Welcome to the latest edition of the Australian Environmental Law Digest.

Subscribe to the Digest for a quarterly selection of quality analysis of environment and climate change law developments around the country.

To contribute articles, please contact us at review@nela.org.au

NELA recently held our national conference, Environmental Law: What Can We Do Better? The conference provided an opportunity to discuss a wide range of environmental law issues, and to consider things that are being done well, and where improvements can be made. Presentations from the event are available at www.nela.org.au, and several of the topics discussed are picked up in this edition.

Liability for remediation following environmental incidents can be complex, and Marita Foley examines some of the difficulties with the Queensland government’s efforts to extend responsibility for remediation to related companies.

Biodiversity indicators in Australia show a persistent decline in species richness and the extent of habitat. What role can environmental laws play in addressing this? Focussing on the current review of Victoria’s Flora and Fauna Guarantee Act, Sarah Brugler describes how existing laws have failed and proposes a suite of options to improve the legal framework. Sharing her experience of indigenous-led conservation projects in the Kimberley, Polly Grace questions whether traditional “national parks” are the most effective model to protect biodiversity. Her article highlights the need for new approaches which allow indigenous-led conservation projects to achieve environmental outcomes while securing land rights and indigenous management.

One of the repeated themes of both the national conference and the WA conference was standardisation of best practice regulatory models, and opportunities to learn from experiences in other jurisdictions. Despite South Australia operating a successful container deposit scheme for decades, other States have struggled to replicate that success. In their article, Bottled Tension, Rebecca Hiscock and Breellen Warry examine recent progress in NSW, tentative steps in other jurisdictions, and the prospects of establishing a national scheme.
The national conference closed with a robust discussion of the role of third party litigation in implementation and enforcement of environmental laws. Recent characterisation of litigation challenging approvals of mining projects as “lawfare” highlights the ongoing tension between government, industry and public interest litigants. In that context, Dr Justine Bell-James looks at whether applicants in the range of legal challenges to the Adani Carmichael mine are making any progress towards improving environmental assessments.

These are all important issues, and the National Environmental Law Association is committed to continuing to provide opportunities for a range of stakeholders to contribute to conversations about how best to address them. We urge you to consider becoming a member of NELA, and joining our policy interest groups, to keep building momentum for more effective environmental laws.

To join, go to [www.nela.org.au/NELA/Membership/Join_Member_Selection.aspx](http://www.nela.org.au/NELA/Membership/Join_Member_Selection.aspx)

Wishing everyone all the best for a harmonious and restorative festive season. See you in 2017!

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Developments in Enforcement of Environmental Laws: recent amendments in Queensland

Marita Foley

Introduction

1. It is meaningless to have environmental laws unless they are properly enforced.

2. There are six categories of legal enforcement mechanisms in environmental law:
   (a) Criminal enforcement, by government agencies and where permitted, by citizens;
   (b) Civil enforcement, encompassing a range of remedies including injunctions and remediation orders;
   (c) Civil penalties;
   (d) Administrative measures including various clean up notices, spot fines, and written undertakings;
   (e) Judicial review to enforce compliance by the executive with the requirements of environmental legislation; and
   (f) Merits review appeals which will require an assessment of environmental laws to reach the correct or preferable decision under the law.

3. However, the enforcement of environmental laws has to varying degrees been problematic in Australia. There are a number of potential explanations for this, although a key reason is likely to be the lack of capacity and insufficient resources on the part of agencies charged with the responsibility for enforcing environmental laws.

4. An important addition to the armoury of environmental enforcement has been the use of directives or administrative orders which can empower competent authorities to direct transgressors to take a number of steps to remedy harm to environment. These provisions have been used with varying degrees of success.

5. One of the key issues which has arisen in the enforcement of directives is identifying an appropriate entity to be served with the directive. This has been particularly problematic when the ‘corporate veil’ has been relied upon by transgressors to avoid liability by winding up companies and avoiding liabilities for polluting the environment or undertaking remediation.

6. The reliance upon the ‘corporate veil’ to avoid liability has led to a number of amendments to environmental laws in Australia directed to ‘lifting the corporate veil’. Of particular interest, and the subject of this paper are recent amendments to the Environment Protection Act 1994 (EP Act) in Queensland. The amendments are directed to extending the range of persons against whom enforcement measures may be taken in Queensland.

7. The new provisions in Queensland have gone beyond the range of potential recipients of directives to enforce environmental laws which are presently in force in other jurisdictions.

1 Barrister, Castan Chambers, Victorian Bar. This paper is based on a presentation delivered at the NELA National Conference on 18 November 2016.
8. For example, in Victoria, in 2006 amendments were made to the *Environment Protection Act 1970* which inserted s 62A(1AA). That section provides that the EPA may direct a corporation to take the clean-up and on-going management measures specified in a Clean Up Notice if a person that caused or permitted pollution or abandoned waste was a subsidiary, related entity or associated entity and:

(a) One or more of the directors of the corporation were aware of the conduct of the subsidiary, related entity or associated entity; or

(b) It is reasonable to expect that a corporation in the corporation’s circumstances, or one or more of the directors would have been aware of the conduct of the subsidiary, related entity or associated entity.

9. That amendment was directed to avoiding corporate structures quarantining liability for polluting behaviour. The provision was modelled on provisions in the *Corporations Act 2001 (Cth)*, which attach liability to parent companies for the insolvent trading of a subsidiary. The change was designed to allow the EPA to order a parent company to accept responsibility for clean-up and ongoing management where its subsidiary is liable under s62A of the Act. The circumstances in which the EPA can do this are where, having regard to the level of ‘control’ over the subsidiary, the directors of the parent company were aware of the conduct of the subsidiary or it is reasonable to expect them to be so aware, and the EPA is not satisfied that the company took all reasonable steps to prevent the polluting conduct.

10. In New South Wales, section 63 of the *Contaminated Land Management Act 1997 (NSW)* provides that the Director of a body corporate that has been wound up may be required to comply with a management order at their own expense if the person was a director of, or a person concerned in the management of, a body corporate that has been wound up within the 2 years before the Court’s order is made, and has failed to comply with the management order. A Court may only order a person to comply with a management order if the EPA satisfies the Court that the person was a director of, or a person concerned in the management of, the body corporate at the time when the management order was made, and there is reason to believe that the body corporate was wound up as part of a scheme to avoid compliance with the management order. There will be reason for such a belief if the company entered into transactions which were voidable under the *Corporations Act 2001* or there was (at the time or times when the company entered those transactions or a substantial portion of them) reason to believe that the land was contaminated.

11. This paper reviews the recent amendments In Queensland which the author anticipates may be replicated in some form in other jurisdictions so as to broaden the range of persons against whom enforcement measures can be taken. The new provisions in Queensland will allow the Department of Environment, Heritage and Planning (DEHP) to target parent companies, ultimate beneficiaries and also shadow decision makers. The amendments are directed to ensuring that persons responsible for causing environmental harm and who are unable or unwilling to carry out the remediation works are held accountable, and that elaborate corporate arrangements cannot be used to avoid responsibility. Importantly, the Act applies to all environmental authorities and is not limited to resource projects.

**Background**

12. On 15 January 2016, the Palmer Nickel and Cobalt Refinery in Yabulu operated by Queensland Nickel terminated 237 workers. On 18 January 2016, Queensland Nickel entered voluntary administration. At this time there were investigations of high levels of
ammonia in local waterways and a prosecution of the plant’s operating company over alleged earlier spills from the dams. The tailings dams were found to be not adequately sealed and required constant maintenance and observation to control leaks.

13. After the operating company entered into voluntary administration, the Queensland Government announced it would cost $93 million to begin the clean-up of environmental damage at the Yabulu nickel refinery. The $93m estimate related to the initial cost of clean-up. The figure represents the initial cost of dealing with millions of tonnes of toxic sludge in the tailings dam and ponds at the plant near Townsville. The area covered several hectares and sat a few hundred metres from the Coral Sea and Great Barrier Reef.

14. In what appears to have been a response to the issues surrounding the Yabulu Nickel Refinery, the Queensland Government introduced a bill to Parliament, which sought to significantly increase the range of people who can be pursued in the event of non-compliance with the EP Act or with conditions of an environmental authority.2

15. In April 2016, the Queensland Parliament debated the Environment Protection Chain of Responsibility Amendment Bill which would give the Government new powers to pursue the owners of resources projects for environmental clean-up costs.

16. The Environmental Protection (Chain of Responsibility) Amendment Act 2016 (CoRA) was passed by the Queensland Parliament on 22 April 2016 and commenced on 27 April 2016.

17. The objectives of the CoRA amendments are to:
   (a) facilitate enhanced environmental protection for sites operated by companies in financial difficulty; and
   (b) avoid the state bearing the costs for managing and rehabilitating sites in financial difficulty.3

18. While the Act received assent on 27 April 2016, it applies retrospectively to entities that became the holder of an environmental authority (through a transfer) after introduction of the Bill on 15 March 2016.
   (a) An environmental protection order (EPO) may be issued to a person undertaking environmentally relevant activities to require compliance with environmental obligations. An EPO is a statutory enforcement tool which can require a person to undertake specific actions within specific timeframes, such as cleaning up or rehabilitating land, giving a bank guarantee or other security.

19. The “chain of responsibility” amendments made to the EP Act broadened DEHP’s powers to issue an EPO to:
   (a) a “related person” of a company that is being, or has already been, issued with an EPO; or
   (b) a related person of a “high risk company” (including a company in administration, liquidation or receivership, or an associated entity of such a company), irrespective of whether the high risk company is being, or has been, issued with an EPO.

20. The new powers do not restrict or change the existing ability of the DEHP to issue an EPO to a person identified in section 358 of the EP Act.

