DEVELOPMENTS IN THE A.C.T.

Integrated Environment Protection Legislation

In November 1994 the ACT Government was due to release a discussion paper outlining its proposal for Integrated Environment Protection Legislation. It is hoped the legislation will be introduced into the Assembly following the February elections. The legislation is modelled on similar legislation introduced in South Australia and Queensland.

The proposed integrated legislation will replace the existing air pollution, water pollution, noise control and ozone protection acts. The legislation purports to take a more holistic view by addressing the overall impact of harmful activities rather than separating environmental management into components of air water noises etc.

The legislation will incorporate a range of environment protection measures:

(i) It will incorporate provisions establishing a general duty of care for environmental harm. The intention will be to place responsibility with individuals for acts on emissions which result in environmental harm;
(ii) Where there is a greater potential for environmental harm, activities will need to be managed to meet the requirements of environment protection policies which will spell out environmental indicators and environmental standards; and
(iii) Where environmental risk is significant, activities will need an environmental authorisation - possibly a licence with conditions attached.

It is envisaged that the legislation will provide opportunities and incentives for voluntary audits in conjunction with agreed environmental management programmes.

The proposed legislation will also incorporate a range of compliance mechanisms. People or activities not observing the duty of care, environmental protection policies or environmental authorisations may be subject to notices. Their purpose would initially be educative, advising how problems should be addressed. In the event of continuing concern over a situation of existing or potential environmental harm or in an emergency, an order may be issued.

An order will provide directions about activities which need to undertaken by the activity manager. Where the environment protection policies, environmental authorisations or orders are not complied with, the provisions relating to offences would apply.

The proposed legislation represents a significant advance on existing arrangements but a number of key issues remain to be resolved:

(i) The legislation's relationship with the ACT Land Act which governs the Territory's system of leasehold land tenure and gives the Government significant control over land use;
(ii) If and how issues of waste management and land contamination are to be incorporated into the legislation;
(iii) Whether the new scheme will incorporate a non-government advisory or expert committee; and
(iv) Third party appeal rights.

Further information can be obtain from the ACT Office of the Environment, telephone (06) 207 2331; Facsimile (06) 207 6084.

Draft Strategic Plan for Contaminated Sites and Management

In October 1994 the ACT Government released for public comment its Draft Strategic Plan for Contaminated Sites Management.

The Draft Strategic Plan is based on the Australian and New Zealand Guidelines for the Assessment and Management of Contaminated Sites, (released by ANZECC and the NHNRC) and the ANZECC position paper on Financial Liability for Contaminated Science Management.

The plan is not a statutory document and simply attempts to outline the proposed objectives and strategies of a plan for contaminated sites management.

Key objectives of the draft plan are the listing of known or suspected contaminated sites; the development of a reliable system to alert current and potential lessees of possible or confirmed contaminated sites; to ensure the implementation of appropriate management or remediation of contaminated sites and to ensure the Territory Government has a sufficient legislative power to carry out its various responsibilities in relation to contaminated sites.

The most important strategy discussed in the draft plan is the review of current legislation to identify those areas of deficiency in relation to contaminated sites management. The plan suggests that new legislation will certainly need to be developed to address the management of contaminated sites.

It is anticipated that the new legislation will include:

(i) The capacity to require the polluter to undertake testing and remediation to a pre-determined level;

(ii) The capacity for access onto leases by approved persons for the purposes of testing;

(iii) Provisions in relation to liability for clean-up costs; and

(iv) Requirements for the disclosure of information.

Overall, the draft plan is a document intended to provide an overview of the Government's proposed approach but contains very little detailed information. No doubt a more comprehensive document will be forthcoming following the February elections. More information can be obtained from the Contaminated Sites Unit C/- The Environment and Conservation Division, PO Box 1119, Tuggeranong ACT 2901.

Amendments to the Nature and Conservation Act

The Nature Conservation (Amendment) Act 1994 came into force on 11 October 1994. The Amendment Act establishes a Flora and Fauna Committee whose functions are to provide the Minister with advice in relation to nature conservation in the Territory. The Act also provides for the development of a nature conservation strategy for the management and conservation of flora and fauna indigenous to the Territory. Finally, the amending legislation provides for the development of action plans in relation to vulnerable, or endangered species or ecological communities declared vulnerable or endangered and the processes which have been declared to be threatening processes.

