Magistrates Court on a sound statutory footing. When electing a year later to pursue the first and second respondents on another basis it undoubtedly had some onus to consider the reasonableness of that basis and it had the expertise to do so: [21]

Additionally, alleging an offence against a party is a serious matter, and an experienced litigant like the Council had an obligation to consider properly whether to bring proceedings.

Ultimately, Andrews DCJ distinguished this case from *Copley* because this case involved an experienced litigant, and an offence. In this case, indemnity costs were awarded.

South Australia

Reffold v Development Assessment Commission (No 2) [2012] SAERDC 52

by Joanna Oborne

This decision concerned an appeal against a decision of the Development Assessment Commission (the DAC) to refuse to extend the life of a development approval for a cabin park at Andamooka.

When determining whether to grant an extension, the Environment Resources and Development Court has regard to:

- the length of the appellant's delay in applying for the extension
- the reasons for the delay
- whether the applicant has pursued a development approval with diligence
- whether there has been a change to the Development Plan or the planning legislation
- any prejudice likely to be suffered by the grant or refusal to extend the period
- any other factors appropriate to the circumstances.

In this case, the appellant argued that the fact that the DAC had extended the life of three other development approvals in the same policy area within the relevant Development Plan for similar developments was a sufficient ground for the Court to overturn the DAC's decision and allow the extension. The Court found that inconsistent decision-making was a relevant factor to be taken into account when determining the matter.

The Court determined that, on the evidence before it, there appeared to be little to distinguish two of these other development approvals from the appellant's, and that it appeared that the DAC had made an inconsistent decision in refusing to extend the life of the appellant's development approval. However, there was insufficient evidence before the Court to satisfy it that the DAC had made an inconsistent decision, and the Court acknowledged that there was likely to be other information relevant to the appellant's proposed development, on which the DAC based its decision, which distinguished the appellant's application for an extension of time from the other three approvals.

The Court determined that, whilst the existence of the other extended approvals was a relevant consideration, they can be only of limited weight in the Court's overall determination.

Ultimately, the Court upheld the DAC's decision to refuse to extend the life of the development approval.

Victoria

Shell Company of Australia v Hobsons Bay CC & Ors (includes summary) (Red Dot) [2012] VCAT 1184

by Felicity Millner and Tom Dreyfus

These proceedings concerned an application by the Shell Company of Australia (Shell) to review the decision of the responsible authority to allow for the construction of three double storey dwellings opposite Shell's fuel storage facility at Newport, in Melbourne's inner-West. Shell's facility is listed as a 'major hazard facility' as defined under the *Occupational Health and Safety Regulations 2007*.

The responsible authority issued a notice of decision to grant a permit allowing for the demolition of an existing dwelling at Newport and the construction of three townhouses directly opposite Shell's facility.

The decision to grant a permit was made notwithstanding the recommendations of both WorkSafe and the Environment Protection Authority (EPA), to which the responsible authority had referred the application, both of which had counselled against granting the permit. The responsible authority took the view that as neither the EPA nor WorkSafe were referral authorities under the applicable Hobsons Bay Planning Scheme, their recommendations need not be considered.

The application to review the responsible authority's decision was made under s 82 of the *Planning and Environment Act 1987* (Vic).

In making its decision, the Tribunal set out to consider two issues in particular:

- whether or not the EPA recommended buffer distance requirements should be considered
- whether a permit should be issued to develop additional dwellings on a site in close proximity to a Major Hazard Facility.

The Tribunal determined that the proximity of the proposed dwellings to a 'major hazard facility' accompanied by an increase of two dwellings on the land in a residential zone was unacceptable.

In finding in favour of Shell, the Tribunal concluded that permitting the construction of the dwellings would introduce a 'very small increased marginal societal risk' [35] and that such a decision may 'set a precedent for similar developments in the area' [36].

The Tribunal considered the EPA document *Recommended Buffer Distances for Industrial Residual Air Emissions, AQ 2/86,* which was a reference document in the planning scheme to be an important source for guidance. AQ 2/86 recommends a buffer distance of 300 metres for fixed roof tanks, of which there are a number at the Shell facility, and sensitive uses such as the review site. The review site is well within the 300 metre buffer distance, however so are other dwellings already built in the surrounding area.

The Tribunal did not consider the existence of other dwellings in breach of AQ 2/86 to be a reason to disregard the document entirely. Rather, the Tribunal reasoned that as AQ 2/86 states that sensitive use development should not proceed unless site-specific variation of the recommended distance is approved by EPA, and given that the EPA approved no such variation, the Responsible Authority must give some weight to the EPA's recommendation.

The Tribunal sought to avoid the 'tyranny of small decisions' scenario, where a series of small decisions avoiding small changes beyond the current situation prevent the implementation of a policy.

Western Australia

Hunter v The Minister for Planning [2012] WASC 247

by Joe Freeman and Ainsley Reid

Mr Richard Hunter, a Goolarabooloo Law Boss, has failed in a Supreme Court challenge made in relation to amendments made by the Minister for Planning to a Shire of Broome Local Interim Development Order, related to the Browse LNG development.

In *Hunter v The Minister for Planning* [2012] WASC 247 Mr Hunter submitted that the Minister had made the amendments beyond power for an improper purpose, arguing that the amendments were made to thwart proceedings he had on foot (against the Shire of Broome, Woodside Energy and the Kimberley Joint Development Assessment Panel) in relation to the Woodside Petroleum LNG development proposed for James Price Point. The amendments made by the Minister would allow for the development to continue irrespective of the outcome of Mr Hunter's other litigation. Chief Justice Martin refused to grant the order on the basis that no evidence could support an inference that the amendment was made for any reason other than the regulation of the development of the land at James Price Point.

NELA submission on the Council of Australian Governments' (COAG) 'green tape reduction' reforms

by Amanda Cornwall[1] and Sarah Waddell[2]

NELA is particularly interested in the reforms to streamline environmental assessment and approvals. NELA welcomes COAG's commitment to maintain high environmental standards, and the Commonwealth's policy of not altering the existing levels of environmental protection in the *Environment Protection Biodiversity Conservation Act 1999* (EPBC Act).[3] NELA would, in fact, support extending the matters to which the EPBC Act applies.

Drivers for the reforms

NELA is concerned that the drivers for the reforms are to favour development over protecting the environment, not just to improve the administration of environmental regulation. The Business Council of Australia's submission to COAG[4] clearly targets the cost of substantive obligations to conduct environmental impact assessments and comply with conditions, not just the administrative costs of demonstrating compliance, referred to as 'red tape'. At the same time the Victorian, New South Wales and Queensland governments have recently flagged plans to significantly relax the native vegetation clearing controls and review planning laws. The Queensland Premier took the message further by calling on the Commonwealth to delegate its powers under the EPBC Act to the states, and to 'get out of the way' so they can compete with other states for development.[5]

NELA supports Australian governments doing more to improve the administration of environmental laws and putting more effort into monitoring and enforcement. We support the Commonwealth Government taking a leadership role in developing national standards and a streamlined national approach to environmental impact assessment. But NELA does not support the Commonwealth delegating its approvals powers under the EPBC Act to the states and territories.

Commonwealth accreditation of state and territory impact assessment processes

Despite the Commonwealth having entered into bilateral agreements with all the states and territories to accredit environmental impact assessment processes, proponents and governments have not often used the accreditation process. We understand the Commonwealth has proceeded to establish administrative arrangements with each state and territory to implement the COAG commitment to ensure state and territory accredited processes will be used more often. We are told the arrangements will make it clearer to the states and territories what the Commonwealth expects of them under the bilateral accreditation agreements. In doing so, it appears the Commonwealth is addressing a suggestion made by the Independent Review of the EPBC Act (the Hawke Review) (2.30).[6]

Many submissions to the Hawke Review described accreditation of state and territory assessment processes through bilateral agreements as encouraging accreditation of the process that was the 'lowest common denominator', or a 'race to the bottom' (2.25). NELA urges the Commonwealth to address the risk of environment impact assessments by states and territories being of lower quality than those assessed by the Commonwealth by providing active oversight.

1 NELA President

2 NELA Executive member. This submission was prepared in response to a consultation paper prepared by the Council of Australian Governments (COAG's) Taskforce for stakeholder meetings in June and July 2012. Several members of a NELA Executive Working Group contributed to the submission.

3 Council of Australian Governments, *Communiqué*: *13 April 2012 Meeting*, Canberra <www.coag.gov.au/>

4 Business Council of Australia, *Discussion Paper for the COAG Business Advisory Forum*, 12 April 2012 <www.bca.com.au/Content/101966.aspx>

5 'Get out of the way Gillard: Newman', *Brisbane Times*, 12 April 2012 <www.brisbanetimes.com.au/queensland/get-out-of-the-way-gillard-newman-20120412-1wvzq.html>

6 Dr Allan Hawke AC, *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (2009) <www.environment.gov.au/epbc/review/publications/final-report.html>.

NELA supports the Commonwealth Minister actively exercising the obligations under the EPBC Act when deciding whether or not to approve a development that has been assessed under an accredited process. The Act requires the Minister to be satisfied that the accredited process will ensure relevant impacts are adequately assessed, and receiving a report of the outcome of the process that provides enough information to make an informed decision on whether or not to approve the development (s.87(4)).

We support the Minister publishing reasons for these decisions to publicly confirm that s/he is satisfied with assessment processes carried out by a state or territory.

Approval bilateral agreements

The Commonwealth has rarely used the option of accrediting a state or territory management plan or authorisation process ('approval processes') available under the EPBC Act (s46). COAG has now committed to develop bilateral arrangements to accredit state approval processes, with the frameworks to be agreed by December 2012, and agreements finalised by March 2013.

When accrediting an approval process the Commonwealth Minister must be satisfied that there is (or will be) adequate assessment of the impacts of actions on the matters protected, and the approved actions will not have unacceptable or unsustainable impacts on a matter protected, and it meets criteria specified in the regulations. The regulations require the Minister to be satisfied that the approval process is subject to public consultation and covers a range of matters including assessing impacts, identifying risks, and the decision maker taking into account the precautionary principle as well as setting out enforceable conditions, monitoring, reporting and auditing requirements.[7]

NELA views with alarm any proposal that amounts to a hasty transfer by the Commonwealth of any of its powers of approval under the EPBC Act to the states, and an associated withdrawal of the Commonwealth from environment regulation.

NELA wants to see the Commonwealth lead a package of reforms to deliver national environmental standards by reviewing state and territory processes with the aim of improving outcomes for the environment.

We are concerned about the short time frame for developing the bilateral agreements to accredit state approval processes because it leaves too little time for a critical analysis of those arrangements.

We strongly support the Department of Sustainability, Environment, Water, Population and Communities improving its compliance monitoring and auditing program and its enforcement functions along with taking an active role in assessment and approval.

NELA is particularly concerned that under state and territory approval processes the Minister for Planning is the determining authority, a portfolio with very different political and statutory considerations to the environment portfolio. The state/territory Minister for the Environment usually only has a concurrence or consultation role in the development approval process. We strongly believe that any accreditation arrangement must address the potential for a reasonable apprehension of bias on the part of the relevant state Minister, or where the relevant state government has an established policy position in relation to a particular development proposal.

The accreditation arrangements must also address circumstances where a state Minister is giving or refusing an approval under the EPBC Act when the state or territory policy is at odds with Commonwealth Government. Environmental approvals are inherently controversial and political.

For these reasons it is critical that the Commonwealth Minister remain actively involved in approval decisions by state and territory Ministers. NELA urges the Commonwealth Minister for Environment to maintain active oversight of accredited approvals and to exercise the power to suspend or cancel a bilateral agreement if there is a breach (as provided in Part 5, division 3 EPBC Act).

Increased use of strategic assessment

The COAG Communiqué from its meeting of 19 August 2011 recognised the role of greater use of regional planning and strategic impact assessments (SIA) as part of the reform of environmental regulation.[8] NELA agrees. We are of the view that SIA can lead to better decision making for sustainable development if done in accordance with international best practice.

SIAs provide the mechanism for the Commonwealth to approve classes of development at regional or landscape

7 Section 46(3)(a) and *Environment Protection Biodiversity Conservation Regulations 2000* Part 2B.

8 Council of Australian Governments, *Communiqué: Meeting 19 August 2011* <www.coag.gov.au/>

scale, assessing cumulative impacts rather than conducting individual project assessments and approvals. Spatial planning maps, ecological surveys and similar instruments identify the matter to be protected, and a joint agreement specifies who will be the approval authority for each relevant decision and the high level conditions for development to proceed. Having determined the framework for development, project-level regulation is left to the states, provided they adhere to the federal ground rules.

All states and the Australian Capital Territory have undertaken or are developing at least one joint SIA under the EPBC Act. They have been used for mining, urban development and infrastructure developments on a large scale. Each SIA has involved a complex process of documenting the necessary steps, what is to be done and how, and who is the appropriate decision maker at the state level. Achieving the goals of cumulative impact assessment, greater certainty for developers and improved environmental outcomes has been challenging for all concerned, but many lessons have been learned.

NELA has taken a particular interest in the emerging practice of SIA in Australia and many of our members have worked on the various SIAs. NELA held a forum on Developments in strategic impact assessments in May 2012, which focussed on the lessons from the SIA for Melbourne's Urban Growth boundary, global practice and challenges of current SIAs in Australia, particularly those for the Great Barrier Reef Marine Park. The speakers said the practice of SIA is in an early stage in Australia and many aspects need to be ironed out before it is to gain widespread support. The presentations to the forum are available at <www.nela.org.au>.