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2 The Environmental Protection (Chain of Responsibility) Bill 2016 (the Bill) was read for the first time on 15 March 2016 and was then referred to the Agriculture and Environment Committee.
3 Explanatory Notes for the Environmental Protection (Chain of Responsibility) Amendment Bill 2016.
Rather, they expand the department’s powers, allowing the department to issue an EPO to ‘related persons’, including parent companies, certain landholders and persons with a ‘relevant connection’ to a company that is carrying out the relevant activity. This may include persons that have the capacity to influence the extent of the company’s environmental compliance or persons capable of significantly benefitting financially from the activities of the company.

Both the environmental authority holder and the related person are then required to take the necessary steps to comply with the environmental protection order.

The amendments allow the DEHP to look behind and beyond the corporate veil to see who controls or has influenced the company and allows them to be pursued for environmental default. The amendments to the EP Act allow the DEHP to extend responsibility for clean-up, rehabilitation and associated costs to a ‘related person.’

As a consequence, liability could be extended to related bodies corporate and to other persons, such as shareholders and financiers.

Key points

The new laws in Queensland will allow environmental obligations to be imposed not only on environmental authority holders, but also on a broad range of ‘related persons.’

The amendments significantly broaden the range of entities and persons that can be exposed to receiving EPOs from the DEHP. If such orders are issued, recipient entities or persons will become directly liable to satisfy the environmental obligations of a corporate holder of an environmental authority in Queensland.

Failure to comply with an environmental protection order is an offence, and also enables the DEHP to recover the costs of addressing the environmental harm from the person or entity issued with the protection order.

The new provisions raise an important risk awareness issue, in that companies associated with resource companies or other companies that hold environmental authorities will need to be aware of the potential that they may become liable for failures by the environmental authority holder. The amendments also have the potential to affect future financing arrangements for environmentally relevant activities in Queensland.

The Draft Guidelines

In deciding whether to issue an EPO to a related person of a company under s363AC or 363AD the DEHP must have regard to any guidelines made under section 548A.


The draft Guidelines seeks to clarify the powers of DEHP to issue an EPO to a ‘related person’ under the Chain of Responsibility amendments to the EP Act.

It is of particular interest that the draft Guidelines seek to introduce, for the first time new concepts such as ‘culpability’ – a concept which is not found within the EP Act.

The release of the draft Guideline by the Minister for the Environment and Heritage Protection was accompanied by a press release which describes the proposed Guideline as a ‘binding instruction’, once it has been finalised and approved by regulation.

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4 Section 363ABA(a), EP Act
34. However, under the EP Act, DEHP need only ‘have regard to’ the Guideline when deciding whether to issue an EPO to a related person. The DEHP is not required to follow the Guideline. The draft Guidelines are not binding on DEHP. The DEHP may act contrary to the principles set out in the draft Guidelines, provided they have ‘had regard to’ the Guidelines in making their decision.

The Key principles

35. The draft Guideline is detailed and includes a number of case studies designed to provide an illustration of how the draft Guidelines will be applied. The draft Guideline provides a set of eleven key principles that will be used to guide DEHP’s decision-making in relation to the issue of an EPO to a ‘related person.’ These principles include that:

(a) EA holders have responsibility for compliance with the conditions of their EA and the EP Act, including the general environmental duty (GED).

(b) Where an environmentally relevant activity (ERA) is conducted without the need of an EA, the operator of the ERA has responsibility for compliance with the EP Act, including the GED.

(c) EA holders and operators conducting ERAs must take all reasonable and practicable measures to protect environmental values from unlawful harm.

(d) EA holders and operators conducting ERAs will be required to pay the cost of restoration or rehabilitation of the environment.

(e) Where enforcement against EA holders or operators conducting ERAs will not achieve restoration or rehabilitation of the environment, or the protection of the environment from harm, the issue of a CoRA EPO will be explored.

(f) When deciding whether to take enforcement action, and who the recipient is of any enforcement action, the department will have regard to its Enforcement Guidelines.

(g) Being a ‘related person’ does not of itself trigger the issue of a CoRA EPO. Culpability will be established prior to a related person receiving a CoRA EPO.

(h) The department will only consider issuing a CoRA EPO to a ‘related person’ where a company has avoided, or attempted to avoid, its environmental obligations.

(i) Any enforcement action taken by the department will be proportionate to the seriousness of the matter.

(j) There is no pre-determined order in which the department will pursue related persons.

(k) A security or bank guarantee will not be required under an EPO where the EPO relates to the same matter for which financial assurance (FA) is already held and the FA is sufficient to cover the cost of complying with the requirements of the EPO.6

What is a ‘high risk company’?

36. The DEHP may issue an environmental protection order to a ‘related person’ of a ‘high risk company’ (whether or not an environmental protection order has also been issued to the high risk company itself).

6 Draft guidelines, p.5
37. A ‘high risk company’ is a company that is an externally administered body corporate (which includes a company in administration, liquidation or receivership) or is an associated entity of a company that is an externally administered body corporate.7

38. The purpose of this provision is to ensure that, if a company is under external administration and may have insufficient funds to meet its commitments, another company could be pursued to ensure compliance.

39. As the group comprising associated entities is broader than related companies, the regulator can potentially look outside the immediate corporate structure of the environmental authority holder to find an entity with the necessary funds to meet any unsatisfied environmental commitments.

The introduction of the concept of ‘culpability’

40. As noted in the Key Principles, where a company has avoided, or attempted to avoid, its environmental obligations and enforcement action against the EA holder or operator of the ERA is not available; or enforcement action against the EA holder or operator of the ERA will not achieve restoration of the environment or the protection of the environment from harm, the DEHP may consider issuing an EPO to a ‘related person.’

41. The draft Guidelines provide: “where there are multiple related persons, the DEHP will consider the relative culpability of each related person to determine the related person that is more culpable for the matter.”

42. The concept of ‘culpability’ is not a concept found in the EP Act but appears to be a new concept developed within the draft Guidelines.

43. Assuming that it is established that one related person is more culpable than other related persons for a matter, the draft Guidelines provide that the DEHP would then consider whether the related person has taken all reasonable steps, having regard to the extent to which the person was in a position to influence the company’s conduct, to ensure that the company has complied with the EP Act and that there has been adequate provision to fund rehabilitation. If it is determined that the related person was not culpable for a matter, or was culpable but took all reasonable steps in the circumstances, the DEHP will not issue the person with a CoRA EPO. However, in circumstances where an EPO is served on one ‘culpable’ party but not another, the apportionment of compliance costs is not addressed. Evidently, this will be a matter to be resolved between those parties by private agreement.

Who may be considered a ‘related person’?

44. A person may be a ‘related person’ if they a person or company with a ‘relevant connection’ to the company carrying out the activity. A ‘relevant activity’ means an environmentally relevant activity under the EP Act that was, or is being, carried out by the company under an environmental authority or that was, or is being, carried out by the company and has caused, is causing, or is likely to cause, environmental harm

45. The relevant connection test has the potential to be applied very broadly.

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7 Section 353AD, EP Act.
8 As those terms are defined in the Corporations Act 2000 (Cth).
9 Draft Guidelines, p13
46. The EP Act provides four circumstances in which a person will be a ‘related person’ of a company:10
   
   (a) parent companies – where the person is a holding company of the company carrying out the activity;
   
   (b) landowners for non-resource activities – where a person or company that owns land on which the company carries out, a relevant non-resource activity;
   
   (c) landowners for resource activities – where the person or owns land on which the company is carrying out, or has carried out, a relevant resource activity and is an associated entity of the company;
   
   (d) a person or company with a ‘relevant connection’ to the company carrying out the activity either through their ability to:
      
      i. significantly financially benefit from the activity; or
      
      ii. influence the extent of their environmental compliance.11

47. Note that a person need only satisfy one of the above criteria in order to have a ‘relevant connection.’

48. Section 363AB(5) of the EP Act allows the department to consider these matters:
   
   (a) as they exist at the time of assessing whether the person is a related person; and
   
   (b) as they have existed at any earlier time.

49. The draft Guideline clarifies which of these matters relate to ‘significant financial benefit criteria’ and/or ‘position to influence criteria’ and the evidence that DEHP may collect and consider.12

50. An example assists in understanding the application of the new provisions. For example, at a closed landfill there may be ongoing environmental issues with landfill gas management which require action to minimise the risk of environmental harm. Before closure, the landfill site was under the control of a company which was wound up post closure of the landfill. The DEHP may seek to enforce compliance with ongoing environmental obligations by an EPO. However, as the company has been wound up it is not possible to serve the company. Under the new provisions attention may be directed towards the directors and shareholders of the company.

51. When deciding whether a person has a ‘relevant connection’ with the company, the Act will allow the DEHP to consider the connection that existed between the person and the company when the landfill was still operating and in the lead up to the environmental issues.

The factors which are relevant to the determination of a ‘relevant connection’

52. The EP Act provides that in deciding whether a person has a relevant connection with a company, the following factors may be relevant:13
   
   (a) the extent of the person’s control of the first company;
   
   (b) whether the person is an executive officer of the first company or a holding company or other company with a financial interest in the first company;

10 Section 363AB(1), EP Act.
12 See Appendix 4, which provides a list of the types of evidence that will be relevant to DEHP’s consideration of these matters.
13 Section 363AB(4), EP Act.
(c) the extent of the person's financial interest in the first company;
(d) the extent to which the person financially benefits from the first company;
(e) any agreements or other transactions the person enters into with a holding company or company with a financial interest in the company;
(f) the extent to which dealings between the person and a company are at arm’s length; or on an independent, commercial footing; or for the purpose of providing professional advice; or for the purpose of providing finance, including the taking of a security;
(g) the extent of the person’s compliance with a requirement for information relevant to the making of a decision by under the relevant provisions.

