EDITORIAL

Intergovernmental Tensions

Much attention has been focused over the last few months on the international environmental scene as a result of the Earth Summit. (A brief report on the Summit appears in the "International Environmental Brief" section of this edition, but a more comprehensive report of the outcome and consequences from Rio 1992 will appear in the September edition of the AELN).

While it is vital that we actively participate in these international activities and foster international relations on matters environmental, we must be careful that in casting our eyes internationally we do not lose sight of the immediacy of the constant need in a federal system, such as ours, to monitor and diligently work at achieving those things that will foster Commonwealth/State and State/State relations in the area of environmental regulation.

A constitutional commentator was once unkind enough to describe Australia's federal system as "an amalgam of states and territories with independent governments united by mutual resent". While there have been many occasions in the past where such sentiments could be argued to reflect the state of domestic Intergovernmental relations, with the so-called "new federalism", they are hopefully a thing of the past Nevertheless, we cannot ignore the fact that there are inherent features of the Australian federal system which have the capacity to, and do in fact, create tensions in Commonwealth/State relations in the area of environmental regulation.

One of these features, which we have been dilatory in addressing and resolving, is the vexed question of whether, and if so to what extent, state environmental and planning laws apply to the Commonwealth, its instrumentalities and Commonwealth places.

A graphic illustration of the tensions caused by this feature in practice arose recently in relation to events involving the Australian Nuclear Science and Technology Organisation ("ANSTO").

ANSTO is the Commonwealth statutory authority that is responsible for the nuclear reactor facility at Lucas Heights, outside of Sydney. In proceedings before the NSW Land and Environment Court, determined in February this year, the Sutherland Shire Council sought, inter alia, declarations that the storage and conditioning of radioactive waste at the Lucas Heights site would constitute a breach of the NSW Environmental Planning and Assessment Act, and sought restraining orders against ANSTO to prevent it from engaging in those activities.

In its Points of Defence, ANSTO claimed that it was an emanation of the Crown in right of the Commonwealth and that it was entitled to immunity from the operation of State environmental and planning laws because the Commonwealth was not bound by NSW laws.

The Intergovernmental tension generated by the position ANSTO asserted was somewhat alleviated when at the hearing of the case, ANSTO abandoned its claim that its activities were immune from the operation of State laws. On 5 February 1992, the Land and Environment Court handed down its judgment, deciding the case in favour of the Council.

Tensions were again heightened when on 4 April 1992, a Bill was tabled before Federal Parliament which sought, inter alia, to declare that ANSTO was retrospectively immune from the operation of State environmental and planning laws (and certain other laws). The Bill passed through Reps in May and the Senate on 18 June 1992.

Whilst it is the fundamental constitutional right of the Federal Parliament to legislate in this way for matters for which it has legislative power, when this step is taken unilaterally, it does little to enhance the co-operative spirit that should exist between the various tiers of Australian government in the management and resolution of environmental issues.

The ANSTO experience begs a resolution of what is a significant policy question - why shouldn't the Commonwealth be bound by <u>all</u> State environmental and planning laws, like any ordinary citizen (individual or corporation?) Unfortunately such questions do not readily lend themselves to simple answers and reasonable arguments can be advanced to support the respective for and against positions.

I do not propose to review these arguments here. I simply wish to make the following observations.

First, tensions will continue to occur in this area unless and until Federal Parliament legislates, as it has the legal capacity to do, to resolve the issue and define the position on the application of State laws to the Commonwealth. Preferably this will be done in accordance with a position agreed with the State governments on this issue. In the alternative, if the attaining of a legislative outcome is not a practical possibility for political reasons, a clear and <u>binding</u> Intergovernmental

agreement is required to bring certainty to the scene so that all levels of government (and others dealing with governments) will know the limits of each others powers on environmental and planning matters and can structure their arrangements accordingly.

Second, while the Federal Parliament has the power to resolve the issue once and for all, it is not simply the responsibility of the Federal government to initiate a resolution to the issue. State governments also need to get more actively and more effectively involved in trying to initiate a resolution.

Third, we must recognise that the result of the failure to achieve a clear and binding position on this issue has been that the responsibility for the issue's resolution has to date been shouldered by the Courts . While the High Court's decisions in Evans Deakin [(1986) 161 CLR 254] and Bropho [(1990) 171 CLR 1] have gone some way to clarifying the law in this area, they have (as the Keynote article in this edition illustrates) also created further ancillary complications. Passing the problem onto the Courts to try and solve is not the answer.

Last, until we have a clear and binding resolution, it is unfortunate that much unnecessary litigation on application of laws questions, run at great expense to the community, with its consequential delays and uncertainties, is likely to remain the order of the day. We must recognise also the reality that where those proceedings are not perceived by the government as producing a suitable outcome, we may well see more specific legislation of the type passed in relation to ANSTO, with its ancillary consequences for Intergovernmental relations.

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Set against this theme of Intergovernmental tension, I trust you will find a number of the articles in this edition of particular interest.

The Keynote article - *"The Application of Environmental Laws to the Crown"* by the NSW barristers Peter Comans and Ian Davidson - considers the complex legal position that regulates the application of State laws to the Commonwealth, and Commonwealth laws to the States.

Another area of Intergovernmental tensions - the *Resource Security* issue - is the subject of the second of the articles in this edition. With the recent rejection of the Resource Security legislation by the Federal Parliament, it is timely to now consider what will be the future direction of this complex issue. This article attempts to do this and I hope readers will find the format I have set for this piece novel and entertaining. In Part I of the article, Professor Douglas Fisher reviews some of the key elements of the resource security legislation from a legal perspective. In Part II, two of the influential players in the resource security debate (Dr Robert Bain of the National Association of Forest Industries, and Mike Krockenberger of the Australian Conservation Foundation) provide their perspectives on a number of key questions about the resource security issue. The answers which they submitted have not been modified or altered and I trust you will find their responses provide a most useful insight into how NAFI and ACF each view the issue.

From matters that are generating Intergovernmental tension, to matters aimed at alleviating this tension, in his article on *"The Role of CEPA and NEPA"*, the newly appointed head of CEPA, Dr Ian McPhail discusses his organisation and looks at, inter alia, the formation of NEPA, a body established under the Intergovernmental Agreement on the Environment to provide a coordinated and cooperative Federal/State approach to environmental matters.

As for the other articles, David Mossop's piece on *"Environmental Laws and the Evolution of the Implementation of Environmental Policy"* is a rather provocative piece that looks at how we set our environmental policy goals and values on how we implement those goals through substantive and procedural law mechanisms. Many will not agree with some of his comments but to the extent that the AELN is to be a vehicle for intelligent discussion of environmental law and related policy issues, it is a thought provoking piece.

Paul Smith's paper on *"Planning and Legislative Reform Agenda"* is an extract of a paper he delivered at the Queensland Division's conference in May, in which he looks at Queensland's need for a new planning framework which builds upon the fundamental strengths of the current system and eliminates its weaknesses.

Readers will note that to complement the current "Developments" sections for each of the Australian jurisdictions and New Zealand, I have added a new section called "International Environmental Brief" in which, as the name suggests, will contain details of developments of international significance. In this edition, the notes cover Rio 1992, Australia's Accession to the Basel Convention on Hazardous Wastes and briefly reviews recent developments at ANZECC.

Finally, and as always, I extend my thanks to all contributors for their excellent efforts.