National environment risk and outcomes based standards

According to the COAG Communiqué of 13 April 2012 COAG plans to agree national environment risk and outcomes based standards to support the bilateral assessment and approval agreements by December 2012. NELA is concerned about the short time frames envisaged for developing national standards. Environmental assessment and approval regimes vary between states and territories and in some jurisdictions, such as the ACT, the strategic impact assessment provisions are far better than those in the EPBC Act; in others assessment provisions are not as rigorous or transparent as under the EPBC Act. Some states have no equivalent protection of threatened or listed species as under the EPBC Act. Any standardisation process will take time and NELA is concerned about the short timeframe committed.

NELA supports an amendment to the EPBC Act to provide a head of power for the national standards so that they have a statutory basis.

NELA looks forward to the opportunity to comment on draft standards.

Monitoring and performance audit power

NELA supports the Commonwealth undertaking performance auditing of both assessment and approval bilateral agreements, as recommended by the Hawke Review.

NELA also supports the Commonwealth having a monitoring and performance audit power to ensure the accredited process is achieving the outcomes expected, as recommended by the Hawke Review, and specified performance audit criteria for the accredited system before approval is granted.

Future consultation

NELA would like to actively contribute to the government's work on the reforms and we would appreciate the opportunity to participate in future consultation meetings.

If you wish to discuss matters raised in this letter please contact:

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In defence of environmental laws: ANEDO and COAG's environmental reform agenda

by Rachel Walmsley[1] and Elizabeth McKinnon[2]

Our environment is a national issue requiring national leadership and action at all levels …

> The prognosis for the environment at a national level is highly dependent on how seriously the Australian Government takes its leadership role[3]
>
> *State of the Environment Report (2011)*

Introduction

This paper provides a brief overview of:

- the recent Council of Australian Governments (COAG) decisions that stand to profoundly affect environmental laws and protections
- why environmental laws matter and why they reflect the fundamental values of Australians
- why Commonwealth involvement in environmental regulation is vital
- how environmental laws should work in Australia.

The COAG agenda – what was agreed and what it means

On 13 April 2012 the COAG – the forum for the leaders of federal, state and territory governments in Australia – agreed to major reforms of Australia's environmental laws. The reforms, proposed by the business community, are directed at both federal and state laws, particularly laws that assess new developments. The key reforms that COAG agreed to include:

- accelerated accreditation of state processes[4] that will effectively end federal involvement in both the assessment and approval of environmentally sensitive developments under federal environmental laws
- fast-tracking of approval of major developments in each state
- rationalising/removing energy efficiency and climate change schemes in each state
- removing other environmental laws seen as unnecessary and costly for business.

These reforms were put forward via COAG's new Business Advisory Forum. No such forum exists for other sectors of the community. The reforms are directed squarely at reducing what big business sees as unnecessary delays and costs. This paper focuses on the first two reforms.

Withdrawal of federal involvement in development assessments

The Commonwealth has agreed to enter into fast-tracked agreements with each state to transfer its powers of assessment and approval under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) to the states. This will cover all developments apart from those that affect world heritage, Commonwealth marine waters and nuclear actions.[5] This means that the Commonwealth would no longer have any role in either assessing the environmental impacts of state developments on nationally significant environmental matters or in deciding whether

1 Rachel Walmsley is Policy and Law Reform Director with Environment Defenders Office NSW <Rachel.walmsley@edonsw.org.au>. This is a redacted version of the ANEDO background paper on the COAG Taskforce reforms developed out of the COAG Business Advisory Forum.

2 Elizabeth McKinnon is a solicitor in the Environment Defenders Office (Vic) <elizabeth.mckinnon@edo.org.au>.

3 Australian State of the Environment Committee, *State of the Environment 2011: Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities* (2011) <www.environment.gov.au/soe/2011/report>.

4 COAG commitments included addressing duplicative and cumbersome environment regulation, and agreement to fast-track the development of bilateral arrangements for accreditation of state assessment and approval processes, with the frameworks to be agreed by December 2012 and agreements finalised by March 2013: *Council of Australian Governments Meeting Communiqué*, 13 April 2012.

5 The Coalition if elected will go further: Sid Maher, 'Tony Abbott's one stop environmental shop' *The Australian* (20 April 2012) <www.theaustralian.com.au/national-affairs/climate/tony-abbotts-environmental-one-stop-shop/story-e6frg6xf-1226333815692>.

to approve those developments.[6] COAG stated that a framework for such agreements would be settled by December 2012 and all agreements would be signed off by March 2013.

Fast-tracking of major projects

COAG's agreement to implement the fast-tracking of 'major projects' is a reform for states' rather than the Commonwealth's processes. In most states this means that new legislation will be implemented to speed up the approval process for any development project deemed to be 'major'. Such projects would almost certainly include big mining or gas projects and transport infrastructure, but could also encompass much smaller developments such as tourist resorts or industrial estates.[7] In ANEDO's experience, major project fast-tracking legislation usually results in an exemption from, or reduction in, environmental assessments and approvals; a single decision-maker to make all relevant approval decisions (usually the Premier or Planning Minister), and a reduction in community consultation and third party rights to seek review.[8]

Why we are concerned

This attack on environmental regulation is alarming at a time when climate impacts are increasing, development pressures on the environment are becoming more intense (especially from mining), and threatened species are being lost at an unprecedented rate. Recognition and management of such issues requires a coordinated, national response. As the *2011 State of the Environment Report* noted, 'Australians cannot afford to see ourselves as separate from our environment.'[9]

The COAG reform agenda threatens to wind back 30 years of important gains in environmental regulation. There is no indication in the COAG documents that environmental standards will be improved as a result of the reform, or that such improvements are even to be considered in the reform process. Moreover, COAG has agreed to a rapid timetable for implementing several of these reforms.

Reforms will be judged by whether they lower costs for business and improve competition and productivity. No value has been attributed to the economic benefits of protecting the environment and human health. The only statement in the COAG communiqué that refers to the environment is that First Ministers 'reaffirmed COAG's commitment to high environmental standards', however this is not backed up by any process, commitment or requirement to do so.

Of particular concern is the proposal for the Commonwealth to 'step back' from environmental assessment and project approval altogether. In a number of states and territories environmental impact assessment is currently weak and inadequate, and the states alone cannot be relied upon for protection of environmentally sensitive places in the national interest. Whilst the current review and approval process at the federal level under the EPBC Act is not perfect, if the Commonwealth accredits the state processes and no longer oversees development assessment or project approval, even worse environmental outcomes are likely.

The direct involvement of EDOs across Australia in environmental law over many years has shown us that it is imperative that both state and federal governments are responsible for environmental regulation. We strongly oppose moves to reduce environmental regulation merely to ease pressure on big business and fast-track major development. Fast approvals that deliver poor quality, high risk or unsustainable development are not in the public interest. Strong environmental laws are essential to the continued health, prosperity and well-being of Australia, and the Australian environment.

Why environmental laws matter

Rather than being seen as 'green tape' or a burden on business, environmental laws are an essential element of a healthy society. Environmental laws not only protect our fragile ecosystems, they also protect our health, our communities, our economy, and future generations. The efficacy of an environmental assessment and approval system should not be judged solely on its ability to meet processing timeframes or attain 'satisfactory' development approval rates. More fundamental is the system's ability to produce ecologically sustainable outcomes.

6 Such as Ramsar protected wetlands, nationally listed threatened species and ecological communities, migratory species and national heritage places.

7 For example in 2009 the Victorian government proposed state projects over $10m be considered major, with discretion to extend that to any project the minister declared to be major.

8 For example, see Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW), which has now been repealed.

9 State of the Environment 2011 Committee, *Australia State of the Environment 2011—In Brief*, Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities, 2011, 'Headlines'.

Environmental laws form the basis for environmental protection in Australia: they set the standards that everyone in Australia must comply with. They require companies proposing developments to minimise environmental harm and to use resources as effectively as possible. They develop market mechanisms to help drive down greenhouse gas emissions, and allow members of the public to participate in decision making about activities that will affect their lives and their surroundings. They ensure that community resources such as clean air and clean water are safeguarded, and they protect biodiversity, natural resources and ecosystems.

The emphasis on reducing the costs to business of environmental compliance that forms the basis for the COAG reforms overlooks the costs to communities of a reduction in the laws that protect their heath and local ecosystems. It can be argued that effective environmental regulation is a cost of doing business that companies can pass on to consumers across Australia. In contrast, the impacts of inappropriate development are disproportionately felt by the communities and local people that have to live with the consequences of such development.

Environmental policies and programs are useful, but they do not replace the need for law. Only laws can require governments and people to act in prescribed manners or prohibit and penalise for harmful or damaging activities. Policies and programs cannot set legally binding standards and requirements, or be enforced when breached. All three are needed to effectively protect the environment.

Environmental laws matter because they:

- recognise at their core the value of the environment, and can seek to ensure that decisions are made in accordance with the principles of ecologically sustainable development (ESD)
- protect the community's right to be informed of, and participate in, decision-making processes that affect the environment
- ensure that a rigorous, science-based assessment of environmental impacts is applied in the decision-making process
- provide enforcement mechanisms where environmental laws are breached
- ensure that our international environmental obligations are upheld.

Why Commonwealth involvement is so important

The COAG proposal to remove the Commonwealth from environmental impact assessment and approval under the EPBC Act and hand those responsibilities to the states is a major concern for the following reasons.

1. Only the Commonwealth Government can provide national leadership on national environmental issues

Federal environmental laws are particularly valuable as they can provide an over-arching framework which sets the standard for environmental assessments and decisions. As stated in the *2011 State of the Environment Report*:

> Our environment is a national issue requiring national leadership and action at all levels ... The prognosis for the environment at a national level is highly dependent on how seriously the Australian Government takes its leadership role.[10]

Not only does the Commonwealth generally have higher standards in environmental regulation, but it is better placed (and often better resourced) to manage the environment in the national interest and maintain an arms-length approach to considering projects. This includes where the state (or a state-owned corporation) is the development's proponent or otherwise has a financial interest in the development's approval. In such situations, the state has a clear conflict of interest that reasonably casts doubt on its ability to objectively and credibly pass judgment on proposed development. Federal environmental laws are often the only thing preventing states from approving actions that harm the environment, as demonstrated below.

2. States are not mandated to act in the national interest

It has been the experience of EDOs over decades that states do not act in the national interest in managing the environment. This is partly due to their single-state focus and partly because they lack the mandate and resources to consider consequences outside their state. A prime example of this is the Murray-Darling Basin, where vested state interests over many decades have led to a significant decline in the condition of the Basin.

The Commonwealth, on the other hand, has the ability to properly consider national or cross-border issues and make decisions in the national interest. This is the reason the EPBC Act focuses on matters of national environmental

10 State of the Environment 2011 Committee, above n 9, 9.

significance – they are matters that by their nature should be considered and protected at the national level by a national government.

3. States directly benefit from the projects they are assessing

For many major development projects the state government is the proponent or a strong supporter of the project, or has an expectation of receiving revenue as a result of the project. Obvious examples are mining and major infrastructure projects. The Queensland Government's approval of the Shoalwater Bay rail line and coal terminal proposal in 2008 highlights the tendency of a state to prioritise short-term political interests over concerns for the environment. This proposal was part of a $5.3b project to produce 25 million tonnes of coal a year for export. It was declared a significant project by Queensland's Coordinator-General (who thereby undertook the project's environmental assessment) but that was rejected by the Commonwealth Minister for the Environment on the grounds that the proposed coal terminal would have 'clearly unacceptable impacts' on the Shoalwater and Corio Bay Ramsar wetlands and Commonwealth lands (the Shoalwater Bay Training Area). In these instances it is unrealistic to expect the state to make an impartial decision as to whether a project should go ahead.

Another example of a state government being more focused on short-term interests rather than the environment was Victoria's consideration of the Scoresby Freeway project that was proposed near Melbourne in 2003. The Victorian government referred the project to the Commonwealth for determination whether it should be assessed under the EPBC Act. The project was divided into parts in the hope that it would not trigger review under the EPBC Act. Among other things, the Victorian government did not state in the referral that it was likely that a further freeway link would need to be constructed across a particular area of environmentally sensitive land in the future as a consequence of the construction of the Scoresby Freeway. Such deficiencies were challenged and the referral was found by the Federal Court to be misleading.[11] This example demonstrates the inherent conflict of interest that results from leaving environmental impact assessment to state based processes, particularly when it is a state-backed major project.

In general, the Commonwealth is a step removed from the development and therefore able to make a more reasoned and measured decision in the national public interest. There are many examples of states signalling that they would progress major projects that would have had significant adverse environmental impacts that were ultimately rejected by the Commonwealth. For example, the Traveston Dam in Queensland, Franklin Dam in Tasmania, Jervis Bay rezoning in New South Wales, releasing of water from Lake Crescent in Tasmania for irrigation, and the Nobby's Headland development in New South Wales, were all state-backed projects that were rejected by the Commonwealth due to the unacceptable environmental impacts they were going to cause. This situation will only be made worse if the COAG proposal for fast-tracking of major projects is adopted in each state. Fast-tracking reforms will reduce environmental controls, oversight and community participation. If the Commonwealth removes itself from approval of these projects, as is proposed, there will effectively be no limit to states' powers to approve developments.