53. Table 1.1 of the draft Guidelines\textsuperscript{14} lists the matters that the DEHP may consider in determining whether a person has a relevant connection to the company, in addition to clarifying whether the matter relates to significant financial benefit (SFB) or position to influence (PTI):

<table>
<thead>
<tr>
<th>Matter that may be considered</th>
<th>SFB / PTI</th>
</tr>
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<tbody>
<tr>
<td>The extent of the person’s control of the company</td>
<td>PTI</td>
</tr>
<tr>
<td>Whether the person is an executive officer of the company</td>
<td>PTI</td>
</tr>
<tr>
<td>Whether the person is an executive officer of a holding company or other company with a financial interest in the company</td>
<td>PTI</td>
</tr>
<tr>
<td>The extent of the person’s financial interest in the company</td>
<td>SFB &amp; PTI</td>
</tr>
<tr>
<td>The extent to which a legally recognisable structure or arrangement makes or has made it possible for the person to receive a financial benefit from the carrying out of a relevant activity by the company including (but not limited to) a structure or arrangement under which the person is not entitled to require a financial benefit, but it is possible for the person to receive a financial benefit because of a decision by someone else or the exercise of a discretion by someone else</td>
<td>SFB</td>
</tr>
<tr>
<td>Any agreements or other transactions the person enters into with the company</td>
<td>SFB &amp; PTI</td>
</tr>
<tr>
<td>Any agreements or other transactions the person enters into with a holding company or other company with a financial interest in the company</td>
<td>SFB &amp; PTI</td>
</tr>
<tr>
<td>The extent to which dealings between the person and the company or a holding company or other company with a financial interest in the company, are at arm’s-length</td>
<td>SFB &amp; PTI</td>
</tr>
<tr>
<td>The extent to which dealings between the person and the company or a holding company or other company with a financial interest in the company, are on an independent, commercial footing</td>
<td>SFB &amp; PTI</td>
</tr>
<tr>
<td>The extent to which dealings between the person and the company or a holding company or other company with a financial interest in the company, are for the purpose of providing professional advice</td>
<td>PTI</td>
</tr>
</tbody>
</table>

\textsuperscript{14} Draft Guidelines, p12.
54. In considering the matters set out in the draft Guidelines, the draft Guidelines have emphasised:

(a) not all matters will be relevant to every determination of relevant connection;
(b) the DEHP will consider the nature of the relationship and all the available evidence, including evidence that suggests a person does not have a relevant connection to the company;
(c) the DEHP will determine the weight of the evidence attributable to each matter depending on the individual circumstances of each case. However, evidence which demonstrates control over the company is likely lend itself more strongly towards a determination of culpability and the existence of a relevant connection;
(d) the fact that there is evidence to support a connection based on a single matter, does not necessarily mean that the DEHP will determine that a connection exists;
(e) generally, the more matters to support a connection, the more likely that the department will determine that a relevant connection exists; and
(f) the DEHP must give consideration to any evidence relevant to the decision that a potentially related person produces in relation to any relevant considerations.

What is a ‘significant financial benefit?’

55. The draft Guideline states that the significance of any financial benefit will be considered within the context of the specific circumstance of each case and may be considered in relation to:

(a) The proportion of the benefit relative to the total assets or benefit available from the activities carried out under the EA; or
(b) The proportion of the benefit, relative to the costs of restoring or rehabilitating of the environment, or protecting the environment from harm.

56. Financial benefit is defined in broad terms in the EP Act as follows:

financial benefit, received by a person, includes profit, income, revenue, a dividend, a distribution, money's worth, an advantage, priority or preference, whether direct or indirect, that is received, obtained, preferred on or enjoyed by the person.

57. The draft Guideline provides specific examples to illustrate the application of the ‘significant financial benefit’ criterion:

(a) **Financial institutions:**

The draft Guidelines refer to “banks”. However, it is likely from the context that relevant guidance will apply also to other (non- bank) financial institutions that
provide relevant services. The draft Guideline provides that a bank would not be regarded as having a “significant financial benefit” on the sole basis that it provided banking products and services to a company for a fee or that it provided credit to a company under a lending agreement on arm’s length commercial terms and receives financial benefits (e.g. interest and the repayment of the loan) at commercial market rates. However, a bank may be regarded as having a relevant connection to a company where it “enters into a lending agreement with a company becoming a major investor in the company and deriving significant dividends and capital gains from the company”. The draft Guidelines are somewhat unclear and confusing in this respect. A “lending agreement” or loan does not typically deliver dividends or capital gains to a financial institution.

(b) **Third party suppliers:**

A supplier would not be treated as having a relevant connection with a company on the sole basis of having received a significant financial benefit from the sale of goods to the company through an arm’s length transaction.

(c) **Shareholders:**

A shareholder with a substantial shareholding and dividends received from the company may be considered to be a related person where the financial benefit received is significant, having regard to the net profit of the company.

**Regard may be had to ‘reasonable steps’ taken by a ‘related person’ to comply with environmental obligations**

58. In deciding whether to issue an EPO to a related person of a company, the EP Act provides that DEHP may consider whether a 'related person' took all reasonable steps to:

   (a) ensure the company complied with its environmental obligations; and

   (b) made provision of funds to rehabilitate and restore the land from the effects of any relevant activity carried out by the environmental authority holder.\(^{15}\)

59. The draft Guideline states that if it is determined that a related person was not culpable for a matter, or was culpable but took all reasonable steps in the circumstances, DEHP will not issue the person with an EPO.

60. The consideration of whether all reasonable steps were taken requires regard to be taken of the extent to which the person was in a position to influence the company's conduct.

61. The EP Act and the draft Guidelines do not provide a generic list of all reasonable steps for particular entities. The draft Guidelines emphasise that what are reasonable steps will depend on the circumstances of the particular situation and the extent to which the person was in a position to influence the company's conduct.

62. What is considered reasonable for one related person will arise from the context of their specific role, powers, responsibilities or other relationship to the company and may differ greatly from the steps which would be reasonable for another related person. The relevant facts and circumstances in light of the nature of the relationship between the company and the related person and will also give consideration to:

\(^{15}\) Section 363ABA, EP Act.
(a) the state of knowledge at the time, and in the lead up to, the issue or incident; and

(b) the foreseeability and probability of the issue or incident occurring.

63. The draft Guidelines outline a number of factors that the DEHP may consider when determining whether a related person took all reasonable steps in the circumstances. The relevant factors include:

(a) **The legal and practical ability to influence the company’s conduct**

Matters to be considered when determining the legal and practical ability of the related person to influence the company’s conduct include:

i. the nature and duration of the relationship between the related person and the company;

ii. the potential for the related person to exercise decision making powers to direct the company’s conduct;

iii. the potential for the related person to provide advice or expertise to influence the company’s conduct, and

iv. any implications of other legislation or law on the exercise of powers by the related person (e.g. *Corporations Act 2001 (Cth)*).

(b) **The extent of actual and expected knowledge of the related person in relation to the environmental obligations of the company**

The greater the actual or expected knowledge of a related person, the greater the expectation that the person would take reasonable steps in the event that an incident occurred. However, a related person cannot avoid their obligation to take all reasonable steps by deliberately, or negligently, avoiding becoming aware of information that was within the person’s role to become informed about.

Matters to be considered when determining the actual and expected knowledge of the related person include:

i. the nature and duration of the relationship between the related person and the company;

ii. whether the related person was informed, or ought to have kept themselves informed about the environmental obligations in the EP Act;

iii. whether the related person maintained, or was expected to maintain, an understanding of the nature of the company’s operations;

iv. whether the related person maintained, or was expected to maintain, an understanding of the environmental risks associated with the company’s operations, and

v. the steps the related person took to kept themselves informed about the environmental obligations in the EP Act, the nature of the company’s operations and the environmental risks associated with the company’s operations.

(c) **Exertion of power or influence – ‘position to influence’**

Consideration will be given to whether the related person exerted their power or influence in a positive or negative way to ensure environmental harm was avoided and adequate provision was made for rehabilitation. The draft Guideline states that person will be in a “position to influence” if the person is capable of
influencing the decisions or actions of the company in relation to its compliance with the EP Act. This can occur in an official (e.g. appointed company director) or unofficial capacity (e.g. someone acting as a shadow director). Relevant matters may include whether the related person:

i. took steps to oversee the design, resourcing and operation of the environmentally relevant activities undertaken by the company;

ii. took steps to oversee the design, resourcing, implementation, monitoring and review of an effective environmental risk management system which was aimed at ensuring compliance with the relevant environmental obligations;

iii. took steps to facilitate processes for company management to be informed of potential compliance issues;

iv. ensured that they responded in a timely way to information received about any potential compliance issues;

v. complied with their duty to notify under the EP Act;

vi. is required to exercise their powers in the interests of a particular stakeholder or class of stakeholders, and

vii. is entitled to enforce their powers or rights under a commercial contract entered into between the person and the company, for example, a bank exercising its right to enforce a security.

The draft Guideline provides examples of determining whether an entity will be considered to be in a ‘position to influence’. Examples include:

i. For financial institutions: A bank would not be regarded as having a relevant connection with a company on the sole basis that it: provided information about its banking services and possible options which may suit the company’s objectives and requirements on arm’s length commercial terms, as this would be considered professional advice provided for commercial purposes. There will not be a ‘relevant connection’ where a financial institution has engaged in debt-restructuring discussions or negotiations with a company related to and for the purpose of providing finance to the company;

ii. For creditors: a secured creditor who decides to appoint a receiver would not be considered to have a ‘relevant connection’ on the basis of a position to influence where it does not exercise influence or control over the business of the company or direct the receiver.

iii. For liquidators, administrators and receivers: the draft Guideline states that the reasonable steps expected, will be considered in light of the external administrator’s requirements and powers under the Corporations Act 2001 (Cth) or the terms of the external administrator’s appointment. The draft Guideline acknowledges that external administrators are required to act in the interests of all creditors as a whole, not merely for the benefit of one creditor or stakeholder. External administrators who exercise their powers and control in a manner which is permitted or required by the Corporations Act 2001 (Cth), the terms of their appointment or general law, will not automatically be considered to have failed to take all reasonable steps. Consideration will be given to an external administrator’s powers and
their obligations under the EP Act when determining potential reasonable steps.