A Bill further amending the Nature Conservation Act was then introduced into the Legislative Assembly on 10 November 1994. The Nature Conservation (Amendment) Bill (No. 2) 1994 introduces a new system of on the spot fines for breach of various provisions of the Nature Conservation Act and provides for the development of management agreements regulating the activities of government agencies in relation to nature conservation issues.

National Environment Protection Council Bill 1994

The National Environment Protection Council Bill was introduced into the ACT Legislative Assembly on 10 November 1994 and was passed without amendment on 1 December 1994.

Amendments to the Water Pollution Act

The Water Pollution (Amendment) Bill 1994 was introduced into the Territory Assembly in November. The bill increases the term of licences granted under the act from 1 to 3 years. It also incorporates a statutory obligation on the Pollution Control Authority in setting licence conditions to ensure best practice methods are adopted.

ACT Elections

Elections for the ACT Assembly are to be held in February 1995. The elections will be the first under the new Hare Clark Electoral System (incorporating Robson Rotation). It is anticipated that environment and particularly planning issues will have a major role to play in the campaign.

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Delayed development of Gungahlin Town Centre

The recent dramatic news coverage in Canberra of the delayed development of Gungahlin Town Centre due to the presence of the legless lizard and the mouthless moth on the site gives the impression that urban planning in the ACT is seriously vision impaired in its approach to environmental issues. This is not a true reflection of the state of the ACT planning process which, in many respects, is far more controlled and receptive to environmental and heritage issues than processes found in other jurisdictions. Nevertheless, consideration needs to be given to the effectiveness of environmental assessment and the coordination of assessment and planning processes in ACT urban development.

Delays have also been visited upon a proposed development of an high technology manufacturing estate in Symonston, an industrial division of Canberra, following thesuggestion that a population of the earless dragon may be located in the area. The proposed development received the go-ahead in early 1994 and was welcomed as an opportunity for Canberra to enhance its manufacturing sector and create job opportunities.

A proposed housing estate development has been deferred pending further investigation into the legless lizard and its habitats.

All of this is occurring against the backdrop of the Lansdown inquiry into ACT planning and the lead-up to the ACT elections in early 1995. It cannot be denied that local politics is behind much of the recent disruption rather than a failure of the planning and assessment system itself, but it would be remiss of those involved in planning and environmental management to ignore the issues raised and not take the opportunity to analyse the adequacy of the planning process and possible improvements which may be introduced.

The development of Gungahlin has occurred over a period of more than twenty years, well before self government in the ACT. In the early 70's planning in the ACT was controlled by the Commonwealth through the National Capital Development Commission (NCDC) which enjoyed a very broad power base, virtually unfettered discretion in local planning and very limited accountability. Those were the early days in the development of environmental awareness generally.

The NCDC was an urban planning body and functions associated with assessment of environmental impact from an ecocentric perspective and protection of ecocentric values were not seen as part of its portfolio. To some extent the separation of these functions, based upon a perceived conflict of objectives, remains, despite the intended integration of planning and management processes into the Land (Planning and Environment) Act 1991 (the Land Act) following self government in 1989. The result is a degree of duplication of assessment processes and some overlap within different divisions of the Department of Environment Land and Planning (DELP). The integration of the conservation objectives of environmentalists and the economic /

functional objectives of planners is not easily achieved, but it is not an impossibility. In urban areas in particular there needs to be a degree of compromise, but only with full knowledge of the consequences.

One of the difficulties of urban planning and environmental management is the limitation of knowledge, technology and resources available at the relevant time. Gungahlin is a case study which highlights this difficulty. Under the Commonwealth regime a broad brush environmental assessment of the area was carried out by NCDC in 1987 and was cleared for development to proceed in 1988. The area covered by the assessment was large and encompassed multiple functions within the proposed development. The report did cover heritage issues and broad environmental concerns such as vegetation, soil and water, and in fact the lizard was recorded in the vicinity at that time. A more thorough asssessment of all wildlife and plant species in the area was not a practical proposition from a cost and time point of view.

The Nature Conservation Ordinance (now the Nature Conservation Act 1980) applied at the time, but the role of the Conservator of Wildlife was quite distinct from the planning process. With the advent of the Land Act the role of the Conservator has been extended to the extent that the Conservator may make submissions to the Planning Authority in relation to variations to the plan (s.16) and the authority must consider those submissions. In practice, if wildlife issues arise during the planning process the Planning Authority will refer those matters to the Conservator for further investigation and will respond to recommendations, but there is no requirement to do so in the Land Act and as a result there is often duplication of the inquiry process.