4. The Commonwealth must ensure we meet our international environmental obligations

Another important function of Commonwealth involvement in environment regulation is to ensure Australia is meeting its many international treaty obligations to protect Ramsar wetlands, biodiversity and listed world heritage areas. For example, in 2009 there was a proposal to develop a major tourist resort on Great Keppel Island in the Great Barrier Reef World Heritage Area. Queensland declared the resort to be a 'significant project' and intended to fast-track it for review and approval under state law. The proposed resort, which included up to 1700 low-rise tourist villas and up to 300 tourist apartments, was rejected by the Commonwealth on the grounds that it would 'clearly [have] unacceptable impacts on' world heritage properties and national heritage places.

The Commonwealth holds primary responsibility for ensuring Australia's international obligations are met and it (rather than the states) is in the best position to do so. If the Commonwealth devolves its obligations under international law it will be up to the states to ensure that development activities comply with Australia's international obligations – a task that they are unlikely to be willing or able to do.

11 *Mees v Roads Corporations* [2003] FCA 306.

5. Only Commonwealth involvement can raise states up to a higher national standard

The absence of the Commonwealth from environmental decision-making means that there will be few (if any) checks and balances on state processes. At present, for development activities that require EPBC Act assessment, the Commonwealth can ensure that national standards are being met. Based on EDOs' experience, in a number of states and territories environmental impact assessment is weak and inadequate. Major projects are often subject to less scrutiny and greater exercise of discretion, even though they are the very projects that are likely to have the highest environmental and social impacts. Without Commonwealth oversight, state governments can continue to operate under inadequate regimes that do not provide appropriate levels of environmental protection.

For example, in Victoria the Government's decision to allow cattle grazing in Alpine national parks did not require any approvals at state level despite being clearly against the intent of state national parks regulation. Strong vested interests in the state overrode the weak environmental requirements. It took the Commonwealth to step in on behalf of nationally listed threatened species and end the practice.

Communities and ecosystems affected by major projects must not be overridden or ignored by fast-track development assessment and approval processes. Attempts to reduce community input and rush through major developments contributed to the former NSW Government's demise in 2011.[12]

How should environmental law work in Australia?

The COAG reform agenda has the potential to wind back 30 years of gains in environmental regulation. The reforms should instead be used as an opportunity to improve environmental standards across Australia, at the same time as lowering costs and increasing productivity.

The following items should be adopted by COAG as an essential part of any environmental reforms:

- COAG should make a commitment that any reforms made at the federal or state level will be aimed at improving environmental standards, alongside the aims of increased productivity and lower costs.
- The Commonwealth should use this opportunity to raise states to a higher level of environmental standards, rather than allow a negotiated 'race to the bottom'. Standards are needed across a range of areas, such as environmental impact assessment; transparency of project information and decision-making processes; community engagement and access to justice; and monitoring, reporting and enforcement requirements.
- States should commit to only making reforms where they will demonstrably improve environmental standards.
- Environmental and planning legislation across the board should include open standing[13] to bring enforcement and judicial review proceedings (or broad standing at a minimum)[14]. Open standing increases opportunities to enforce the law other than by reliance on government agencies, improves public confidence that laws will be adhered to,[15] and helps ensure that limited resources are directed to resolution of substantive issues.
- The Commonwealth should retain its primary role in environmental impact assessment for nationally significant environmental matters, and not agree to bilateral approval agreements with the states. However, if bilateral approval agreements are signed, they should only be done on condition that each state meets a higher national standard that is at least commensurate with the EPBC Act's protections, rather than simply accrediting current weak state processes. For example in Victoria, a bilateral agreement should not be signed until Victoria has implemented the new environmental impact assessment legislation that it has committed to.

12 Former Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW).

13 See: *Environmental Planning and Assessment Act 1979* (NSW), s 123(1) under which any person may bring proceedings in the Court for an order to remedy or restrain a breach of the Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.

14 See: s 487 of the EPBC Act. However, EDO offices have observed that the current standing rule in s 487 of the Act imposes evidentiary barriers that prevent some applicants from obtaining standing, in addition to posing a practical burden in the preparation of proceedings.

15 See: F Millner, 'Open standing and enforcement' (2011), 26 *Australian Environment Review* 7, 185–87. See also EDO NSW, NCC and TEC submission to NSW Planning Review Issues Paper (March 2012), response to Chapter E.

- States should not implement major projects fast-tracking provisions that exempt major projects from environmental regulation. If major project fast-tracking processes are implemented, they should retain the highest levels of environmental impact assessment and community involvement. The projects with the greatest potential impacts deserve the greatest assessment and scrutiny.
- Reforms to the EPBC Act should be aimed at improving environmental standards in the Act and ensuring all states are brought up to a higher national level.
- As the reforms proposed will have a direct impact on the community and the environment, not just business, COAG should institute a Community Advisory Forum to balance out the partisan views of the Business Advisory Forum.

Conclusion

The proposal by COAG represents a direct attack on environmental laws across Australia. Public participation and environmental assessment processes are fundamental elements of good environment laws, and are essential for ensuring long term sustainable outcomes. The public interest value and benefits of these processes mean that they must not be dispensed with on the basis that some sectors perceive them to be an unnecessary burden. Any costs of development assessment processes must be balanced by the public interest benefits. These benefits, although difficult to quantify with a dollar value, are vital and must be protected by robust environmental laws at both state and Commonwealth level.

Feedback invited on *Draft Framework of Standards for Accreditation*

In November 2012 the Australian Government Department of Sustainability, Environment, Water, Population and Communities (SEWPaC) released a draft *Framework of Standards for Accreditation and a Statement of Environmental and Assurance Outcomes.*

The Standards document was released to the states in July 2012, and in November was released publicly with an explanatory preface. The framework is expected to be finalised by December 2012.

The draft Standards document forms the basis for the Australian Government's approach to the development of 'approval bilateral agreements' under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act).

The document sets out:

- standards for accreditation under the EPBC Act and other Commonwealth law and policy
- additional Commonwealth considerations that the Commonwealth will take into account when determining whether the standards have been met.

Feedback on the technical validity and accuracy of the document is welcome and can be provided to epbc.reform@environment.gov.au.

The Australian Government expects to finalise the draft Standards in December 2012.

The Renewable Energy Target gets a good review

by Wayne Gumley[1]

In the last few months there have been several important policy developments and related news items in relation to the Australian Government's Renewable Energy Target (RET). Most significantly, in October the Climate Change Authority (the Authority) released its *Discussion Paper Renewable Energy Target Review*. This set out the preliminary views of the Authority in relation to its statutory review of the Renewable Energy Target (the Review).[2] This followed hard on the heels of an *Issues Paper* released in August,[3] and consultations that included some 8 700 submissions (including about 8 500 campaign submissions from GetUp and Hepburn Wind). This article will outline some of the more significant recommendations made by the Authority and provide some concluding observations on the importance of retaining the RET alongside the carbon price mechanism.

A key consideration for the Review is its interaction with the changing policy landscape since the RET and its predecessor, the Mandatory Renewable Energy Target (MRET), were first established. To recap briefly, the essence of both schemes is that purchasers of wholesale electricity must acquire and surrender a defined quantity of Renewable Energy Certificates (REC) to represent a certain fraction of the electricity they acquire. The REC can be obtained from accredited renewable energy generators, who earn one REC for each megawatt-hour (MWh) of additional renewable energy they generate (such as wind farms and solar PV owners). In this way generators of renewable energy receive a subsidy for their activities by selling REC to liable parties. The original MRET scheme was introduced in 2001 with a target of or 9 500GWh of additional renewable electricity by 2010 (ca. 1% of total electricity generation).

The RET scheme triggered a large wave of renewable energy projects, particularly in the wind farm sector and the initial target was met three years early in 2007. In 2009 the expanded RET introduced a much more ambitious national target of 45 000GWh by 2020 (a 20% target). The Solar Credits scheme was also introduced at that time, to provide a special incentive for small-scale schemes, by providing five REC for each MWh generated (partly to compensate for withdrawal of certain other subsidies for solar installations).

The expanded RET scheme coincided with a range of generous new feed-in-tariff arrangements offered by state and territory governments, and significant increases in household electricity charges, which combined to cause higher than expected investment in small-scale schemes. This resulted in an over-supply of REC and a significant decline in the market price for REC during 2009, which significantly undermined the viability of large scale projects. In response to this problem, the RET was split into two separate schemes in 2010, separating 'small scale' and 'large scale' renewable electricity generators. The Solar Credits multiplier was also progressively reduced to bring the multiplier back down to one by 2013.

The latest development is the Clean Energy Future Plan which introduced the carbon price mechanism from 1 July 2012, and several new regulatory agencies including the Climate Change Authority, the Australian Renewable Energy Agency (ARENA) and the Clean Energy Finance Corporation (CEFC). ARENA's role is to provide $3.2 billion in funding to support research and development in promising and emerging renewable energy technologies. CEFC aims to overcome capital market barriers capital market barriers that hinder the financing, commercialisation and deployment of renewable energy, energy efficiency and low emissions technologies. The Clean Energy Plan thus provides a second major legislative mechanism for promoting reductions in greenhouse missions alongside the RET.

Continued existence of the RET

A fundamental question for the Review is whether the RET is still needed at all, given the introduction of the very comprehensive Clean Energy Plan centred on the carbon price mechanism. The Authority suggests there will be three main points of interaction:[4]

1. The RET will increase the overall short-term cost of abatement (by mandating a proportion of renewable

1 Senior Lecturer in Law, Department of Business Law and Taxation, Faculty of Business and Economics (email wayne.gumley@monash.edu).
2 Commonwealth of Australia, Climate Change Authority, *Discussion Paper: Renewable Energy Target Review* (October 2012).
3 Commonwealth of Australia, Climate Change Authority, *Issues Paper: Renewable Energy Target Review* (August 2012).
4 Ibid 29–30.

energy generation).

2. The carbon price will interact with the REC price (with increasing wholesale electricity prices, REC prices are expected to be lower).
3. The RET will affect the pattern of emissions abatement in Australia by giving advantage to eligible renewable energy projects.

Notwithstanding these interactions, the Authority provides a number of strong justifications for retention of the RET. Firstly there is recognition that the task of reducing greenhouse emissions is a long term objective and, whilst the RET could increase the cost of abatement in the short term, the RET has an important longer term role as a supplementary measure to help unlock new cost reduction opportunities in the future.

Secondly, the RET is of great importance in the face of uncertainty over the future of the carbon price, based on the promise by the Federal Opposition that it will dismantle the carbon price mechanism should it win government at the next election. The Authority recognised that such political uncertainty has already suppressed investment in large scale renewable energy projects. Accordingly the RET is a vital safety net in Australia's climate change responses, providing a credible and effective carbon pricing policy that can continue to provide certainty for investors in the absence of a carbon price.

A wide range of other important justifications for the RET were also recognised by the Authority, including the promotion of energy security, public health benefits, promoting competition in electricity markets and creating new employment.

Despite the political uncertainty noted above, a number of resource sector submissions argued that the carbon price mechanism now removes the need for the RET. The Authority effectively rejected this contention, recognising that the carbon price is still very new and markets will need considerable time to adjust. On the other hand the RET has operated for many years and considerable investments have already been made on the assumption of the continued existence of this scheme. Even industry representatives commented upon the importance of a stable policy environment for future investment in electricity generation, whether renewable or otherwise. Accordingly the Authority stated that this Review 'concentrates on whether any improvements can be made to the design of the RET rather than challenging the RET's existence'.[5]

5 Ibid 38.

The Large scale RET (LRET)

A basic question addressed by the Review regarding the large-scale renewable energy target (LRET) is whether the scheme target of 41 000GWh by 2020 can be met. The Authority was satisfied that this target could be achieved based on information about projects in the pipeline, published by the Australian Energy Market Operator.[6] This finding allows for the negative effect of restrictive planning laws that have emerged in some states, and notes that the COAG Standing Council on Energy and Resources may need to examine this matter.