(d) **Financial decision-making**

If a related person was in a position to make financial decisions in relation to, or on behalf of, the company at a time relevant to the particular matter, the DEHP may consider any financial decisions made by the related person. Relevant circumstances will include whether the related person:

i. exercised their financial decision making powers in such a way that adequate funds were available for the company to comply with its environmental obligations and ensure that environmental harm was, or is avoided;

ii. made decisions to expend, or not, money to ensure that environmental harm was or is avoided;

iii. made, or is making available funds to help prevent or remedy environmental harm or meet rehabilitation requirements;

iv. is required to exercise their financial decision making powers consistent with statutory or fiduciary duties, and

v. is required to exercise their financial decision making powers in the interests of a particular stakeholder or class or stakeholders.

(e) **Whether there was reliance on others to ensure that the environmental harm was avoided, and whether this reliance was reasonable**

This factor will be relevant where the related person delegated their environmental responsibility to another person or relied on the environmental advice or expertise of others. Where it can be shown that a related person reasonably relied on another person in relation to the company's environmental conduct, the reasonable steps of that person may be less onerous. Matters to be considered when determining whether the related person reasonably relied on others may include whether the related person:

i. ensured that competent and qualified persons were engaged to undertake environmental activities on behalf of the company;

ii. provided clear and correct instructions to those persons engaged to undertake environmental activities on behalf of the company and took action to ensure those instructions were followed; and

iii. reasonably relied on the advice or expertise of others.

What are the implications of the new provisions?

64. The CoRA amendments have been controversial. The key areas of controversy have been the broad definitions of 'related person' and 'relevant connection' under the EP Act.

65. The consequence of the broad definitions used in the new provisions is that the definition has the potential to capture persons who contract with, lease land to, invests in, or is otherwise in a position to influence the conduct of a company carrying out an environmentally relevant activity under the EP Act.

66. There is no obligation on the Department to choose the "most" related person or the person with the "most" relevant connection. The consequence of this is that any or all related persons could equally be pursued.
67. There is also no recourse (under the EP Act) for one related person against any other related persons for a contribution to any environmental costs in the event that the department elects to pursue only one such person.

68. The draft Guideline issued by DEHP provides some clarification of the intended scope of the new provisions and may provide a degree of comfort to financial institutions, shareholders and third party suppliers (depending upon the terms of their arrangements).

69. What is clear from the draft Guideline is that it is intended that unspecified levels of ‘culpability’ will be required before a ‘related person’ will be pursued. The concept of ‘culpability’ is not referable to provisions in the EP Act.

70. There remains a considerable level of uncertainty as to the application of the new provisions. That is because DEHP is only required to have regard to the Guideline. Therefore, the DEHP will retain discretion as to the application of the draft Guidelines when determining liability under the new provisions. Similarly, provisions relating to consideration of ‘reasonable steps’ taken by ‘related persons’ are expressed in permissive and not mandatory language. The DEHP may take these matters into account in determining whether to issue an EPO to a ‘related person’ but is not required to do so, nor is it bound to refrain from issuing an EPO if ‘reasonable steps’ have been taken to comply with environmental obligations.

71. It will therefore be important for all persons and entities with a relationship with an EA holder or operating company to consider both the EP Act and the draft Guideline to ascertain whether they may fall within the definition of a ‘related person’ of an operator company holding an EA so as to become potentially personally liable for the satisfaction of the environmental obligations of the environmental authority holder.

72. Where concerns arise about being captured by the chain of responsibility provisions, consideration will need to be given as to whether they can demonstrate taking all reasonable steps to ensure the operator company’s compliance with the EP Act.

73. It may be prudent for persons who may be captured by the definition of ‘related parties’ to update relevant agreements or other documentation to ensure compliance with obligations under the EP Act and to make adequate provision for the environmental rehabilitation and restoration of land.

74. In some circumstances, more proactive measures, such as compliance audits and regular inspections to ensure compliance with relevant environmental obligations, may be warranted to ensure that a related person could establish that ‘reasonable steps’ have been taken to satisfy the environmental obligations of the environmental authority holder.
Fixing Victoria’s broken nature protection laws: Where to next?

Sarah Brugler

Introduction

The key law protecting nature in Victoria - the Flora and Fauna Guarantee Act 1988 (FFG Act) - is almost 30 years old. It is widely agreed that it has failed to meet its objective to provide a legal framework to halt the loss of biodiversity in Victoria. The Victorian government has committed to review the FFG Act, and ‘modernise threatened species protection to adopt world’s best practice’. Drawing on reviews and audits of the Act, this paper identifies how the Act has failed to meet its original promise. The case is then made for why the nature that the FFG Act was intended to protect, urgently needs this Act to be fundamentally reformed. The recommendations contained in Environmental Justice Australia’s (EJA) reform proposal are then summarised to demonstrate how the FFG Act can become an effective and efficient nature conservation law for Victoria.

The state of nature in Victoria

Successive State of the Environment reports for Victoria document the continuing decline of Victoria’s plants and animals.

Victoria is the most densely populated and urbanized state in Australia and it is therefore not surprising that it is also the most widely cleared state with nearly two-thirds of Victoria’s landscape modified for agricultural and urban purposes. Around half of Victoria’s native vegetation has been lost.

Despite Victoria being one of the most cleared states in Australia, habitat loss continues, especially in threatened woodland and grassland ecosystems. Other persistent problems - which are common throughout Australia - include climate change, habitat fragmentation, inappropriate fire and land use regimes, and an epidemic invasive species problem.

Given the already highly altered state of Victoria’s environment, if nature and all its benefits are going to have any chance of long term survival in Victoria, a strong regulatory regime that focuses on conserving what is left, as well as restoring what has been lost, is required.

An overview of the Flora and Fauna Guarantee Act and 30 years of failed implementation

Although the failure of implementation of the FFG Act is well documented, it is necessary to briefly summarise the key elements of the Act and recognise where the key failings have occurred, in order to summarise EJA’s solutions for how the situation can be improved.

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16 Lawyer, Environmental Justice Australia. This paper is based on a presentation at the NELA National Conference. For more information on the biodiversity law reform work of Environmental Justice Australia, go to www.envirojustice.org.au


19 Ibid.

20 Ibid; Department of Sustainability and Environment (2008), Native vegetation net gain accounting; first approximation report. Department of Sustainability and Environment, East Melbourne.

21 Ibid.
1. The guarantee and listing
At its time of inception - in 1988 - the FFG Act held initial promise and the Victorian community had high expectations for what the Act would deliver. This was perhaps a product of the ambitious overarching objective of the FFG Act, which is a ‘guarantee’ that all species can survive and flourish in the wild.22

Following enactment of the FFG Act, the Victorian government devoted the resources necessary to implement an Act that contained such high ambitions and there was an initial flurry of activity from the government’s environment department as resources were allocated to implementation of the Act. This is demonstrated through the early implementation of the first part of the threatened species component of the Act - the listing of threatened species, communities and threatening processes - whereby the majority of nominations for listing were made by specialist government employed officers in the early years of the Act23.

Unfortunately, listing of species, communities and threatening processes in more recent times is starkly contrasting with almost all nominations coming from concerned community members with a passion for the subject, or with a very skilled knowledge base in a relevant area.24 What has resulted is an ad-hoc listing process that is insufficiently comprehensive.

To further compound the ineffectiveness of the FFG Act listing process, the government has - in direct competition to their FFG Act obligations - committed scarce resources to maintaining separate ‘advisory lists’ which are an informal listing process that the government has established, outside of the regulatory framework. It is the advisory lists that are used in various planning processes and which they are periodically reviewed by the government (unlike the FFG Act lists).

2. Action Statements
One of the key tools - and the only mandatory one - under the FFG Act is the production of action statements for species, communities and any potentially threatening processes ‘as soon as possible’ following listing.25 Action statements must set out what has to be done, and what is intended to be done, to conserve the threatened species or community, or manage the listed threatening process.

Although no legal enforceable obligations arise from action statements under the FFG Act, they are the primary tool for protecting and conserving threatened flora and fauna under this Act.26 The production of Action Statements can be described as protracted, at best. Despite legal challenges about the lack of action statements for listed species, communities and threatening processes27, the majority of listings still do not have an action statement.28

3. Critical habitat, public authority management agreements and flora and fauna management plans
Other key tools that exist under the FFG Act that can be used by the government to protect and conserve species, and manage threatening process are: declarations of critical habitat29, the issuing

22 Flora and Fauna Guarantee Act 1988 (Vic) s 4 (1)(a)
of interim conservation orders\textsuperscript{30}, the establishment of public authority management agreements\textsuperscript{31} and the creation of flora and fauna management plans\textsuperscript{32}.

To date, there has been one critical habitat determination, but this was revoked soon after. There have been no interim conservation orders, no public authority management agreements established in the last ten years, and no flora and fauna management plans.

4. Offences relating to flora

The Act does create offences for the taking of flora, however the various exemptions have meant that the government’s interpretation of the FFG Act offences is that they only apply on public land, and do not apply to activities incidental to forestry or associated forestry road works.\textsuperscript{33} Even then, we don’t really know how often those offences are breached or enforced - this is not something the government makes public\textsuperscript{34} - but we confidently assume that there is very little enforcement activity that occurs.