Following an initial broad site assessment, such as that carried out for Gungahlin in 1987, more detailed assessments are carried out by the Planning Authority prior to the actual development of a specific area and this process should pick up the more specific site characteristics.

In the case of Gungahlin it appears that.the limitations on available resources and knowledge at the time go some way towards explaining the failure of the site assessment process in the first instance. Very little is known still of the lizard species involved and assumptions had been made that the lizard was limited to undisturbed native grasslands. The particular site had been used largely for pastoral purposes and was not classed as untouched native grassland. The assumption has been shown to be wrong and the various development projects have been placed on hold while further investigation of the lizard, its habitat and whether it is in fact an endangered or even a threatened species is carried out.

The alert first came from the Wildlife Research Unit (DELP) via the Conservator of Wildlife. As mentioned above the Conservator does have input into the planning process under s.16, but this is limited. The Conservator also has input as a concurring authority under s.235 in relation to certain controlled activities as described in Schedule 4. The relevant activity for present purposes is work affecting places listed in the Heritage Places Register or an interim Register. "Heritage Places" includes places which represent significant habitat for native species; rare, endangered or uncommon species, etc (s.56 & Schedule 2). The difficulty is of course that the places have to be on the register.

The Conservator is also governed by the Nature Conservation Act and has responsibilities in relation to protection of wildlife under that Act. If the Conservator is of the view that wildlife is threatened there is an obligation to take steps such as reporting to the Planning Authority which must then take such matters into account. Despite s.8 of the Land Act which provides that "the Territory, the Executive, a Minister or a Territory authority shall not do any act or approve the doing of any act that is inconsistent with the Plan.", the Planning Authority is also bound by the Nature Conservation Act if it becomes or is made aware of a threat to wildlife.

In the case of the legless lizard, its existence in the area of Gungahlin has been known as far back as 1988 and the Conservator did make submissions to the Planning Authority at that time. The Authority did not take the matter any further, for reasons suggested above, and in hindsight this could be seen as a shortfall, not so much on the part of the

Planning Authority, but within the planning structure and the legislation.

The role of the Conservator in the planning process needs to be reviewed and intergrated to a greater degree; and the wildlife legislation is currently under review. This should look to avoiding duplication of the assessment process and requiring detailed assessment at an earlier stage. As illustrated by Gungahlin, the costs saved at the earlier stage have been more than offset by the overall cost to the community now that the lizard has come home to nest.

The positive signs from Gungahlin and Symonston are that the issues of the lizard, the moth and the dragon have been taken seriously by the Planning Authority and the ACT government before it may have been too late. Too often in the past it has been a case of looking back and asking why a species or heritage item was obliterated in the name of progress and to that extent ,at least, the planning process in the ACT should be applauded.

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DEVELOPMENTS IN WESTERN AUSTRALIA

Prerogative Writ Applications Against The EPA

The Environmental Protection Authority of WA ("EPA") has been the subject of two recent prerogative writ applications.

Mandamus to compel environmental impact assessment of Plan

First to take action was Mr Robin Chapple, an environmental consultant, who has applied in the Supreme Court of WA for a writ of Mandamus to compel the EPA to assess the Burrup Peninsula development plan proposed by the Department of Resources Development of WA ("DRD").

The EPA initially decided to assess the plan at the level of Public Environment Report but rescinded that decision on legal advice that plans are not assessable under the Environmental Protection Act 1986 (WA). The EPA has filed a notice to accede to the Supreme Court's decision whilst the State of Western Australia has entered an appearance acting primarily for the DRD. An order nisi has been granted pending hearing of the issues by the Full Court early in the new year.

Certiorari to quash environmental impact assessment decision to permit shell sand dredging

The Coastal Waters Alliance, an amalgamation of organisations with a connection to Cockburn Sound, has applied in the Supreme Court of WA for a writ of certiorari to quash the decision of the Minister and the EPA to allow continuation of the dredging shell sand in Cockburn Sound by Cockburn Cement Ltd. Cockburn Cement Limited has been dredging shell sand in Cockburn Sound since 1972 under the Cement Works (Cockburn Cement Ltd) Agreement Act 1971 (WA), as amended in