The Review also considers whether the existing 41 000GWh target for the LRET should be reduced, particularly in the light of declining electricity demand over recent years. On balance the Authority was satisfied that this target should not be reduced, primarily because this would increase uncertainty and access to finance in the large-scale renewables market. It was also noted that a reduction would be unlikely to make a significant difference to average household electricity bills.[7] The Authority also recommends that the target should continue to be expressed in terms of GWh rather a fixed percentage of total energy generation.[8]

The Small-scale RET (SRES)

The key question for the Review of the small-scale schemes (SRES) is whether it should continue as a separate scheme, given the additional cost and administration requirements. The Authority recognised that REC prices were adversely affected when the schemes had operated together in the past (before the 2010 amendments). Given that similar uncertainty and investment risk could arise again if they were recombined, it was recommended that they remain as separate schemes.[9]

The Authority also considered various architectural changes to the SRES. One proposed reform is to significantly reduce the current threshold for SRES projects (of 100GWh) down to as low as 10GWh, so that 'medium-sized' projects carried out largely by the small business and commercial property sector, would fall into the LRET scheme. This point remains under consideration.[10]

6 Ibid 48–49.
7 Ibid 71 (and R3).
8 Ibid 75 (and R2).
9 Ibid 85 (and R5).
10 Ibid 87 (and R6).

Another SRES design issue is the risk that the level of subsidy provided by the RET could need an adjustment mechanism in future should external factors such as state and territory feed-in-tariffs, a strong $AUS and falling technology combine to over-stimulate this sector. The Authority considered several measures to manage this risk including:

- A long term GWh cap. This was not recommended due to a lack of flexibility.[11]
- Lowering the REC price cap which is currently set at the clearing house price of $40. This was also not recommended due to complexities with the system for lowering the cap.[12] However a recommendation was made that the clearing house should be amended to a deficit sales facility, whereby new REC can only listed when the clearing house is in deficit.[13]
- Discounting the number of REC issued for each megawatt-hour (in effect, to adopt a multiplier of less than one) with the possibility of 'banding' to provide different discount factors for different technologies. The Authority adopted a preliminary view that a discounting system would be the best option to enable the Minister to adjust the subsidy level as needed to control the cost of the SRES.[14]

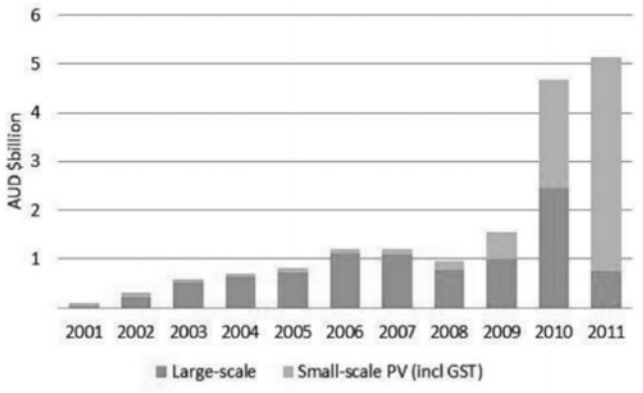
Other technical issues

The remaining chapters of the *Discussion Paper* cover various other technical aspects of the RET scheme. Chapter 6 considers the economic efficiency and equity considerations regarding the liability and exemption framework, including individual liability, the surrender mechanism, the shortfall charge, and exemptions for Emissions Intensive Trade Exposed industries and the exemption for self-generators. Chapter 7 considers the eligibility of sources and technologies under the LRET and SRES with specific regard to the eligibility of waste coal mine gas and biomass from native forests, as well as whether displacement technologies should be eligible activities under the SRES. Chapter 8 considers whether amendments to the RET scheme are needed to actively promote a more diverse range of renewable energy technologies beyond wind, bagasse and solar PV. Other potential sources that have not yet achieved any installed capacity due to relatively high cost include geothermal and wave energy. Chapter 9 considers key aspects of administering the SRES including accreditation and deeming arrangements.

General observations

Overall the Authority provides considerable assurance that the RET is working extremely well and it should now be maintained in broadly similar form to support the considerable future investment needed to meet the 2020 target. One clear measure of its success is the spectacular growth in household solar PV installations since 2009 (as depicted in Figure 7 below):

Figure 7 **Total large & small-scale renewable energy investment in Australia (AUD billion)**



Source: Bloomberg New Energy Finance, *BNEF Australia Investment Data*, 2012

No doubt the dramatic growth in SRES in 2010 was strongly boosted by the extraordinary combination of the Solar Credits multiplier, generous state and territory feed-in-tariffs, a stronger Australian dollar, the falling cost of solar panels and steadily increasing household electricity prices. The Authority suggests that since the Solar Credit multiplier and feed-in-tariffs have been scaled back, this trend is not likely to continue. However, in October 2012, the Clean Energy Regulator released quarterly data that casts serious doubt upon that prediction. By September 2012 over 858 000 Australian homes have installed solar photovoltaic panels and the current trend suggests this will extend to over one million homes by mid 2013.[15] This means that over 10% of all Australian households are now supplying a large proportion of their own domestic electricity needs.

11 Ibid 90.
12 Ibid 91 (and R7).
13 Ibid 97–100 (and R10).
14 Ibid 94–97 (and R8, R9).

15 Australian Government, Clean Energy Regulator, List of SGU/SWH installations by postcode <http://ret.cleanenergyregulator.gov.au/REC–Registry/Data–reports> and Professor Ray Wills, Chief Adviser to Sustainable Energy Association of Australia, SEA Press Release (9 October 2012) <www.seaaus.com.au/content/blogcategory/33/155/>.

The other notable trend from Figure 7 is the decline in LRET schemes after 2010. One of the most important factors here is the trend to a more restrictive attitude to wind farms changes in Victoria and NSW. We have now reached an extraordinary episode in environmental law where it seems that a larger buffer zone is required for a wind farm than for a coal seam gas operation or an open cut coalmine![16] One can only hope that this type of nonsensical conflict between federal and state laws is a temporary anomaly that COAG will soon rectify. Investors in large projects also face considerable uncertainty about the future of the RET, which should be resolved reasonably soon, when the Commonwealth Government responds to the final recommendations of this Review. Added to that is the continuing uncertainty about the future of the carbon price, which should be resolved after the 2013 election.

There is good reason to be confident that both the RET and carbon price will be retained. As mentioned above, the RET has produced impressive results and should be judged a huge success. Two fundamental criticisms of the RET are raised in the Review and these will be considered in more detail below. Firstly, it is argued that, we now have a carbon price so the RET is no longer needed. Secondly, it is argued that the RET is not the 'least cost' option. In my view, neither argument justifies removal of such a well-established and successful scheme.

Impact of the carbon price?

It is important to recall that the major rationale for the carbon price is to provide a 'price signal' that will drive greenhouse emission reductions across the Australian economy, including a shift to low carbon renewable energy sources. The recent CPI figures for the first quarter of operation of the carbon price have revealed that this 'great big tax' has made a miniscule contribution of about 0.25% to CPI for the quarter, which is projected to be 0.7% over a full year.[17] To suggest that such a small price signal will drive an economy wide shift to renewable energy technology is not credible. Of course it should be noted that the impact of the carbon price on household electricity prices is considerably higher, and estimated to be about 6%.[18] This is lower than the 10% Goods and Services Tax introduced in 2000 which had little if any impact upon consumer spending patterns. However in this case the narrow base of the carbon price means the increase is largely confined to electricity bills, and households have many energy efficiency and behavioural responses which can offset the increase, without significant change to lifestyle.

Of course Australian electricity prices have been steadily increasing over a number of years due to other factors such as the cost of infrastructure upgrades and increased administration charges. The cost of all renewable energy subsidies including the RET make up less than 7% of total price and an even smaller proportion of the price increases.[19] And every increase to the total price just makes the economic case for energy saving investments like solar PV even stronger, even after withdrawal of the Solar Credits multiplier and reductions in state feed-in-tariffs. It is already quite evident that higher electricity charges have encouraged this type of behaviour, as electricity demand has been falling since at least 2006.[20] This should be more widely acclaimed as a huge greenhouse policy achievement, with economic growth in Australia effectively being de-coupled from electricity generated greenhouse emissions since 2006.

A fundamental point to emphasise here is that the key to success of a market-based instrument is the availability of viable alternatives (for example, despite increasing petrol prices, commuters will not reduce use of cars unless there is convenient public transport on the route they use). The strength of the RET is that it subsidises new alternative energy technologies through the early years of their development and ultimately increases the range of energy options for the future. And economics purists who dislike regulatory intervention ought to be pleased that competition in energy sources is being successfully developed by the RET. For the first time in generations Australian households have cost-effective alternatives to the centralised fossil fuel based electricity supply system. Let us not forget that the main rationale for privatisation of the energy sector in the first place was a fear of inefficient government monopolies. Given the modest price signal provided by of the carbon price at

16 See the article in this issue by Lisa Caridis and Anne Kallies for more detail on the Victorian laws.

17 P Hannam, 'Carbon price's feared impact a 'storm in a teacup'' (based on Treasury modelling), *Sydney Morning Herald (*22 October 2012) <www.smh.com.au/business/carbon–economy/carbon–prices–feared–impact–a–storm–in–a–teacup–20121021–27zd5.html>.

18 Australian Energy Market Commission, *Possible Future Retail Electricity Price Movements: 1 July 2011 to 30 June 2014; Final Report*, 2011 <www.aemc.gov.au/market-reviews/completed/possible-future-retail-electricity-price-movements-1-july-2011-to-30-june-2014.html>.

19 Ibid.

20 ABC News 'Power consumption makes historic drop' (15 August 2011) <www.abc.net.au/news/2011-08-15/power-consumption-makes-historic-drop/2839394>.

present (which is expected to decline when the flexible price period commences in 2015) the RET should be recognised as our most effective driver of investment in new renewable energy technology.

Not a least cost approach?

The second common criticism repeated throughout the *Discussion Paper* is that the RET is not a 'least cost' way of reducing greenhouse gas emissions. It seems that the expression 'least-cost' has now sunk to the level of meaningless jargon. Like the expression 'sustainable development' it means different things to different people. The RET is aimed at dealing with what Sir Nicholas Stern described as 'the greatest and widest ranging market failure ever seen'.[21] Stern was referring primarily to the potentially massive external costs imposed upon current and future generations by the continued burning of fossil fuels (the massive storm that lashed New York in October 2012 is a good example). So when we talk about 'least cost' the analysis has to include these massive environmental impacts across the whole of global society to be meaningful, not just the increased cost of electricity to local consumers.

Market failure requires regulatory intervention. Whilst Stern advocated the use of a carbon price he warned that this alone is unlikely to be adequate and other regulatory strategies will be required, particularly strategies to overcome 'barriers to change'. Some of the more obvious barriers to change in the uptake of new low emission energy sources are the up-front research and development cost and the capital cost of installation. The RET has demonstrated that it is particularly good at subsidising these costs for new renewable energy sources. One of the ironies on this 'least cost' argument is that the prevailing wisdom supported by well known economic analysis such as the McKinsey greenhouse abatement cost curves has traditionally rated solar PV as one of the highest cost options.[22] One wonders about the quality of economic analysis involved when the solar PV market in Australia has shown that households can invest less than $20 000 to secure a system that can physically provide more electricity than the household needs and slash electricity bills to such an extent that the investment pays itself off within a few years. There is also a huge intangible benefit driving this type of investment for households. This benefit includes both a warm inner glow from using (largely) emissions free technology as well as the personal satisfaction or directing hard earned money away from the voracious new energy supply oligopoly, which has proven to be anything but low cost and efficient in their dealings with electricity consumers.

In conclusion, the Climate Change Authority has presented an encouraging defence of the RET in this *Discussion Paper* and it can be hoped with good reason that the Commonwealth Government will retain the RET broadly in its existing form to provide the type of investor certainty that is needed to support the considerable level of new large scale renewable energy investments that is required to meet the 2020 target.

The views expressed are the author's personal opinion and they do not convey any official view of NELA on this topic. NELA has a policy project on 'Delivering a clean energy future', which is also the title of the **2013 NELA National Conference (**7–9 March 2013 —Melbourne —www.nelaconference.com.au). The review of the RET is an important aspect of that policy debate. The conference theme poses the question: *What is the proper role of the states and territories in planning a low carbon future given the Commonwealth's role in regulating greenhouse gas emissions*?, and several plenary sessions will discuss different aspects of that debate. In the lead up to the conference NELA will publish an information paper on renewable energy policies and programs, and policy papers on the regulation of carbon emissions.

NELA welcomes debate and encourages members to respond to this article and make further contributions on this topic for possible inclusion in future issues of the NELR or for consideration at the national conference.

21 N Stern, *The Economics of Climate Change: The Stern Review* (Cambridge University Press, 2007), 25.

22 McKinsey & Company, *An Australian Cost Curve for Greenhouse Gas Reduction*, 2008, Exhibit 4 at 14 <www.gbca.org.au/resources/industry–publications/an–australian–cost–curve–for–greenhouse–gas–reduction/1475.htm>.

This little Aussie went to market… Australia enters the international carbon market without a floor price

by Kathryn Walker

The *Clean Energy Act 2011* (Cth) gives effect to Australia's obligations under the Climate Change Convention and the Kyoto Protocol. A key element of the Act is the much publicised carbon price which came into effect on 1 July 2012. The carbon price was set at $23 per tonne, rising by 2.5% each year until 2015. From 1 July 2015, Australia will move to a fully flexible price for carbon.

Since inception, the Government has been adamant that a carbon price ceiling and floor would be necessary to ensure investment certainty. As at 10 July 2011 it was intended that the carbon pricing mechanism would include a price ceiling and price floor for the first three years of the flexible price period (2015–16, 2016–17 and 2017–18). The price floor was intended to help reduce downside carbon price risk for investors in low emission technologies by establishing a minimum carbon price in Australia over the period.

The *Clean Energy Act* and associated legislation contained a floor price by combining a minimum auction reserve price for domestic carbon units with a surrender charge for international units. The surrender charge was to be imposed by the *Clean Energy (International Unit Surrender Charge) Act 2011*. However, given the price of carbon on the European market (currently between 7–10 Euros per tonne), Australia's floor price of $15 per tonne was said by many to hamper development of the forward market, leading to less efficient forward prices and therefore investment uncertainty. Whether driven by the European market or otherwise, on 28 August 2012, the Government announced that the carbon floor price would be removed.

What does removing the floor price mean?

The removal of the floor price is said to be necessary to facilitate the linking of the Australian carbon scheme to the European carbon scheme. The linkage will be, in effect, a two stage process; stage one will commence on 1 July 2015 with a partial link to the European market and stage two will commence on 1 July 2018 with the full linkage of the systems.