Further licences, permits and authorisations can be granted in respect to the taking of flora provided that in the case of licences and permits, they do not threaten the conservation of the protected flora.\textsuperscript{35} Despite this seemingly broad qualification in law to the granting of licenses and permits, in practice, we understand that licences and permits issued for the taking of protected species under the FFG Act have been rarely refused by the relevant government department.

5. Biodiversity strategy

The FFG Act also includes an obligation to create a biodiversity strategy.\textsuperscript{36} This is intended as a means to achieve broader state wide conservation outcomes beyond threatened species protection. However the operation of the strategy to date has proved to be of limited utility and the strategy itself – produced in 1997 – is considerably out of date.\textsuperscript{37} The strategy is lacking in detail and content.

A new draft ‘biodiversity plan’ - which is intended to replace the 1997 biodiversity strategy - was recently released by the Victorian Government and has been part of a public consultation process.\textsuperscript{38} While we welcome the Government’s commitment to establish a new biodiversity strategy for Victoria, we believe that further policy detail and commitment should be incorporated into the draft plan if it is to become a useful and effective instrument that achieves landscape-scale approaches to conservation across Victoria. See below for our FFG Act recommendations for how this could be achieved.

Time for reform

As demonstrated above, the FFG Act is well overdue for overhaul and the Victorian government must better protect threatened species and do more to reverse trajectories of decline. We believe that the current government review of the FFG Act provides a good opportunity for it to become an effective and efficient nature protection law for Victoria.

\textsuperscript{30} Flora and Fauna Guarantee Act 1988 (Vic) s 26-44.
\textsuperscript{31} Flora and Fauna Guarantee Act 1988 (Vic) s 25.
\textsuperscript{32} Flora and Fauna Guarantee Act 1988 (Vic) s 21.
\textsuperscript{35} Flora and Fauna Guarantee Act 1988 (Vic) s 48(1),(2) and (4).
\textsuperscript{36} Flora and Fauna Guarantee Act 1988 (Vic) s 17-18.
\textsuperscript{37} Environment Defenders Office (Vic) Ltd, March 2012, pg.8.
\textsuperscript{38} For further information, see here: http://haveyoursay.delwp.vic.gov.au/biodiversity-plan.
Environmental Justice Australia has prepared a comprehensive reform proposal that sets out how the Victorian government can achieve this. The proposal focuses solely on the review of the FFG Act and how the tools currently contained within the FFG Act can be amended to ensure they are more effective and efficient in conserving and restoring biodiversity in Victoria.

In the course of preparing our proposal, we grappled with difficult questions that a process such as this presents, for example: examining why a law like the FFG Act is needed; how the balance between government threatened species regulation and community enabling landscape scale frameworks should be met; what is the most effective interaction between state based nature conservation laws and federal conservation laws; and how such a law can deal with the ever-increasing complexity that climate change brings to threatened species and nature conservation generally.

We have attempted to address some of these difficult questions as best as possible, while leaving aside issues relating to funding, aside from making the obvious point that significant public and private spending is needed to accompany the reformed legislative proposal.

The next and final section to this paper summarises the key elements to our reform proposal to demonstrate how we believe the FFG Act can be reformed to become an efficient and effective nature conservation law for Victoria.

**Summary of EJA’s proposal for reform**

1. Include a broad public authority duty that obligates public authorities to operate consistently with the FFG Act. Currently, the FFG Act only requires public authorities to ‘have regard’ to its objectives. The FFG Act should affect whole of government decision making to prevent habitat destruction of threatened species, under for example, forestry laws.

2. Remove the exemptions that currently override the threatened species provisions of the FFG Act. These exemptions (made by Ministerial Order) have made ineffective the FFG Act protections over the habitat of listed threatened species, communities and populations.

3. Give greater clarity around the obligations of the Minister and government departments in relation to administration of the Act. That is, the existing FFG Act tools should be updated and their use by government made mandatory in certain circumstances.

4. Incorporate a landscape scale approach to environmental management and ecological restoration in the FFG Act. Threatened species should continue to be a major focus for the Act, but to have any chance of restoring our environment and reversing trajectories of decline, a landscape scale community enabling approach is essential. Two key elements of this approach are:

   - the inclusion of a more comprehensive legislative governance framework for the biodiversity strategy, such as mandating that it be updated every five years and that it must work towards 20-year biodiversity targets; and

   - the establishment of an incentives framework for landscape scale restoration activities in the FFG Act, centring on the preparation of ‘Landscape Action Plans’ for regionally nominated landscapes. This would enable and incentivise communities, local government and businesses to engage in the development of binding plans to deliver regional biodiversity targets.
5. Include environmental justice provisions in the FFG Act. As part of this, and to ensure that private individuals and companies comply with the Act, two key reforms are required:

- a new entity to monitor compliance and to enforce the provisions of the FFG Act; and
- a scale of penalties for non-compliance including sufficiently dissuasive fines and community service orders, as well as options for criminal prosecutions for serious offences. To ensure that the government is accountable, communities need to be allowed to challenge decisions through the courts and for this not to be financially prohibitive. More publicly available information about what is being done under the FFG Act is also needed.

At the time of writing, a public consultation is expected to be released imminently regarding the government’s proposals for reform of the FFG Act.

If the Victorian Government adopted each of the above recommendations in their vision for the FFG Act, we believe that the FFG Act would be a world leading nature protection law setting a high standard for other states to follow.

Indigenous-Led Conservation: experiences from the Kimberley

Polly Grace

Indigenous people make up just five percent of the global population but hold nearly 22 percent of the world’s lands and waters and are stewards for approximately 80 percent of the Earth’s biodiversity. In the Kimberley region, these figures increase significantly, with Indigenous people making up close to 50% of the population, holding native title rights over more than 70% of the region, and managing the cultural and conservation values of their native title country through 13 Indigenous ranger groups.

In this context, there is an undeniably central role for Indigenous people to play in conservation management but, conversely, a significant risk that indigenous rights will be negatively impacted or undermined by conservation agendas. The development and use of Indigenous Protected Areas (IPAs) in Australia has for 30 years provided a mechanism to balance the interests of conservation with the rights of indigenous people, achieving significant environmental, social and cultural outcomes. In the Kimberley, however, this balance risks being shaken by the Western Australian (WA) Government’s proposal to establish the ‘Kimberley Wilderness Park’, moving from a model of sole Indigenous conservation management to a model of joint control with the WA Government.

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39 Legal & Policy Officer, Land & Sea Management Unit, Kimberley Land Council. The views expressed in this paper are those of the Author and should not be attributed to the Kimberley Land Council, its Executive Board or its management.
44 SVA Consulting, Department of Prime Minister & Cabinet (2016) “Consolidated report on Indigenous Protected Areas following social return on Investment Analyses”.
45 Government of Western Australia (2011) “Kimberley Science and Conservation Strategy”.
Where indigenous aspirations are to increase conservation protection on country, it is timely to explore alternative models in order to continue building on Australia’s leadership in this area, and to avoid conflict between indigenous and conservation agendas.

Indigenous Protected Areas Program

Since the early 1990s, Australia has been at the forefront of international best practice for its work with Indigenous people to establish IPAs.

An IPA is an area of land or sea country that is voluntarily declared to be a protected area and which is managed by Indigenous people in accordance with international guidelines developed by the International Union for the Conservation of Nature. The program was set up in 1997 to facilitate the expansion of Australia’s National Reserve through leveraging partnerships between Indigenous people and government. The deliberately unregulated nature of the IPA program aligned with contemporary international thinking, shifting away from the “Yellowstone Model” of government controlled and regulated parks, to recognise that Indigenous or private landholders may have other effective means to manage protected areas.

Today, IPAs cover almost 500,000 square kilometres, making-up over 40% of Australia’s National Reserve System, and are pivotal to the Australian Government’s ability to deliver on its international targets under the Convention on Biological Diversity.

Within the Kimberley region, there are eight declared IPAs, covering approximately 90,000km², an area roughly the same size as Tasmania. These IPAs include some of the most remote and intact ecosystems in Australia, including identified biodiversity hotspots. They are managed by teams of Indigenous rangers who operate, under the guidance of traditional owners, to “conserve ecosystems and habitats together with associated cultural values and traditional natural resource management systems”.

A key strength of IPAs is the degree of autonomy exercised by traditional owners in managing these areas. In the Kimberley, the majority of IPAs fall on exclusive possession native title land and Aboriginal Reserve, with traditional owners exercising native title rights to direct conservation and cultural management priorities across their country. This approach has been hugely successful, with an increasing number of Native Title Prescribed Body Corporates (PBCs) integrating ranger activities into their core business, allowing them to leverage capacity building, employment and social outcomes as a co-benefit of the support provided under IPA Programs. IPAs also provide an opportunity for PBCs to leverage partnerships, with Government, conservation groups or philanthropic organisations, increasing investment in remote communities and simultaneously enhancing conservation outcomes. These complementary social, economic and cultural benefits flowing from IPAs are well documented, with analysis suggesting that the social return on IPA investment is more than triple the original investment value.

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49 Department of the Environment and Heritage, The Indigenous Protected Area Program Background Information and Advice for Applicants, date unknown.


51 International Union for Conservation of Nature, “Protected Area Categories” at [https://www.iucn.org/theme/protected-areas/about/protected-areas-categories](https://www.iucn.org/theme/protected-areas/about/protected-areas-categories). Note, the majority of IPAs are IUCN Category V or VI, although some IPAs have been declared with a higher level of protection.

52 SVA Consulting, Department of Prime Minister & Cabinet (2016) “Consolidated report on Indigenous Protected Areas following social return on Investment Analyses”.
While IPAs were at the forefront of best-practice conservation management when launched 30 years ago, limited evolution of the program in this time has resulted in circumstances where the program may not always match the aspirations of Indigenous people, conservationists or State Governments.