Linking the systems will enable participants in one system to use units from another system for compliance purposes, reducing the cost of cutting carbon pollution, increasing market liquidity and supporting global co-operation to reduce carbon emissions. From 1 July 2015 Australian businesses will be able to buy and use European Union emissions allowances to assist in meeting their obligations under the Australian scheme to meet up to 50% of their liabilities (until 2020).

From 1 July 2018, businesses will be able to use carbon units from Australia or Europe for compliance under either system, and European entities will be able to use Australian units for compliance.

How will it work?

Currently, under the *Australian National Registry of Emissions Units Act 2011* (Cth), eligible international emissions unit classes are restricted to Kyoto protocol removal units, certified emission reduction units and emission reduction units. From 1 July 2015, European Union emission allowances will become another class of eligible international emission units under that Act. Removing the floor price and introducing a further sub-limit on the use of Kyoto protocol eligible international units will mean that liable entities can use Kyoto protocol eligible international units to meet up to 12.5% of their annual liabilities within the overall 50% limit of eligible international units.

Financial products

The classification of European Union emissions units as eligible international emissions units means that they will become a financial product subject to licensing and regulation. If your business provides financial services in the carbon market in respect of products associated with regulated emissions units (for example, derivatives over emissions units or managed investments that involve emissions units) you are required to hold an Australian Financial Services Licence (AFS licence) with authorisations covering both regulated emissions units and the associated product. ASIC will manage new licences and variations to existing licences for those intending to provide financial services in regulated emissions units.

Off to market…

To facilitate the linkage if the European and Australian systems, the Government will limit the use of Kyoto Protocol eligible international units and set a price ceiling referrable to the expected 2015–16 price of European allowances. Businesses will have access to more, lower cost emissions abatement units through a highly liquid carbon market. If, as is anticipated, Australia is a net importer of international units, the linkage of the two systems will mean that businesses will have better access to international units for use from July 2015. The removal of the carbon floor price and the linkage of the two systems will ensure that there is a single price for Australian and European carbon units. Whether or not it will provide investment certainty and put Australia in a better position in the carbon market is still open for debate. However, with the European Union carbon price remaining low, what is certain is that if the price does not increase to the budget prediction of $29 per tonne by 1 July 2015, Australia will likely have a $6.3 b deficit in the carbon price revenue for that year.

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Victorian wind farm laws: a blow to Australia's clean energy future?

Lisa Caripis[1] and Anne Kallies[2]

It's been just over one year since the Baillieu government introduced the second part of its far-reaching planning law reforms to restrict the development of wind farms in Victoria. The results are an example of how state planning law can create conflicts with the objectives of national renewable energy goals.

With a majority in both houses of Parliament, the Coalition was able to amend Victoria's planning framework to deliver on its 2010 election promise to 'restore fairness and certainty to the planning process for wind farms'.

In pursuit of this aim, the planning amendments most notably impose a blanket ban on wind farms in many parts of the state. They effectively give the owners of any dwelling within 2km of a proposed wind farm the power to decide whether or not the development should proceed. A July 2012 amendment clarifies that these changes are targeted at wind farms generating electricity for supply to the grid, not for on-site use.

Economically, reports indicate that the impacts of these changes in terms of lost or stalled wind farm investment and employment have been considerable, in a state that has some of Australia's best wind resources.

While promising to 'give the community a greater voice' through these changes, the amendments instead render local, pro-wind initiatives, such as community wind farm projects impossible in many locations.

Not only do the planning law changes have the potential to entrench existing fossil fuel power generation in Victoria, they undermine the Victorian Government's commitment to the federal Renewable Energy Target (RET).

The RET is designed to ensure that 41 000GWh – close to 20% – of our electricity comes from large-scale renewable energy by 2020. It implicitly relies on implementation through state and territory planning frameworks, because decisions about what kind of development can take place and where rest with the states. The Climate Change Authority, which reviews the RET, notes:

> State and territory planning regulations may affect the level of renewable energy generation, its mix, and the geographic distribution of renewable power stations.

This can cause problems when state laws are out of step with national targets, as the electricity market rule-maker pointed out last year. It is of some concern that New South Wales draft guidelines also adopt the 2km consent rule and impose a noise assessment regime stricter than in any other jurisdiction in Australia, the United States or Europe.

The Victorian example illustrates the need to integrate policies that support renewable energy into state planning frameworks for Australia to move towards a low carbon energy future.

Germany is renowned for successfully transitioning away from fossil fuels and integrating more solar and wind energy powered generators into its grid. Like Australia, Germany has a federal system of government and it too has a renewable energy target (35% by 2020).

In contrast to Australia, community-level planning laws in Germany must give effect to national renewable energy policy. German federal planning law imposes an express obligation on local planners to recognise national renewable targets. In Germany, all regulatory frameworks relevant to renewable energy, be they planning laws or laws regulating the electricity market, have been adapted to acknowledge national renewable energy targets.

This, and not just the very generous feed-in tariff scheme, has been a major reason for why Germany has been so successful at transforming its electricity sector.

While the division of law-making powers between the states and federal government in Australia is different to that in Germany and the current Victorian government seems set to limit wind farm development in the state, there are ways Victorian state planning law could support wind farm development and thus support national energy goals. This would be consistent with the notion of cooperative federalism which underpins many areas of law and policy where there is a shared role for the federal and state and territory governments.

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Enshrining support of the Renewable Energy Target into the legally binding state planning policy could be a good start. Indeed, state planning policy before the 2011 amendments had an overarching strategic vision of facilitating the development of wind farms, and was influential in many planning permit decisions such as the approval of Hepburn Wind, near Daylesford.

Specific development controls could help promote and protect wind farm development in suitable locations. Planning controls such as statutory safeguard plans can be used to protect wind resources from interference by another type of development, such as timber plantations. This has been suggested by the planning panel for the Portland windfarm.

Such controls can also be used to protect existing or proposed wind farms from encroachment by conflicting development or land uses. Changing zoning rules and conditions to preference renewable energy in particular areas is another way to give effect to the public interest in installing more wind power.

A stronger requirement for decision-makers to consider the principle of inter-generational equity (the interests of future generations) could help make sure the broader and longer term interests in wind farm projects are taken into account.

Planning laws and policies are meant to guide decision making on development and land use in a way that is forward thinking and strategic. They are meant to balance and integrate local, regional and state-wide community priorities and vision. The current planning framework limits the consideration of interests to a narrow set of local concerns and in so doing forgoes the opportunity to align state planning law with national renewable energy goals.

These issues are discussed in more depth in Lisa Caripis and Anne Kallies, ‘‘Planning Away’ Victoria’s Renewable Energy Future?: Resolving the tension between the local and global in windfarm developments’, (2012) 29 *Environmental and Planning Law Journal* 415.

Key issues in the development of nuclear energy in Asia

by Matthew Baird[1]

Introduction

The fallout from the Fukushima nuclear accident was still occurring when commentators predicted the end of the push for new-build nuclear power. However despite the costs of Fukushima many countries in Asia are still pushing forward with nuclear power. This paper looks as some of the key regulatory issues that need to be addressed if nuclear energy is to gain any measure of public support. In particular Asia nations should consider the use of strategic environmental impacts assessment and transboundary impact assessment to look at the possibility of a regional response to nuclear safety, the location of nuclear power plants (NPP) and the treatments and disposal of nuclear waste. The paper also recommends the adoption of a regional convention for access to information, public participation and access to justice in environmental matters, modelled on the Aarhus Convention.

The push for new-build nuclear was recognised in *The Economist*'s front cover headline in September 2007: 'Nuclear power's new age'. The leader noted:

> Managed properly, a nuclear revival could be a good thing. But the industry and the governments keen to promote it look like repeating some of the mistakes that gave it a bad name in the first place… The nuclear industry needs to persuade people that it is clean, cheap and safe enough to rely on without a government crutch. If it can't it doesn't deserve a second chance.[2]

The Economist magazine, which had named coal as the number one public enemy on its front cover in 2004, is not a usual supporter of new-build nuclear power plants (NPPs). It opposes the need to provide sovereign risk guarantees and other non-free market mechanisms to enable the construction and operation of such plants.

At the General Conference of the International Atomic Energy Agency (IAEA) in September 2011, IAEA Director General Yukiya Amano said:

> Following the Fukushima Daiichi accident, there was speculation that the expansion in interest in nuclear power seen in recent years could come to an end. However, it is clear that there will, in fact, be continuous and significant growth in the use of nuclear power in the next two decades, although at a slower rate than in our previous projections. We expect the number of operating nuclear reactors in the world to increase by about 90 by 2030, in our low projection, or by around 350, in our high projection, from the current total of 432 reactors.... The factors that contributed to increasing interest in nuclear power before the Fukushima Daiichi accident have not changed: these include increasing global demand for energy, as well as concerns about climate change, volatile fossil fuel prices and security of energy supply.[3]

At the 2012 Conference, Director-General Amano commented:

> The safe management and disposal of radioactive waste and spent fuel remain key issues. The Agency works closely with Member States in this area. The nuclear industry has been managing interim waste disposal successfully for more than half a century. But no long-term disposal facility has so far become operational for nuclear spent fuel. This is often due to difficulties involving public acceptance….
>
> Nuclear safety remains the primary responsibility of individual countries. However, governments have recognized that effective international cooperation is vitally important and that the IAEA has a unique role to play in this regard. It is essential that the Nuclear Safety Action Plan is implemented in full. We must never become complacent. The ultimate goal is to make nuclear power as safe as humanly possible everywhere and to restore public confidence.[4]

1 Barrister, MEIANZ, Cert Env Prac; Chair, Environmental and Planning Law Group, Law Council of Australia; Deputy Chair, LawAsia's Standing Committee on Environmental Law. E: <matthewbaird@wentworthchambers.com.au>. This paper was presented at the 25th LAWASIA Conference in Bali, November 2012.

2 *The Economist*, 8–14 September 2007, 11.

3 General Yukiya Amano, IAEA Director, 'Statement to Fifty-Fifth Regular Session of IAEA General Conference 2011', Fifty-Fifth Regular Session of IAEA General Conference 2011, Vienna, Austria, 19 September 2011. <www.iaea.org/newscenter/statements/2011/amsp2011n021.html>.

4 General Yukiya Amano, IAEA Director, 'Statement to Fifty-Sixth Regular Session of IAEA General Conference 2012', Fifty-Sixth Regular Session of IAEA General Conference 2012, 17 September 2012, Vienna, Austria, <www.iaea.org/newscenter/statements/2012/amsp2012n012.html>.

In March 2012, *The Economist* presented a follow-up report on nuclear energy, headlined 'The dream that failed'. Although recognising that nuclear power would continue to be developed and used over the coming decades it noted '…the promise of a global transformation is gone'.[5]

However there still exists another driver for increasing the number of NPPs, and that is the push towards a lower carbon economy. The International Energy Agency (IEA)'s *Energy Technology Perspectives 2012 – Pathways to a Clean Energy System,* provided some key findings based on the 450ppm CO2 scenario extended out to 2050 (the 2° scenario), compared with the 'business as usual' scenario of 6° temperature change by 2050. The findings included:[6]

- a sustainable energy system is still within reach and can bring broad benefits
  - » technologies can and must play an integral role in transforming the energy system
  - » investing in clean energy makes economic sense – every additional dollar invested can generate three dollars in future fuel savings by 2050
  - » energy security and climate change mitigation are allies
- despite technology's potential, progress in clean energy is too slow
  - » nine out of ten technologies that hold potential for energy and CO2 emissions savings are failing to meet the deployment objectives needed, and some of the technologies with the largest potential are showing the least progress
  - » the share of energy-related investment in public research, development and demonstration (RD&D) has fallen by two-thirds since the 1980s
  - » fossil fuels remain dominant and demand continues to grow; locking in high-carbon infrastructure.

As some commentators have observed, whilst the key driver for reduced consumption is improved energy efficiencies, nuclear power is highly efficient compared with renewable technology, and remains 'an essential technology in a low carbon electricity system'.[7]

The future of nuclear power in the region

In the IAEA's 2012 low projection, the world's installed nuclear power capacity grows from 370GW today to 456GW(e)[8] in 2030, diminishing by 9% from the level projected last year. In the updated high projection, it grows to 740GW(e) in 2030, which is about 1% less than estimated in 2011. Relative to projections made before the Fukushima accident, the low projection has been reduced by 16% and a more moderate eight per cent in the high projection.

The low projection shows a 10-year delay in the pre-Fukushima anticipated growth, with the capacity that was projected for 2020 before the accident now being projected for 2030.

Projected growth is strongest in East Asia, which includes China and the Republic of Korea. From 80GW(e) at the end of 2011, capacity grows to 153GW(e) in 2030 in the low projection and to 274GW(e) in the high.

Currently only three countries in East-Asia operate NPPs – the Peoples' Republic of China, the Republic of Korea and Japan. Pakistan and India also have NPPs. In 2012 the United Arab Emirates became the first country in 27 years to start building its first NPP.

Despite the Fukushima accident, there continues to be substantial interest in NPP development. In 2012 there were 63 new NPPs under construction in 14 countries and 152 new NPPs on order or planned. The IAEA World Energy Outlook projects a 70% increase in nuclear energy generation by 2035, led by China, Korea and India.[9] Over 29 countries are currently considering or planning for nuclear power in 2012, and 10 are from the Asia-Pacific region. There are currently 41 reactors under construction across Asia, and over the next decade there are 98 reactors planned with a further 221 proposed.[10]

China has 14 NPPs in operation: Qinshan Phase I, II III (5 reactors); Daya Bay (2 reactors); Ling Ao Phase 1 (2 reactors); Tianwan (2 reactors) and Ling Ao Phase II (2 reactors). There are also 26 NPPs under construction with a target of 60-70GWe by 2020. Expressions of interest in NPPs can also be found in the government papers of Malaysia, Thailand, Philippines, and Indonesia. Both Cambodia and Myanmar have also made some observations about the possible development of NPP.

5 *The Economist*, 10 March 2012, 15.
6 'Executive summary', *Energy Technology Perspectives 2012 – Pathways to a Clean Energy System* (International Energy Agency, 2012).
7 mzconsultinginc.com, 'Blog : Nuclear Power – The Dream lives on!', (2012) <http://mzconsultinginc.com/blog/?p=230>
8 A gigawatt, orGW(e), equals one billion watts of electrical power.
9 'Trends' (2012) 43(4) EERL 11
10 Asia Nuclear Business Platform, 'Financing nuclear power projects: new trends emerging for Asia' (23 October 2012) <www.nuclearbusiness-platform.com/wp-content/uploads/2012/10/ABNP-Press-Release-23-Oct.pdf>

In relation to Vietnam, a report from GlobalData released 25 September 2012, said Vietnam is planning to build 10 000MW of nuclear generation to ensure a secure energy supply for its growing economy. According to the report, the Vietnamese Government aims to increase its economic growth rate from 5.89% in 2011 to between 6 and 6.5% by 2013. Due to the expected GDP increase that will be met by a rise in power demand, the country plans to invest about $50b in the power sector over the next decade.

Vietnam has entered into a number of nuclear cooperation agreements, enabling the nation to develop a competent regulatory infrastructure, as well as attain technological knowledge and human resources from established nuclear countries. Since 2000, Vietnam has signed agreements with China, Argentina, Russia, France and Japan, and Kazakhstan has plans to supply fuel for NPPs in Vietnam and participate in plant construction.

Total installed power capacity in Vietnam is expected to reach 52GWe by 2020, with nuclear power expected to account for around 1.5% of capacity. According to the report, nuclear is expected to increase to 20–25% by 2050 after the country builds the 10 nuclear reactors scheduled for completion by 2030, which will contribute an additional 10 000MW to the country's installed capacity.[11]

India has focused on coal and oil to generate energy. Supply for these sources is dwindling, and is becoming cost prohibitive.

Nuclear Power Corp of India Ltd has expressed interest in building 19 new NPPs (each of which will have a capacity of 700MW), with immediate plans for four. The intention is to split these plants between Haryana state and Madhya Pradesh state. These four new units will reportedly cost in the range of $373b, most of which will be financed through debt leveraging.[12]

Fundamental challenges

Nuclear safety remains a key challenge for the development of NPPs in the Asia-Pacific region. Work done in the USA and also by the IAEA will determine whether there is any likelihood that NP will win back any level of public acceptance.

In addition the storage and treatment of low-level radioactive waste is a major issue of concern to civil society groups in the region. This remains one of the intractable problems for the nuclear industry. Partly because the standard industry practice of on-site storage is no longer acceptable to the community. Currently there are few moves to find alternative storage arrangements.

One of the key developments for NPP in the region should be the use of SEIA on the proposed new build NPP. Also due to the significant cross boundary impacts of NP there should be use of transboundary environment impact assessment (Tb EIA).

In addition one of the key needs in the region is the development of principles of access to information for environmental matters.

Nuclear safety

After the Fukushima NPP disaster the IAEA set up a Nuclear Safety Action Team to oversee prompt implementation of the *IAEA Action Plan on Nuclear Safety* approved by the Board of Governors and endorsed by all 151 Member States in September 2011.

The Action Plan confirmed that 'the responsibility for ensuring the application of the highest standards of nuclear safety and for providing a *timely, transparent and adequate* response to nuclear emergencies, including addressing vulnerabilities revealed by accidents, lies with each Member State and operating organization.'

The first plenary meeting of the Asian Nuclear Safety Network (ANSN) took place on 19 September 2011 as a side event to the IAEA General Conference. The IAEA Deputy Director General for Nuclear Safety and Security, Denis Flory, opened the meeting, highlighting the importance of collaboration in the field of nuclear safety. The meeting included presentations from representatives from the IAEA and ANSN members on global and regional challenges in nuclear safety post-Fukushima. In the last part of the event, ANSN Member States, support countries and organizations shared their perspectives for the future of the network.

11 'Nuclear power will help meet growing demand in Vietnam, report finds' (2012) <www.power-eng.com/articles/2012/09/nuclear-power-will-help-meet-growing-demand-in-vietnam-report-finds.html>

12 H. Wright 'India debates use of nuclear energy' (12 October 2012) <www.epcmworld.com/news/main-news/nuclear-energy-india>.

The United States' response to the Fukushima disaster

The USA currently has 104 active NPPs, out of 444 NPPs worldwide. Following Fukushima, President Obama ordered a comprehensive review of NPP safety.

The US Nuclear Regulatory Commission's (USNRC's) report *Enhancing Reactor Safety in the 21st Century* (2011) found that the Commission's longstanding defence-in-depth philosophy, supported and modified as necessary by state-of-the-art risk assessments, should continue to serve as the primary organizing principle of its regulatory framework, observing that:

> Although complex, the current regulatory approach has served the Commission and the public well and allows the Task Force to conclude that a sequence of events like those occurring in the Fukushima accident is unlikely to occur in the United States and could be mitigated, reducing the likelihood of core damage and radiological releases.
>
> Therefore, in light of the low likelihood of an event beyond the design basis of a U.S. nuclear power plant and the current mitigation capabilities at those facilities, the Task Force concludes that continued operation and continued licensing activities do not pose an imminent risk to the public health and safety and are not inimical to the common defence and security.

The Task Force nonetheless made various recommendations for clarifying the regulatory framework, and concluded that the application of the defence-in-depth philosophy could be strengthened by including explicit requirements for beyond-design-basis events.[13]

Impact assessments

Strategic environmental impact assessments (SEIAs) and transboundary environmental impact assessments (TbEIAs) can be used for both the selection of NP as a possible energy source, as well as possible site locations for new-build NPP. At the same time SEIA and TbEIAs can provide valuable tools for the consideration of site selection for possible nuclear waste storage, including the possibility of an ASEAN radioactive waste repository.

Dr Andrew Macintosh has considered possible locations for NPPs in Australia, finding that many would best be co-located with coal-fired power plants.[14] NPPs have many specific requirements that limit the number of potential sites. However Macintosh highlighted the need for a broader approach to site selection for NPPs.

New-build NPPs would normally involve the completion of an SEIA that would consider a number of sites. Any EIA would then take into account local criteria, including restrictions on proximity to populated areas. See for example Finland's Radiation and Nuclear Safety Authority (STUK), the United States (US) Code of Federal Regulation (USCFR 2003) and regulatory guidelines issued by the US Nuclear Regulatory Commission (USNRC 1998).

The Greater Mekong region

The Mekong River Commission commissioned an SEIA for hydropower projects in the Greater Mekong region.[15] It concludes:

- the Mekong is a globally important river, one of the few remaining international rivers undammed over most of its length
- one dam across the Lower Mekong mainstream commits the river to irrevocable change
- the proposed developments when under construction and operating have the potential to create international tensions within the Lower Mekong Basin (LMB) due to impacts on ecosystem integrity, sediment and nutrient loads, the disruption to other uses of the Mekong and reduced productivity in fisheries and agriculture
- many of the risks associated with the proposed mainstream developments cannot be mitigated at this time – they would represent a permanent and irreversible loss of environmental, social and economic assets
- there are many substantial gaps in institutional and procedural arrangements for ensuring the effective management of construction and operation of the projects

13 Charles Miller *et al*, *Recommendations for Enhancing Reactor Safety in the 21st Century:* The Near-Term Task Force Review of Insights from the Fukushima Dai-Ichi Accident (US Nuclear Regulatory Commission, 2012) <pbadupws.nrc.gov/docs/ML1118/ML111861807.pdf>.

14 A. Macintosh, 'Siting Nuclear Power Plants in Australia, where would they go?' *Research Paper No 40* (Australia Institute, 2007).

15 International Centre for Environmental Management, *Strategic Environmental Assessment (SEA) of hydropower on the Mekong mainstream: Final Report prepared for the Mekong River Commission (Hanoi, 2010)*.

- critical national capacities in terms of personnel and skills are not yet in place to oversee, control, monitor and enforce safeguards and operational rules
- the framework of regional standards and safeguards are not fully developed and are not adequate
- there are so many remaining uncertainties and serious risks associated with the developments that more studies are needed to better inform responsible decisions making
- the state of knowledge about the Mekong is not considered adequate for making an informed decision about mainstream dams at this time.

Those issues require further study, assessment discussion and resolution among LMB countries, facilitated by the MRC, before commitments to mainstream hydropower development are made.

Some of the issues raised in the SEA on the mainstream dams would also be applicable to the development of NPPs in the region. This is especially true in the context of energy development and the appropriate mix of energy sources.

The Espoo Convention 1991 on Environmental Impact in a Transboundary Context[16] and the Protocol on Strategic Environmental Assessment[17] provide a good basis for both transboundary and strategic assessments.

Access to environmental information

The IAEA Action Plan adopted after the Fukushima disaster stated:

> Transparency in all aspects of nuclear safety through timely and continuous sharing and dissemination of objective information, including information on nuclear emergencies and their radiological consequences, is of particular importance to improve safety and to meet the high level of public expectation. Nuclear accidents may have transboundary effects; therefore it is important to provide adequate responses based on scientific knowledge and full transparency.[18]

An adoption of an Asian Regional Convention on Access to Environmental Information would be a significant opportunity for the nuclear industry to demonstrate that in terms of practices, procedures and safeguards it supports the public right to know. An Asian regional Convention would allow some discussion about the extent of access and public participation and would also allow discussion on the Environmental Impact Assessment (EIA) process that varies from country to country. It would also be in accord with the IAEA Action Plan on Nuclear Safety.

The Korean Environmental Law Association successfully moved a motion at the World Conservation Congress in Jeju, South Korea, in September 2012, concerned with natural disasters and industrial accidents resulting from natural disasters. Amongst other things it called for the establishment of a regional agreement for early and prompt notification and consultations and the right of access to information for all.[19]

A number of proposals have been recently submitted to the IAEA to amend the Convention on Nuclear Safety (CNS) [20] dealing with greater public transparency, accountability and periodical reviews of safety standards.

Access to information for environmental matters

One multi-party convention that deals with access to information in environmental matters and that is particularly relevant to the development of nuclear power is the Aarhus Convention.[21] As of 26 September 2012 the European Union and 45 European states have signed, from Portugal to Kazakhstan, Kyrgyzstan and Tajikistan.[22] The main rights in the Aarhus Convention include:

- the right of everyone to receive environmental information that is held by public authorities ('access to environmental information')
- the right to participate in environmental decision-making ('public participation in environmental decision-making')

16 Both of these instruments were negotiated under the UN Economic Commission for Europe framework. The Convention on the Environmental Impact Assessment in a Transboundary Context, opened for signature Espoo, Finland, 25 February 1991 (entered into force 1997): <www.unece.org/env/eia/eia.html>. [Australia is not a party].

17 The Protocol on Strategic Environmental Assessment (Kyiv, 2003) entered into force on 11 July 2010. See <www.unece.org/env/eia/sea_protocol.html>.

18 IAEA Action Plan.

19 M147: Management of secondary environmental damage from natural disasters, accessible at <http://portals.iucn.org/docs/2012congress/motions/en/M-147-2012-EN.pdf>.

20 *Convention on Nuclear Safety* opened for signature Vienna 20 September 1994 [1997] ATS 5, entered into force 24 October 1996.

21 *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998 (entered into force 30 October 2001). Australia is not a Party <www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention.html>.

22 <www.unece.org/env/pp/ratification.html>.

- the right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general ('access to justice').[23]

Storage and treatment of nuclear waste

The United States has had a significant focus on the dealings with nuclear waste. This still remains a controversial topic, especially since the decision of the Obama Administration to seek to withdraw the licence permit for the high level waste repository at Yucca Mountain.[24] A number of NPP operators have commenced court proceedings to challenge the decision to halt the Yucca Mountain facility.

In most environmental law cases, deference to agency standards is also apparent in US case law. In 1983 the USNRC determined that permanent storage of nuclear waste would have no significant impact. This was accepted by the US Supreme Court in *Vermont Yankee Nuclear Power Corp v Natural Resources Defense Council*, 435 US 519 (1978). However given the release of radioactivity as a consequence of on-site storage this may no longer reflect an appropriate application of the precautionary principle.

The storage of low-level waste is a major priority for the future development of NPPs. Although most industry literature provides for on-site storage of low-level waste as being a suitable mechanism, storage of waste needs to be addressed immediately and with public participation.

Currently there are approximately 26 million cubic metres (m^3) of radioactive waste. Of this cumulative total, 20 million m^3 had been disposed of and 6 million m^3 had been placed in storage.[25] It is estimated that every year the existing 432 reactors will generate about 153 780m^3 of waste per annum. [26]

The United States, France, Japan, China have no current off-site waste storage facility. Finland and Sweden are moving towards developing a site. The first deep geological repositories for nuclear spent fuel to become operational are in ONKALO facility in Finland, but only after 2020.