While recognised by the Australian Government, and forming part of Australia’s National Reserve, there is no legislative or regulatory framework for IPAs, and their treatment by State or Territory governments, like that of conservation or Indigenous rights more broadly, varies from jurisdiction to jurisdiction. In the Kimberley, the majority of IPAs fall on State (not Commonwealth) lands, with no formal legal framework within WA for recognising IPAs. While native title land, and therefore the majority of IPAs in the Kimberley, is treated as ‘Crown land’ in WA, therefore receiving some level of protection through the application of state environmental laws, these laws focus on regulating, rather than prohibiting, certain activities, and Indigenous rangers have no power to issue infringement or enforcement notices under these laws.

A further challenge facing IPAs is the limited financial resources available to support conservation outcomes. As currently structured, IPAs receive core funding from the Australian Government under its IPA Program. This program is essential to the existence of Indigenous conservation initiatives, however ongoing funding is uncertain, and even at current funding levels, available resources are generally recognised as requiring supplementation to support the extensive work taking place. For this reason, Indigenous rangers rely on complementary funding sources, including State, Commonwealth or philanthropic grants and income earnt through the provision of conservation and land management services. Existing levels of IPA funding is not only insufficient to support existing IPAs, but demand for the establishment of new IPAs outstrips available funding and demand for Indigenous ranger jobs frequently outstrips available positions. Amplifying this challenge, the increasing pressure on IPAs to deliver multiple purpose outcomes, either through existing frameworks or through financially beneficial add-ons, such as youth justice programs, creates a situation where existing resources are stretched to capacity, and the core conservation purpose of IPAs risks being undermined.

In addition to limited legal protection and financial resources, a further challenge facing IPAs is the opacity of Indigenous land tenure, particularly native title law, with native title holders uncertain of, and facing extensive obstacles to, exercising native title rights to undertake land management activities.

These challenges indicate that, 30 years on from the commencement of the IPA program, it may be timely to revisit key aspects of the program, including scaling up levels of support commensurate with the significant conservation, cultural and social benefits delivered by IPAs; where requested by indigenous groups, identifying legal or regulatory avenues to enhance conservation protections and powers of indigenous rangers; and identifying policy and legal mechanisms which confirm and strengthen the ability of native title holders to leverage their native title rights to undertake land management activities.

**Government conservation models in the Kimberley**

In WA, conservation areas are created and regulated under the *Conservation and Land Management Act 1984* (WA) (*CALM Act*) in conjunction with the *Land Administration Act 1997* (WA). The CALM Act is directed at the protection of ‘public lands’, and establishes a management regime for

53 For example, the following statutes apply to Crown Land in Western Australia: *Environmental Protection Act 1986* (WA); *Biodiversity Conservation Act 2016* (WA); *Fish Resource Management Act 1994* (WA).
56 See s41 *Land Administration Act 1997* (WA) and ss5,6 *Conservation and Land Management Act 1984* (WA).
conservation areas, under the responsibility of Department of Parks and Wildlife. In addition to the protections provided under the CALM Act, conservation reserves may receive additional protection through the declaration of a Class A Reserve,\(^{57}\) which requires approval of both houses of parliament to undertake certain activities in these areas.

The CALM Act does not provide any specific avenue for the recognition of IPAs, although in practice there can be an overlap of CALM Act and IPA areas.

In recent years, WA Government conservation efforts in the Kimberley have been dominated by the Kimberley Science and Conservation Strategy. This Strategy sets out the process for the WA Government’s delivery on its 2011 election commitment to establish the Kimberley Wilderness Park and complementary marine protected areas, which would become Australia’s largest conservation park.\(^{58}\) The Strategy proposes to create new conservation areas under the CALM Act, and with a significant proportion of the proposed new areas falling on exclusive possession native title, to achieve this through joint management arrangements with Traditional Owners.

Joint management has been explored in various forms in Australia for a number of years, with the first jointly managed national park established in 1981 on the Coburg Peninsula north east of Darwin. At its most basic, joint management is a partnership between traditional owners and government which seeks to balance the interests of Indigenous people, conservationists, governments and tourists.\(^{59}\) It has been described as both an attempt to find common ground, and a trade-off between the rights of interest of Indigenous people, and the right and interests of government conservation agencies and the wider Australian community.\(^{60}\) While there are examples of successful joint management arrangements, one of the strongest criticisms is that it inevitably involves government-led coercive partnerships, with asymmetrical power relations.\(^{61}\) A broadly publicised example of this is the tension between Traditional Owners’ desire to close Uluru to climbers and the Northern Territory Government’s desire to use it as a tourism opportunity.\(^{62}\)

The benefits and compromises which flow from joint management are inevitably fact specific, and will depend on the underlying rights and tenure of the traditional owners, the governance and power relations of the joint management arrangements, the aspirations of traditional owners and the extent to which joint management helps to further these. Recent developments in Queensland, where traditional owners have agreed to the development of jointly managed National Parks in exchange for the creation of equivalent areas of freehold title\(^{63}\) suggest the extent to which joint management can be viewed or used as a trade-off or bargaining tool.

Under the WA Government’s approach to joint management, the proposed areas would be brought under the CALM Act as either jointly vested or jointly managed lands,\(^{64}\) with the regulatory protections of the CALM Act applying. Lands would be managed jointly by the Department of Parks and Wildlife and Traditional Owners in accordance with a negotiated Joint Management Agreement.

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\(^{57}\) Section 42 Land Administration Act 1997 (WA).

\(^{58}\) Government of Western Australia (2011) “Kimberley Science and Conservation Strategy”.


\(^{64}\) See sections 7, 8A and 8AA Conservation and Land Management Act 1984 (WA).
One major concern in relation to the WA Government’s proposed model of joint management for the Kimberley is that it moves from the existing approach of Indigenous-led sole management under IPAs, to a government-centric approach, with a significant lessening of indigenous rights. These concerns are amplified by the positioning of the WA Government in relation to indigenous rights more broadly, with the government actively pursuing a policy to erode native title rights and interests. WA Premier Mr Colin Barnett recently said:

“What I don’t want to see, and what you don’t want to see, is increasing areas of the State, particularly in the Kimberley, being tied up in conservation of a sort … The conservation issue, particularly in the Kimberley, is important, but the State has taken on that responsibility... The conservation of the Kimberley has been done by the government and it is government that should do that.”

His statement suggests the WA Government remains caught in the historical paradigm of traditional government-controlled National Parks, which will make any attempts at genuine and equal partnership through joint management difficult to realise.

An alternative approach

The different models of Indigenous conservation can be described as a spectrum, with Indigenous sole management at one end, co-management in the middle, and government management, with an Indigenous advisory role, at the other end. In the Kimberley, where traditional owners hold exclusive possession native title rights and are actively managing areas for conservation through IPAs, the WA Government’s proposal for joint management, which could involve surrendering control of traditional lands and removing independent decision-making, suggests a perplexing move down this spectrum, and demonstrates the need for an alternative pathway which supports Indigenous aspirations of sole management of country. In the Kimberley, this could be achieved through amendments to the CALM Act and Land Administration Act 1997 (WA) to allow for the recognition of IPAs, or through new legislation providing for the creation of ‘Aboriginal National Parks’.

Amendments to existing WA laws to recognise IPAs may go some way to addressing the dual challenges of limited environmental protections and limited resources for IPAs. In the Northern Territory, the Territory and Parks Wildlife Conservation Act (NT) has been used to provide Territory Government recognition the Dhimurru IPA, allowing rangers to leverage increased resources and protections. Under the Territory and Parks Wildlife Conservation Act (NT), Aboriginal corporations can enter into a legal agreement with the Territory government for the protection and provision of resources for a conservation area. This approach can be distinguished from existing CALM Act provisions relating to joint management or joint vesting which, while allowing for joint management agreements, shift management responsibility away from traditional owners into a joint management body, as well as potentially impacting the underlying tenure and native title rights and interests. To complement these changes, changes would also be required to the Land Administration Act 1997 (WA) to allow for the declaration of Class A Reserves over these areas in a way that would not impact on the underlying rights of native title holders.

70 Ibid, 187.
71 Section 73 Territory and Parks Wildlife Conservation Act (NT).
Given the extent of changes that would be required to the CALM Act and Land Administration Act 1997 (WA) to achieve this outcome, a more straightforward approach could be the development of new legislation to allow for the creation of Aboriginal National Parks. Key features of this legislation should include the ability to limit certain activities without Parliamentary approval (similar to a Class A Reserve); the ability to regulate certain activities and manage visitors – with approval coming back to the native title holders as opposed to the Minister; the ability of rangers to enforce plans of management; and an avenue for the WA Government to invest resources – recognising that the Aboriginal National Park delivers valuable conservation outcomes. There is precedent in WA for the creation of conservation areas through specific legislation, although this has generally been site-specific.  

Conclusion

Developments in conservation and land management, including the development of IPAs, the growth of private conservation areas and recent announcements by the Queensland Government of an intention to enable the creation of private national parks, demonstrate the strong potential for indigenous people to be controlling and managing conservation outcomes on Indigenous lands.

IPAs have provided a vehicle for indigenous people to pursue the goal of sole-Indigenous management of conservation areas for over 30 years. However, where indigenous people have aspirations to strengthen conservation outcomes in IPAs, including through leveraging additional funding or enforcing IPA plans of management, the voluntary structure of IPAs may no longer be adequate.

In the Kimberley, the alternative proposed to IPAs by the WA Government is a model of joint management. This represents a swing away from indigenous-led management, towards more traditional models of State controlled conservation.