On-site storage is no longer an acceptable option for the community. The public perception is that radioactive waste is a danger even if properly managed. Perceived risk can often be significantly greater than the scientific risk. Public attitudes to nuclear power relates significantly to public perceptions of the handling and safe disposal of radioactive waste.[27]

Even before Fukushima there was a very clear public view on radioactive waste:

- 92% agree that a solution for highly radioactive waste should be developed now and not left for future generations
- 81% believe that it is politically unpopular to take decisions about the handling of any dangerous waste
- 79% think that the delay in making decisions in most countries means there is no safe way of disposing of highly radioactive waste.[28]

Perhaps a regional approach to storage and reprocessing of radioactive waste is required both to deal with the public perception issues and also to provide the actual solution to the low-level and future high-level radioactive waste.

The recent court action over the Lynas Rare-Earth facility in Malaysia highlights the concerns expressed over the current regulatory scheme to deal with radioactive waste. Although the IAEA has undertaken investigations of this issue the licence issued to Lynas did not clearly identify the precise method proposed to treat the radioactive waste.[29] Community action has focussed on the lack of certainty surrounding the treatment of the waste. Even

23 See also: the Chisinau Declaration adopted on 1 July 2011: Economic Commission for Europe, Meeting of the Parties to the Convention on access to information, public participation in decision-making and access to justice in environmental matters, Fourth session, Chisinau, 29 June–1 July 2011, <ECE/MP.PP/2011/CRP.4/rev.1www.unece.org/fileadmin/DAM/env/pp/mop4/Documents/ece_mp_pp_2011_CRP_4_rev_1_Declaration_e.pdf>.
24 The Year in Review 2001, Section on Environment, Energy and Resources Law, ABA, 2012, 248.
25 Nuclear Energy Agency, *Radioactive Waste in Perspective (*OECD, 2010) 66.
26 Ibid 67.
27 Ibid 49.
28 Ibid 50.
29 IAEA, *Report of the International Review Mission, Malaysia, on the Radiation Safety Aspects of a Proposed Rare Earths Processing Facility (the Lynus Project)*, 23 May–3 June 2011, Malaysia <www.iaea.org/newscenter/news/pdf/lynas-report2011.pdf>.

the IAEA Review team recommended that the issue of a Plan of Management dealing with radioactive waste should be provided prior to the commencement of operations.[30] However in line with international norms of the precautionary principle such a plan of management should be provided to the commencement of the project as being a fundamental issue needing to be determined.

It should be noted that a recent decision of the US Court of Appeals in *State of New York at al v NRC* was decided on 8 June 2012. This decision in a 3-0 finding, held that the USNRC was required to undertake a more detailed EIA when it made a rule regarding the temporary on-site storage of nuclear waste. In essence the NRC sought to continue the current practice of on-site storage. However it did so following the decision to suspend work on the long-term storage facility at Yucca Mountain.

The USNRC held in 1984 that 'spent nuclear fuel' (SNF) could be safely stored on site for 30 years beyond the life on the NPP. In 2010 the amended finding would have allowed SNF to be stored on-site for up to 60 years. This was successfully challenged and the Court held that an EIS or a finding of 'no significant impact' was required before the NRC could make the amendment.

This decision is important, as it will require a significant examination of the current practice of on-site storage of SNF. This will potentially have worldwide implications.

Conclusions and recommendations

Although the future of NPP development in the Asia region is quite strong, it is possible to enhance the security and safety of the community by the adoption of a number of recommendations for reform.

The use of SEIA and TbEIA should be encouraged, to enable the full costs and benefits of the development of NPPs to be examined. This will also enable appropriate mitigation measures to be adopted.

The ASEAN region and APEC should consider the adoption of a regional Convention on Access to Environmental Information along the lines of the Aarhus Convention.

ASEAN and APEC should consider the opportunities to examine radioactive waste issues. This could be done in the context of considering a regional radioactive waste facility.

The future of NPPs in the Asian region will depend on the willingness of governments and the industry to discuss these above matters. It is no longer appropriate for regulators and industry to avoid the political nature of the decisions about NPPs. As recognised by *The Economist*: '[b]arring major technological developments, nuclear power will continue to be a creature of politics not economics.'[31] As a consequence it is now the challenge of the industry to make genuine attempts to engage civil society.

30 Ibid 4.

31 'Special Report', *The Economist*, 10 March 2012, 5.

Overview of the 2012 IUCN World Conservation Congress

by Penelope Figgis AO[1]

The International Union for the Conservation of Nature (IUCN) held its quadrennial World Conservation Congress at the International Convention Centre (ICC) on Jeju Island, South Korea, 6–15 September 2012. Leaders from government, the public sector, non-governmental organizations, business, United Nations agencies and social organizations gathered to discuss, debate and decide solutions for the world's most pressing environment and development issues. The Congress brought together 10 000 people, including 5 000 conservation experts from 153 countries, and provided 600 events.

The first five days of the Forum about sustainability ideas, thinking and practice was followed by the Members' Assembly, a global environmental parliament of governments and NGOs, where elections take place for all senior positions and motions are passed which form IUCN's policies.

It was my pleasure from 5–12 September to perform my dual roles of Director of Australia's national committee of IUCN members – 'the ACIUCN', and Vice Chair of the World Commission on Protected Areas (WCPA), Oceania. Australia and the wider region of Oceania were well represented with over 100 delegates. I can only offer a few snapshots from my own experience. I was principally involved with the Congress Forum, as national committees do not have a vote in the Assembly. I followed the World Heritage, connectivity conservation and BIOPAMA streams in addition to several marine and financial meetings.

I encourage readers to explore the richness of the IUCN Congress site including many videos of Congress events <www.iucn.org/>. There is also a summary of the Congress at <www.iucnworldconservationCongress.org/forum___exhibition/summaries/>.

Overall it was a deeply inspiring event, as we met with colleagues from around the world who are using all their intellect and resources to try to defend the living fabric of the earth, and the rights of all peoples who are dependent on it, against a growth and resource consumption paradigm which often appears to accord nature scant value.

WCPA steering committee and members' meetings

The day before the Forum commenced, the six Commissions of IUCN representing some 12 000 global experts met in Jeju. On the opening day, WCPA also had a half day Steering Committee meeting attended by about 70 members. WCPA has some 1 400 members across 154 countries.

The WCPA Chair, Nik Lopoukhine, and the Head of IUCN's Global Protected Area Program, Trevor Sandwith, reported on the last four years, and the major influence that the WCPA had exerted on strategic directions in protected area policy globally. Nik highlighted the importance of WCPA in shaping the Programme of Work on Protected Areas (POWPA) under the Convention on Biological Diversity (CBD), which shapes much of the work and funding for protected areas worldwide, but is less visible in Australia. Nik also identified our key roles in areas such as:

- connectivity conservation – expanding the idea of varied and equitable governance across wide land and sea scapes
- natural solutions – our work on getting ecosystems and biodiversity conservation understood as critical responses to climate change
- management effectiveness, which has now become a global best practice norm across the WCPA.

Some of the WCPA's work areas have been especially high performing, such as marine conservation and conservation in the high seas. But specialist groups with strong leadership working on policy areas such as tourism, freshwater management, healthy parks/healthy people, landscape restoration, sacred and cultural sites, cities and protected areas, and World Heritage have also had achievements.

The most important factor shaping the WCPA over the next four years will be global work towards achieving Target 11 of the CBD's Aichi targets, which commits over 100 nations to having 17% of terrestrial and 10% of marine territory in protected areas. While this is a key direction for the future, at least 14 of the Aichi targets can also be partly achieved

1 Director, Australian Committee for IUCN

through protected areas of all kinds. Many of the initiatives discussed below such as the Protected Planet and the Green list will be central to WCPA's work.

The Congress meetings also discussed ideas for the World Parks Congress in Sydney, Australia, in 2014. It was suggested the Congress could have three major themes:

- recognising the full spectrum of values, from spiritual and aesthetic to economic
- governance: all forms of governance including indigenous peoples' rights, governance of the high seas, and models for land and sea scape management
- mainstreaming: all forms of partnerships and alliances to achieve conservation though the tourism, health, water and insurance sectors.

The themes are not yet set in stone. They will be discussed in the next few months and WCPA members will be given a chance to provide input.

The Forum

World Heritage

On the occasion of the 40th anniversary of the World Heritage Convention, a Forum workshop focused on engaging the IUCN constituency for conservation and communities. Over 100 delegates attended, representing many government and organisational members of IUCN, and IUCN Commission members. It was my privilege to chair this session and to attempt to draw out consensus points to be conveyed to key bodies associated with the Convention.

It was clear that there are deep concerns about the long term credibility of the World Heritage Convention. The problems are multifaceted, including:

- a lack of capacity or political will to manage sites well, which leads to more 'in danger' designations
- increasing pressures from the many threats that beset even well managed sites
- a lack of proactive assistance to State parties
- internal issues within the World Heritage Committee which have the potential to lower the rigour of assessment and harm the critical 'brand' 'World Heritage'.

The meeting called upon the World Heritage Committee to ensure that all processes comply with the Operational Guidelines for the World Heritage Convention, consistently and rigorously, and that they are transparent to the wider community. It also called on the World Heritage Committee to ensure that the advice of IUCN and ICOMOS is treated with due respect. The meeting also supported the 'World Heritage Watch' NGO initiative that emerged from the World Heritage NGO forum in St Petersburg in July 2012, which involves establishing an international network of NGOs to safeguard the integrity and implementation of the World Heritage Convention.

Biodiversity and Protected Areas Management Programme

The Biodiversity and Protected Areas Management Programme (BIOPAMA), launched by the European Commission in July 2011, has two main components: one on protected areas which will be implemented by IUCN and the European Commission Joint Research Centre (JRC), and another on access and benefit sharing (ABS). The richness and diversity of the plants, animals and ecosystems in protected areas of many countries in Africa, the Caribbean and the Pacific provides services to local people and communities in and around these areas. The protection and sustainable use of these resources can help reduce poverty and provide benefits for urban areas and communities located far from the protected area itself. However, in most countries there are information gaps and a lack of adequate capacity to plan and effectively manage protected areas. BIOPAMA seeks to address this challenge.

Quite a number of our colleagues from Oceania were involved with discussions on the BIOPAMA. The meetings in Jeju endeavoured to sort through the complex issues of implementation and aligning BIOPAMA with other initiatives in the three target regions. We stand ready to assist in the Pacific by mobilising IUCN Commission members with appropriate skills to add capacity.

The Protected Planet brand

The WCPA re-launched its best practice series of technical publications within the Protected Planet brand, with a new cover and design and two new titles: *Ecological Restoration for Protected Areas* and *Guidelines for Applying the IUCN Protected Area Management Categories to Marine Protected Areas*. Several others are in the pipeline, including titles on governance of protected areas, systematic conservation planning, and a major revision of all titles is planned for the 2014 World Parks Congress <www.iucn.org/about/work/programmes/gpap_home/gpap_capacity2/gpap_bpg/>.

The WCPA journal *PARKS* was also re-launched as an on-line, peer reviewed and open access journal <www.iucn.org/about/work/programmes/gpap_home/gpap_capacity2/gpap_parks2/> and several other new IUCN publications with released at the Protected Planet Pavilion during the Congress.

Protected Planet Report

The first ever global report card on progress toward the achievement of UN targets on biodiversity and development that rely on national parks and protected areas as the chief strategy – the Protected Planet Report – was launched at the Congress. The report shows that overall that great strides have been made in the last ten years to create more protected areas globally, but that in order to achieve the targets agreed in Nagoya in 2010, a terrestrial protected area the size of Argentina and an MPA the size of Australia is needed. Simply declaring these areas will not be enough however, as all protected areas must be managed. Progress toward achieving management effectiveness targets in protected areas is well below the target for their declaration. Achieving good management will require a massive investment and political will. The report can be downloaded at <www.unep-wcmc.org/medialibrary/2012/09/14/eb3bb854/PPR2012_en.pdf>.

Marine protected areas

As concern grows about the state of marine resources and the degradation of the world's oceans, new IUCN guidance launched in Jeju may significantly improve ocean protection.

IUCN defines a protected area as:

> A clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values.

This definition will make it much harder for marine areas that permit resource exploitation to be MPAs. It should slow the trend of fisheries advisory bodies claiming that area mechanisms that exploit fish, are MPAs. Pipeline and wind farm areas will also not be considered MPAs unless they have clear long-term objectives for nature conservation and are consistent with MPA guidelines. If marine areas involve extraction and have no defined long-term goals for conservation and ocean recovery, they are not MPAs.

IUCN categories are applicable to all types of protected areas, but as there are fewer MPAs, there is less experience and understanding of MPAs, and the application of the MPA category may become inconsistent. Confusion tends to arise when sites have been incorrectly assigned on the basis of activities that occur, rather than using the stated management objectives. Also, where protected areas include both land and sea, the objectives for the marine component are rarely considered when assigning the site's category.

International Connectivity Conservation Network

Dr Graeme Worboys and Dr Olivier Chassot launched the International Connectivity Conservation Network (ICC) at the Congress. The objective of the Network is to assist global corridor managers to interact, to share experiences and knowledge, and ultimately to help facilitate the establishment and effective management of large scale corridors that connect protected areas. More information is at <www.connectivityconservation.net>. The launch of the ICC Network is another step in IUCN WCPA's progressive facilitation of connectivity conservation globally.

An Earthscan publication, *Connectivity Conservation Management: A Global Guide,* was launched in 2010 at the Melbourne Healthy Parks, Healthy People Conference and it has since helped facilitate connectivity conservation management in different parts of the world. It includes the science supporting connectivity conservation, and was a key reference to an Australian National Advisory Committee responsible for preparing Australia's first ever whole-of-continent draft 2012 National Wildlife Corridors Strategy. The book followed workshops in 2004 (Papallacta, Ecuador) and in 2008 (Dhulikhell, Nepal) which helped to develop the content for the book.

Restoration Guidelines

This publication provides guidance on the restoration of terrestrial, marine, and freshwater protected areas, at both system and site levels on. As restoration sometimes has to extend beyond protected area borders, to address ecosystem fragmentation and maintain well-connected protected area systems, this guide uses the term 'restoration for protected areas' for activities within protected areas, and for activities in connecting or

surrounding lands and waters that influence protected area values. It provides information on principles and best practice, with examples, and advice on the process of restoration, but it is not a comprehensive restoration manual and does not give detailed methodologies and techniques. More information is at <http://data.iucn.org/dbtw-wpd/edocs/PAG-018.pdf>.

Green List

Three events at the Congress aimed to advance discussions around an IUCN initiative to develop a 'Green List of Well-Managed Protected Areas'. The List will celebrate protected area successes, acting as a benchmark for progress towards effective and equitable management, and rewarding innovation, excellence and enterprise. Protected areas wishing to be included on the List will have to satisfy agreed criteria concerning conservation and effective management, and equitable governance. Several pilot projects are underway in Colombia, Kenya and with the WWF Tiger Conservation Program.

The objectives and mechanisms for a Green List were presented at a well-attended event in the Protected Planet Pavilion and this was followed by a more technical workshop session that examined the process for selecting and assessing sites for the Green List in a 2-hour workshop that used 'educational clickers' to gather audience feedback on the proposal. Other potential pilot site countries indicated their keenness to participate during this program.

A Memorandum of Understanding between the Korean National Parks and Wildlife Service (KNPS) and the IUCN was signed at a press conference. Under the MOU, KNPS will provide staff support and funding to assist in the development of the Green List as well as participating as a pilot site in the program. Motion 048 on Development of Objective Criteria for a Green List of Species, Ecosystems and Protected Areas was adopted by the Member's Assembly.

The Members' Assembly

More than 180 motions were proposed to the Members' Assembly, IUCN's unique global environmental parliament bringing together governments and non-governmental organizations to debate and vote. The Assembly approved resolutions on a wide range of issues including action to recover Atlantic bluefin tuna stocks and avert extinctions of rare dolphin species; shutting down illegal bear farms; scaling back offshore drilling in French Guiana, Suriname and Guyana; and providing better payment channels for ecosystem services in poor countries.

Action on stopping the escalating poaching of elephants and rhinos was approved, and the push for a globally binding treaty on protecting wildlife from mercury contamination was endorsed, as was greater enforcement of laws on wildlife crime and reducing the impact of recreational divers on marine environments.

IUCN's work programme for the coming four years was also approved, recognizing that global production and consumption patterns are destroying nature. At the same time, people, communities, governments and business are underutilizing the potential of nature and the solutions it provides. The adopted quadrennial programme builds upon IUCN's niche as the world's leading authority on biodiversity conservation.

Australian members will find interest in the motions that are accessible at <http://portals.iucn.org/2012motions/>. Here are a few of particular interest:

- M182: Australia's Proposed Marine Reserve Network
- M164: Need for non-regression in environmental law and policy
- M053: Strengthening the World Heritage Convention
- M045: The Sydney VIth IUCN World Parks Congress 2014
- M046: Healthy parks healthy people
- M054: Sacred Natural Sites: Support for custodian protocols and customary laws in the face of global threats and challenges
- M055: Implementation of the United Nations Declaration on the Rights of Indigenous Peoples in the context of the UNESCO World Heritage Convention
- M056: Valuing and conserving and of geoheritage within IUCN Programme 2013–16
- M065: Protecting the Great Barrier Reef World Heritage area and other important heritage areas of Australia from the harmful impacts of the expansion of the mining and gas industries and other activities
- M085: Antarctica and the Southern Ocean

The elections

The Assembly is also the forum at which the members of IUCN chose their key office bearers for the next quadrennial. Members vote for the President and Councillors from each region and the Chairs of IUCN's Six Commissions of Experts.

The President

IUCN Members elected their new President, Mr Zhang Xinsheng of China. He will lead the world's largest environmental organization for the next four years. He succeeds Ashok Khosla, who successfully represented IUCN 2008–12. The website has an interview with the newly-elected President where he speaks about his hopes and plans for the future <www.iucnworldconservationCongress.org/news___press/?11094/The-next-four-years-according-to-Zhang-Xinsheng>

Oceania Councillors

Councillors who will represent Oceania on the IUCN Council are:

Andrew Bignell, New Zealand, Manager International, Department of Conservation, Wellington, New Zealand

Andrew's career has focussed on natural resources management, particularly National Park and other terrestrial and marine protected areas management. He has undertaken roles in research, planning and governance of protected areas, with a particular focus on New Zealand and the Pacific. He has been a senior member of the Department of Conservation for many years and has had active engagement in departmental governance and whole-of-government activity. Andrew is responsible for the Department's engagement in international activities with responsibility for strategic relationships. He is a member of the CBD COP Bureau. Within the Pacific he has participated in the work of inter-governmental organizations, the Pacific Islands Roundtable for Nature Conservation (an NGO/Government alliance) and participated in the formation and work of the IUCN Oceania Regional Committee. He is a member of the WCPA and Chair of the New Zealand Committee of IUCN Members.

Brendan Mackey, Australia, Professor and Director, Griffith Climate Change Response Program, Griffith University, Australia

Brendan has internationally recognized expertise in the fields of conservation science, particularly in relation to ecosystems, connectivity conservation, forest management, and biodiversity-climate change interactions. He has been a member of expert groups which have written reports for the CBD Secretariat (Technical Reports 41 and 43). He has participated in various UN conferences and CoPs for climate change and sustainable development processes. He has considerable experience in the formulation of science and evidence-based conservation policy.

Brendan continues his term on the Council, where previously he has been Co-Chair of the Policy and Programme Committee, and a member of the Governance Committee, the Private Sector Task Force, the Rio+20 Task Force, and the Climate Change Core Group. He is also a member of the Commission on Environmental Law, the World Commission on Protected Areas, and the Commission on Environmental, Economic and Social Policy. He serves ex officio as a Regional Councillor on the Executive Committee of the Australian Committee for IUCN. He works on matters of conservation and environmental protection with governments at all levels, the private sector, and NGOs.

Anna Elizabeth Tiraa, Cook Island, Director of Climate Change, Cook Islands Government

Anna Tiraa is a committed conservationist with more than 20 years working for the benefit of the Pacific Islands environment. Anna has undertaken environmental related work for government, national and international NGOs, communities, the private sector, inter-governmental regional organizations and the UN. Her work experience includes project design, implementation, negotiation, monitoring, and review and evaluation. She has been a major contributor to bringing back a critically endangered endemic Rarotongan bird from the brink of extinction.

As Biodiversity Officer for the Secretariat for the Pacific Regional Environment Program (SPREP), Anna has contributed to the biodiversity conservation efforts of more than 20 Pacific Island countries and territories. This experience has given her a sound knowledge of processes across a broad spectrum of groups contributing to conservation initiatives in the Oceania region, and allowed her to establish a valuable network of environmental policy makers and practitioners in the Oceania region.

Anna's educational qualifications include a BSc in Environmental Studies from the University of the South Pacific, Fiji (1994), and an MSc in Natural Resources Management from the Asian Institute of Technology, Thailand, (2011), for which she was awarded a UNEP scholarship. Her research project concerned biodiversity and climate change in the Cook Islands. Anna is presently a member of the IUCN Commission on Ecosystem Management (CEM) and Deputy Regional Vice Chair for Oceania, World Commission on Protected Areas (WCPA). She is an Executive Committee member of

the IUCN Transboundary Specialist Group (Oceania Representative). She is also an Executive founding member of Tapororporo'anga Ipukarea Society (a Cook Islands Environmental NGO formed in 1996, also an IUCN Member) and was a Global Councillor for BirdLife International Council 2004–06.

Commission Chairs

Congratulations go to all the elected Chairs who guide their Commissions to achieve so much of the international output of IUCN:

- Commission on Environmental Law: Justice Antonio Herman Benjamin, Brazil
- Commission on Ecosystem Management: Piet Wit, The Netherlands
- Commission on Education and Communication: Juliane Zeidler, Germany
- Commission on Environmental, Economic and Social Policy: Aroha Te Pareake Mead, New Zealand
- Species Survival Commission: Simon Stuart, United Kingdom
- World Commission on Protected Areas: Ernesto Enkerlin Hoeflich, Mexico

Read more about the new Chairs <www.iucnworldconservationCongress.org/member_s_assembly/candidates_for_election/commission_chairs/>

Information for contributors

How to contribute

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

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

Acceptance of written work in the NELR does not in any way indicate an adoption by NELA the accuracy of the opinions expressed by, or information presented by authors. Authors remain responsible for their opinions, and any defamatory or litigious material, and neither NELA nor the NELR Editor accepts any responsibility for such material.

NELR 2012–13 deadline for contributions:

2013:1 – 22 March 2013
2013:2 – 7 June 2013
2013:3 – 13 September 2013

NELA Bulletin
(bi-monthly newsletter mailed to all members)

Contributions to the NELA Bulletin may be submitted to the NELA Secretariat at any time and need to be received in the last week of each even-numbered month (Feb/Apr/Jun/Aug/Oct/Dec).

National editor: Dr Hanna Jaireth

Member, IUCN Commission on Environmental Law – mhsjaireth@netspeed.com.au. Hanna is employed by the Law Council of Australia and volunteers as coordinating editor of NELR and Chair of the Management Committee of the Environmental Defender's Office (ACT). She has a longstanding interest in sustainable development and human rights, and has worked as an academic, lawyer, public servant and communications officer in a range of private and public sector positions. Hanna completed undergraduate arts/law(hons) and postgraduate international relations degrees.

International editor: Kathryn Walker

Partner, Lynch Meyer Lawyers, Adelaide – KWalker@lynchmeyer.com.au – Kathryn holds a Bachelor of Arts Degree with Honours in English and a Bachelor of Laws Degree. Kathryn practises in the area of litigation specialising in building and construction, competition and consumer and environment and planning law. She is a member of the Property Council Urban Development Committee, the HIA Planning and Environment Committee, the CCF Women in Civil Committee, the UDIA Sustainable Development Committee and the UDIA (SA) EnviroDevelopment Board (SA). Kathryn is also a member of the Law Society of South Australia, the Environmental Defender's Office (SA), the National Association of Women in Construction, the Australian Water Association and the Australasian Land and Groundwater Association.

Federal editors: Shol Blustein and Felicity Deane

Shol Blustein: PhD Scholar, Law Faculty, Queensland University of Technology and Climate Change Research Analyst, Minter Ellison Lawyers – shol.blustein@student.qut.edu.au. Shol is completing a PhD in climate change law with the Faculty of Law at the Queensland University of Technology. Shol's doctoral research is titled '*Towards low emissions in the electricity generation sector: creating a coherent legal model for developed nations*'. Shol also works for Minter Ellison Lawyers as a Climate Change Research Analyst in the Energy and Resources Group. As part of this role Shol regularly gives presentations and writes client papers on the climate change law and policy landscape in Australian and overseas. Before joining Minter Ellison, Shol worked as a banking and finance lawyer with another top tier law firm in Melbourne.

Felicity Deane: PhD Scholar and Sessional Academic, Law Faculty, Queensland University of Technology – f.deane@student.qut.edu.au

Felicity is currently completing a PhD in climate change law and World Trade Organization law with the Faculty of Law at the Queensland University of Technology. Felicity's PhD is titled *The Clean Energy Package and the World Trade Organization: An Analysis of Compliance Issues*. Felicity also works as a sessional academic within the Law Faculty at QUT. Prior to this Felicity was employed as a Senior Policy Officer with the Queensland Government.

Australian Capital Territory editor: Camilla Taylor

Solicitor, EDO (ACT) – camilla.taylor@edo.org.au. Camilla is the principal solicitor at the Environmental Defender's Office (ACT). She has an extensive background in litigation and aims to complete her Master of Laws at the University of NSW.

New South Wales editor: Dr Nicholas Brunton

Partner, Henry Davis York – nicholas_brunton@hdy.com.au. Nick has been a member of NELA and state editor since 1992. He has degrees in Law and Geography from Macquarie University and received a PhD from the University of Sydney in 1998. His thesis examined the law and policy relating to coastal water pollution in Australia. Nicholas currently practises in the areas of planning, environment, valuation, property and commercial law. He is also kept busy providing guest lectures at both Sydney and Macquarie.

Queensland editor: Dr Justine Bell

Post-doctoral research fellow – j.bell@law.uq.edu.au. Justine completed her Bachelor of Laws and PhD at the Queensland University of Technology, and is now a post-doctoral research fellow in the Global Change Institute at the University of Queensland. Justine's research interests broadly span environmental, insurance and property law, and she is currently working on a large multi-disciplinary project examining how to effectively manage the impacts of sea-level rise. Justine also teaches undergraduate and postgraduate environmental law subjects at the TC Beirne School of Law at the University of Queensland.