Non-conducive political and legal settings are amongst the greatest challenges to indigenous-led conservation management. In order to build on the last 30 years of international progress in conservation management, an alternative approach is needed which strengthens indigenous rights to sole management through providing pathways to funding and enforcement. Models for such an approach already exist in the Northern Territory and in site-specific national park legislation in WA. The WA Government should work with the Commonwealth Government and traditional owners to build on international progress and domestic experience in indigenous conservation management and pioneer a new model for indigenous-led conservation management.

72 See for example Rottnest Island Authority Act 1987 (WA).
Bottled Tension: Will Australia ever see a national container deposit scheme?

Rebecca Hiscock, with Breellen Warry

The harm caused to the natural environment, terrestrial and marine life by litter is well known. When easily recyclable items such as beverage containers are disposed of instead of recycled, a valuable resource is lost. When littered items are subsequently recovered, they are often too contaminated to be recycled.

Conceptually, container deposit schemes highlight the tension between achieving environmental protection targets and the pressure placed on government by private commercial enterprise. In practice, they deliver positive outcomes for the environment, community and government, exemplifying the “polluter pays” principle and encouraging “product stewardship” on the part of the beverage industry by obliging beverage suppliers to take greater responsibility for their packaging after it is sold to consumers.

Container deposit schemes currently operate in South Australia and the Northern Territory, with a scheme due to begin operating in NSW by June 2017. Queensland and Western Australia propose to introduce container deposit schemes by 2018.

This article outlines some key features of the proposed NSW container deposit scheme, as well as similar schemes operating in or proposed by other states and territories. However, with no plans to introduce schemes in Victoria or Tasmania, at this stage, a national scheme appears unlikely.

Introduction of a NSW container deposit scheme

A 2015 survey of local government, state agencies, private land managers and community groups found that over $162 million is currently spent on managing litter in NSW each year. About 160 million drink containers were littered in NSW in 2014–15, representing about 44% of the volume of all litter in NSW. Drink containers make up the largest proportion of litter volume in NSW, twice as much as the next most common items, take-away cups and food containers.

The NSW Government has committed to reducing the volume of litter in NSW by 40% by 2020. In August this year, the NSW Government released the draft *Waste and Resource Recovery Amendment (Container Deposit Scheme) Bill 2016* (the Bill) and a Container Deposit Scheme Regulatory Framework Discussion Paper. The Bill amends the *Waste Avoidance and Resource Recovery Act 2001* (NSW) by inserting a new Part 5 which establishes a container deposit scheme (NSW Scheme) to promote litter reduction and the recovery, reuse and recycling of beverage containers.

Following a period of public consultation, the Bill was revised, and introduced to the Legislative Assembly in early October. The Bill was debated and passed through Parliament without amendments. Although the NSW Scheme is not due to operate until July 2017, the administrative parts of the *Waste Avoidance and Resource Recovery Amendment (Container Deposit Scheme) Act*

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2016 (the Act) were commenced by proclamation on 17 November 2016, enabling the NSW Government to invite applications for the role of scheme coordinator and enter into the contractual arrangements contemplated in the Act.

Overview of the NSW container deposit scheme

Under the NSW Scheme, anyone who returns an eligible empty beverage container to an approved collection depot or reverse vending machine will be eligible for a 10 cent refund. The scheme will be funded by beverage suppliers who bring such containers into NSW. A network of depots and reverse vending machines will operate across the State to receive the empty containers. All beverage suppliers and retailers must sell eligible beverage containers that display the required NSW Environment Protection Authority (NSW EPA) approved labelling.

The Act sets out the objectives and basic framework of the NSW Scheme, and enables further details to be provided for under regulation. The key elements of the NSW Scheme are:

- the establishment of a single scheme coordinator (Scheme Coordinator) appointed under contract by the Minister for the Environment (Minister), responsible for ensuring that State-wide access and recovery targets are achieved, and that refunds are paid for any eligible containers that are returned to a collection point;
- the establishment of multiple network operators (Network Operators), appointed under contract by the Minister, who will directly run or contract with collection point operators, to ensure there is an effective collection network for people to return their containers for the refund;
- the payment of refunds by collection point operators to people who deposit eligible containers at collection facilities;
- the establishment by the Scheme Coordinator of a cost recovery scheme (Supply Arrangement) under which beverage suppliers (Suppliers) agree to make contributions towards funding the refunds and any handling and administration fees; and
- an obligation on Suppliers to apply to the NSW EPA for container approval, and to display a refund marking on approved containers.

Offences under the NSW Scheme

Monitoring and enforcement of compliance with the NSW Scheme by the Scheme Coordinator and Network Operators will be administered by the NSW EPA under the powers conferred by Chapter 7 of the Protection of the Environment Operations Act 1997 (NSW). Fines may be imposed for breaches of contractual obligations by the Scheme Coordinator or Network Operators.

Suppliers will be prohibited from supplying beverages in containers that are subject to the NSW Scheme, unless they enter into a Supply Arrangement, and obtain the requisite approval from the NSW EPA.

Penalties also apply in respect of a failure by collection point operators to maintain accurate records of refunds paid to and the identity of people applying for refunds (contingent upon the number of containers for which a refund is claimed).

Container deposit schemes in other states and territories

South Australia

South Australia pioneered the nation’s first container deposit scheme in 1977, administered today under the Environment Protection Act 1993 (SA) (SA Scheme).

Under the SA Scheme a wide range of beverage containers are divided into two categories by approval of the SA Environment Protection Authority (SA EPA), being those which can be presented for a refund at retail outlets, and those which can be presented at a collection depot for a refund.
Approved containers must bear a refund marking. Other activities requiring SA EPA approval include the operation of collection depots (facilities for receiving containers in exchange for the payment of refunds) and carrying on business as a super collector (collecting and delivering containers presented at collection depots for reuse, recycling or disposal).

The SA Scheme is distinct from the NSW Scheme in that beverage suppliers are required, as a condition of their approval, to supply beverage containers, to ensure that a system is in place for the recovery and recycling of their empty beverage containers, to the satisfaction of the SA EPA. These systems, called Waste Management Arrangements (WMA), go further than the Supply Arrangements proposed under the NSW Scheme, in that beverage suppliers contract directly with super collectors to ensure the WMA is delivered, in addition to funding the refunds.

**Northern Territory**

Until January 2012, South Australia was the only jurisdiction to operate a container deposit scheme in Australia. The Northern Territory then introduced a container deposit scheme modelled closely on that of South Australia, administered by the *Environment Protection (Beverage Containers and Plastic Bags) Act 2012* (NT). The South Australian and Northern Territory container deposit schemes work independently of each other and only provide refunds for beverage containers purchased within the jurisdiction. However, they have signed an intergovernmental agreement to promote coordination and consistency between the schemes of both jurisdictions. This ensures that the refund amount and the types of containers caught by the schemes are the same.

In March 2013, Coca-Cola, Lion and Schweppes successfully challenged the validity of the Northern Territory’s container deposit scheme, on the basis that it breached the *Mutual Recognition Act 1992* (Cth) (*MR Act*) (*which enshrines goods and services providers’ right to freedom of movement across all states and territories*). Although the Northern Territory was granted a temporary exemption from the MR Act in relation to its container deposit scheme, this exemption expired before it could secure a permanent exemption. Somewhat of a pyrrhic victory for the beverage industry, the Northern Territory Government had to fund the payment of refunds to consumers with no financial input from the beverage industry for 4 months, until a permanent exemption was granted from the MR Act. South Australia did not face this issue, as the SA Scheme commenced before the MR Act came into effect.

**Proposals by other states**

In July 2016, the Queensland Government announced it would implement a container deposit scheme by 2018 and has been in high level talks with the NSW Government about setting up a single Scheme Administrator to deliver the scheme across both states. Similarly, in August 2016, the Western Australian Government said it would implement a container deposit scheme commencing in 2018. In addition, the ACT Environment Minister Simon Corbell has previously indicated that Canberra may follow suit in the event that a scheme was established in NSW.

While Victoria has previously attempted to establish a container deposit scheme, the draft *Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2011* (Vic) was ultimately quashed in the lower house after being passed by the Legislative Council of Victoria in June 2009. The Legislative Assembly refused to entertain the proposed bill, due to concerns that it sought to unlawfully impose a levy which, under the *Constitution Act 1975* (Vic), is

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82 Government of Western Australia, ‘Cash back for drink containers to help recycling’, (Media Statement, 17 August 2016).
83 Lawson, Kirsten, ‘Canberra likely to follow NSW into refunds for drinks containers’, *Canberra Times*, 5 January 2015.
exclusively the power of the Legislative Assembly. At this stage, there do not appear to be any proposals for a container deposit scheme in Victoria.

Environmental organisations in Tasmania have been agitating for a container deposit scheme for some time. In 2014, the Tasmanian Government commissioned a cost benefit report, which found that although the scheme would yield environmental benefits, the projected $4 million annual cost to the State to ship containers to the mainland for reuse, recycling or disposal was prohibitive. The Tasmanian Government accepted the findings of this analysis and, in December 2014, the Minister for Environment, Parks and Heritage announced the decision not to proceed with the introduction of a Tasmanian-based container deposit scheme.

Will we ever see a national container deposit scheme?

A national container deposit scheme (National CDS) was considered by the former COAG Standing Council on Environment and Water, who in March 2014 released a Decision Regulation Impact Statement (RIS) examining options for additional government intervention to increase packaging resource recovery and recycling, and decrease packaging litter. Among the options examined, were three possible means of delivering a National CDS, the first of which was developed by the Boomerang Alliance, the second of which was based on case studies of international schemes and the third of which was based on a national application of the existing SA Scheme.

The RIS identified positive environmental impacts of a National CDS, including its ability to achieve the highest litter reduction impact when measured by tonnages. This was because container deposit schemes involve direct price incentives to the community to return beverage containers, which comprise 60% of public place litter by weight.

Nevertheless, the RIS concluded that of all the options examined, a National CDS would incur the greatest net cost to the community. The cost would stem from the need to roll out purpose-built infrastructure across Australia, to manage item-by-item refund payments for over 12 billion beverage containers each year. Approximately 73% of these containers would otherwise be recycled via kerbside and other recycling systems. The RIS concluded that re-routing of material into an alternative recycling system would add significant costs and generate minimal benefits, particularly as three quarters of the beverage containers targeted are glass.

While we are unlikely to see a unified approach to container deposit legislation by the states and territories for some time, the introduction of the NSW Scheme and the imminent container deposit schemes proposed by Western Australia and Queensland is generating momentum in the right direction. Constitutional responsibility for waste management lies with state jurisdictions and, as a result, the Commonwealth Government is largely confined to working with states and territories through the National Environment Protection Council in the development of national approaches to waste issues. Partnerships between states and territories however, could deliver cross-jurisdictional container deposit schemes which circumvent issues around the freedom of movement of goods and services providers across states and territories, to deliver cost efficient schemes.

The Carmichael coal mine planned for Queensland’s Galilee Basin has cleared another legal hurdle, with the state’s Supreme Court dismissing a legal challenge to the validity of the Queensland government’s decision to approve the project.

The court found in favour of the Queensland Department of Environment and Heritage Protection, ruling that its approval of Indian firm Adani’s proposal was within the rules.

The decision is another setback for environmentalists’ bid to stop the controversial project. But Adani does not yet have a green light to break ground on the project, and legal questions still remain, both about this project and about climate change litigation more generally.

The Supreme Court ruling

It is important to note that this was a judicial review proceeding – a narrow type of review in which the court is not permitted to consider whether or not the decision to approve the mine was “correct”. The court could only rule on whether correct procedures were followed, while accepting that the decision was at the government’s discretion.

Within this already narrow context, the argument on which the legal challenge hinged was even more constrained. It was brought by an environmental campaign group called Land Services of Coast and Country (LSCC), and was focused on a particular point of Queensland environmental law.

The Environmental Protection Act 1994 (Qld) requires that decisions are made in accordance with the Act’s objective, which is to deliver “ecologically sustainable development”. LSCC argued that the government failed to do this in approving the coal mine.

The Supreme Court disagreed, finding that the government had considered all matters that it was obliged to consider. So in this respect, the Supreme Court’s decision is an endorsement of the process, but not necessarily the ultimate decision.

Is this the final hurdle overcome for Adani?

In short, no. The decision can be referred to Queensland’s Court of Appeal. There is also ongoing litigation against Adani in the Federal Court of Australia under federal environmental and native title laws. There are also some approvals yet to be obtained by Adani, including a groundwater licence.

Is this ruling a rejection of climate change arguments against the coal mine?

No. This case dealt specifically with the question of whether the Queensland government had complied with a particular aspect of the law. The Supreme Court did not (and was not able to) address the potential climate change impacts of the proposed mine.

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90 Law Lecturer, University of Queensland
91 The Environmental Protection (Underground Water Management) and Other Legislation Amendment Bill 2016 and Water Legislation Amendment Bill 2015, passed by the Queensland Parliament on 10 November 2016, reinstated the previous requirement for mining companies to obtain a licence to extract groundwater, but explicitly provided that any decision to grant such a licence for the Adani mine could not be subject to appeal by third parties. See http://www.abc.net.au/news/2016-11-10/parliament-qld-laws-water-licence-requirements-mining-companies/8011634
These climate issues were addressed more fully by Queensland’s Land Court in the case of *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors* [2015] QLC 48.

Importantly, the Land Court in this case accepted the scientific basis for climate change, and agreed that “scope 3 emissions” (that is, the emissions produced when the coal is burned overseas) are indeed a relevant consideration in whether or not to approve the mine.

However, Adani successfully used a “market substitution” defence, arguing that if the mine is refused, coal would simply be mined elsewhere and burned regardless.

**What does this case say about climate change litigation more generally?**

The latest judgement was handed down amid a series of fresh attacks on the rights of environmental groups to use Australia’s environmental laws to hold companies and governments to account. Federal Environment and Energy Minister Josh Frydenberg has raised concerns about “activists … seeking to frustrate” projects with “vexatious litigation”, while Prime Minister Malcolm Turnbull has revised plans to amend federal environmental legislation so as to restrict standing to apply for judicial review – the so-called “lawfare” amendments.

In the wake of the new ruling, the head of the Queensland Resources Council has criticised the delays caused by litigation against mining projects.

This begs the question: is climate change litigation “vexatious”? A close analysis of Queensland court decisions would suggest the opposite. Climate change issues have been considered in a series of three key Queensland Land Court cases: Wandoan Mine in 2012, Alpha Coal Project in 2014, and the Carmichael Mine (Adani) in 2015.

The Alpha Coal matter has proceeded to the Supreme Court, the Court of Appeal, and leave has been sought to appeal to the High Court of Australia. Importantly, none of these cases has been dismissed as vexatious; each resulted in a lengthy judgement analysing the complex legal issues raised by the objector.

Furthermore, although objectors have not yet succeeded in stopping a mining project on the basis of climate concerns, they have nevertheless made modest strides. Most recently, President McMurdo of Queensland’s Court of Appeal found that the Land Court must consider scope 3 emissions in deciding whether a mine should be granted environmental approval. This represents significant progress, given that climate science was questioned by Queensland Courts less than ten years ago.

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95 *Xstrata Coal Queensland Pty Ltd & Ors v. Friends of the Earth - Brisbane Co-Op Ltd & Ors, and Department of Environment and Resource Management* [2012] QLC 13

96 *Hancock Coal Pty Ltd v Kelly & Ors and Department of Environment and Heritage Protection (No. 4)* [2014] QCA 242

97 *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors* [2015] QLC 48

98 *Coast and Country Association of Queensland Inc v Smith & Anor; Coast and Country Association of Queensland Inc v Minister for Environment and Heritage Protection & Ors* [2015] QSC 260

99 *Coast and Country Association of Queensland Inc v Smith & Ors* [2016] QCA 242

100 Ibid at [11]

101 For example, *Xstrata Coal Queensland Pty Ltd & Ors, Re* [2007] QLRT 33
The only significant barrier remaining to a successful climate change case is the market substitution defence, which will be considered by the High Court if special leave is granted in the Alpha Coal matter.

Climate change litigation has also clarified other environmental and economic impacts. In the Carmichael Mine case, it was discovered that the mine site was a critical habitat for the endangered black-throated finch – evidence that was not previously available. The Land Court ordered strict conditions aimed at protecting this species. The litigation also served to clarify the significantly overstated economic benefits of the mine – particularly Adani’s estimate that it would generate more than 10,000 jobs. It was revealed in court that this figure was more likely to be 1,206 jobs in Queensland, as part of a total of 1,464 jobs in Australia.

Where to for climate change litigation?

Although the latest judgement is another setback for environmental groups, it is part of a bigger body of case law that is making real and discernible progress in ensuring that climate change is considered by decision-makers and courts.

Given that several courts have agreed on the validity of climate litigants’ arguments, it seems perverse for the federal government to try and restrict environmental groups’ right to continue raising these concerns.

Join the National Environmental Law Association

NELA is Australia’s leading national environmental law organisation that promotes public debate and understanding of national environment and climate change laws. We hold national and state events to provide information about key legal issues, publish a range of resources, promote critical analysis through our annual student essay competition and provide opportunities to share environmental law research outcomes through our new academic colloquium.

NELA encourages input from members on law reform topics through our policy working groups, and makes submissions to public inquiries to contribute to debate around effective and efficient environmental regulation. For more information, visit our submissions page.

Why join?

NELA membership offers the opportunity to work with leading lawyers, academics, judges, consultants and policy makers who want to improve the way we manage Australia’s natural resources and cultural heritage. Other membership benefits include:

- a monthly eBulletin packed with updates on case law, legislation, inquiries, events and job opportunities
- contributing to NELA policy submissions on national environment and resources laws
- shaping the programs of NELA events and contributing to our publications
- networking opportunities with environmental and planning law practitioners, policy makers, students and judges
- discounts to NELA events and the events of partner organisations

NELA is a not for profit company that relies on membership fees for income to administer its activities and the pro bono support of our members to provide quality content.

To get involved with our work, become a member today.
Member profile: Wildaliz De Jesús Arocho

Wildaliz has been a member of the NELA Executive Committee since 2014 and was recently appointed as Secretary.

Wildi has a strong interest in the links between cultural and heritage values and biodiversity conservation. Her academic background includes a Bachelor of Environmental Science from Universidad Metropolitana (Puerto Rico) and postgraduate studies in Environmental Law from Vermont Law School.

Tell us a bit about your current role

My career in environmental policy and regulation in Western Australia (WA) includes environmental impact assessment, prescribed premises; and currently, policy advice for the management of land and waters under conservation and land management legislation in WA.

I am also a member of the IUCN World Commission on Protected Areas.

What do I enjoy about my work in conservation and land management?

The most attractive part of my role is collaborating with a diverse range of stakeholders who come together to manage land and waters in ways that protect the conservation, cultural, recreational, spiritual and therapeutic values of nature.

What do you enjoy about being on the NELA executive committee?

The best part of being in the NELA executive committee is working with a leading group of environmental law practitioners in Australia who are devoted to the highest standards of quality and accuracy of information that is presented to all members on matters of environmental law across the country.

What brings you joy?

My favourite source of joy is the search for inspiration. I read poetry every night and Pablo Neruda is always at the top of my list. Recently discovered sources of joy include the works of Chimamanda Ngozi Adichie and Shokoofeh Azar.

Want to find out more about NELA membership? Go to www.nela.org.au