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.

John Snell
Clayton Utz, Solicitors

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The EPA initially decided to assess the plan at the level of Public Environment Report but rescinded that decision on legal advice that plans are not assessable under the Environmental Protection Act 1986 (WA).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

1986. Pursuant to the terms of the 1986 statutory amendment, there have been environmental assessments of the Dredging Management Plans, which must be approved every two years. Longer term plans had not been addressed until the Authority called in and assessed the proposal. The writ suggests that the Authority took into account irrelevant considerations and failed to give adequate weight to environmental factors in reaching its recommendations. A decree nisi has been granted and the matter will come before the Full Court for argument in the new year.

Interim Injunctions Against Logging Operations Of The Department Of Conservation And Land Management

The Bridgetown-Greenbushes Friends of the Forest Inc, a conservation group, was in November granted by the Supreme Court two interim injunctions to stop the Department of Conservation and Land Management of WA ("CALM") from logging two compartments of jarrah forest in the State's south west, one in the Kerr State Forest near Balingup and the other in the Hester State Forest near Bridgetown. The plaintiff sought the injunctions on the grounds that the logging operations would constitute:

1. A breach of the Wildlife Conservation Act (for taking listed endangered fauna);

2. A breach of the Environmental Protection Act for failure to ensure compliance with conditions contained in a Statement by the Minister for the Environment pursuant to an environmental impact assessment of the Defendant's 1994-2003 Forest Management Plan; and

3. A denial of natural justice by reason of a failure to consult with the plaintiff and the local community in accordance with a legitimate expectation created by the Defendant that such consultation would take place.

CALM has since given undertakings not to conduct logging operations in the two compartments pending the determination of the proceedings by the Court.

Western Swamp Tortoise Draft Policy

The draft environmental protection policy was outlined in the AELN of June 1994. The Public consultation stage has now been completed. The EPA has decided to withhold the policy for a period, likely to be 12 months, whilst land management proposals are worked out to allow for the achievement of the aims of the policy and at the same time recognising the concerns of landholders. Once land management plans have been established the next stage is a revised draft. The policy is then remitted to the Minister who consults with those affected by the policy.

Planning Legislation Amendment Bill 1994

The comments on this Bill by the WA Division of NELA were published in the last issue of the AELN, pages 21-32. The most contentious aspects of the Bill related to changes to the system of environmental impact assessment in Western Australia. The Bill has now been re-submitted to the Western Australia Parliament without the clauses proposing changes to environmental impact assessment. The Minister for Planning has commented that those portions of the Bill will be presented again in a separate Bill in 1995.

Alex Gardner
University of WA Law School

DEVELOPMENTS IN VICTORIA

Draft State Environment Protection Policy (Groundwaters of Victoria).

A draft State Environment Protection Policy (Groundwaters of Victoria) was released for public comment by the Victorian EPA in October. The objective of the Policy is to reserve groundwater resources which are free from contamination for future use, as well as to protect the ecological values of surface waters.

The water quality objectives in the Policy are based on the Australian and New Zealand Environment and Conservation Council (ANZECC) and Australian Water Resources Council (AWRC) national water quality guidelines and the SEPP (Waters of Victoria). As with other SEPPs produced by the Victorian EPA, the SEPP (Groundwaters of Victoria) specifies the boundaries of the area affected by the Policy, the beneficial uses to be protected, environmental indicators and objectives, an attainment program and related activities. No specific criteria or standards are provided in the Policy, although the development of criteria is to be based on the ANZECC criteria for fresh and marine waters, taking into account current and potential uses and local conditions, risks, economic and state politics.

The groundwater environment is segmented on the basis of total dissolved solids (TDS) background concentrations and beneficial uses specified for each of the five segments. Schedule A contains groundwater quality objectives to protect the beneficial uses identified for each segment.

Schedule B is to contain Groundwater Protection Zones (those with special significance or vulnerability) and Schedule C is to contain Groundwater Pollution Zones (ie., those zones already contaminated). No zones have been included on these schedules at this stage.

In addition to the normal requirements for planning and environmental documentation to be consistent with the Policy, the EPA may require a hydrological assessment to be carried out to determine any risk to groundwater quality or beneficial uses. Attenuation zones can be included in licences, licence renewals and works approvals in much the same way as mixing zones are utilised in surface waters.

Related activities proposed for future implementation include research and monitoring, data collection and databases, groundwater management plans, codes of practice and guidelines, public education, reporting and review.

The draft SEPP (Groundwaters of Victoria) includes a Policy Impact Assessment which outlines the issues underlying the preparation of the Policy and assesses its potential impacts.

Comments on the Policy and the Policy Impact Assessment should be sent by 28 February 1995. Contact Darryl Strudwick at the EPA for a copy of the Policy.

Environment Effects (Amendment) Bill

An amendment to the Victorian Environment Effects Bill, which provides for State environmental impact assessment of development proposals, has been proposed.

Notes from the Second Reading have been included, with some amendments, below. A more detailed review and assessment of the implications of this amendment will be included in the next issue.

The broad purpose of the Bill is to amend the Environment Effects Act 1978 to provide that Environment Effects Statements (EESs) for public works are only required at the direction of the Minister for Planning.

When the original act was introduced to parliament in 1978, many public works were not subject to planning and other development approval controls. Therefore the Act was principally concerned with public works, although provision was made in section 8 of the Act for it to apply to municipal and private sector works.

In practice, the Act has been applied to public, municipal and private works. The need for separate provisions in the Act for public and private works has lessened over time, as statutory approvals for public works have been introduced, notably in the provision of the Planning and Environment Act 1988 that provides that planning schemes bind the crown. Further, the Act is not usually invoked if the normal approval process can adequately deal with the main issues of concern. Only some eight to twelve EESs have been required, on average, each year. This situation has been so since the Act came into operation.
Successive governments have misinterpreted the Act regarding Ministerial discretionary powers. It was thought that the Minister for Planning had discretion to determine when an EES was required. In fact the Minister has discretion to decide whether an EES is required for private works, but such discretion does not apply to public works. That is, a decision by the Minister for Planning that specified public works do not require an EES does not exempt those works from the application of the Act.

In order to provide that public works and private works are treated similarly, the Bill specifies that the Act only applies to those public works declared by the Minister. This reflects a long-standing practice where the Minister has decided when an EES was required for public works. When he has declined to require an EES, he has given reasons for his decision. This practice will continue.

The new provisions will apply to works which commenced before as well as after the amendment of the Act.

The Act also provided that any relevant Minister could require the preparation of an EES by an officer of his Department. This provision has not been used for many years; instead if another Minister believes an EES to be desirable, consultation with the Minister for Planning is the usual procedure. As the provision is contrary to the purpose of the Bill it is being repealed.

In conclusion, the EES process has high credibility in Victoria, with both industry and community groups. To ensure that its credibility is maintained, it is desirable that the approvals process is only used for works where the normal approval process cannot adequately deal with the major issues of concern.

Thanks and acknowledgement are extended to the Melbourne Office of Freehill Hollindale and Page for providing the following commentary.

Victoria To Validate Land Titles In Accordance With Native Title Act

A bill for an Act to validate land titles in accordance with the Commonwealth Native Title Act 1993 has been introduced into the Victorian Parliament.

Background

The Mabo decisions cast doubt over the validity of freehold estates and other interests in land which were created after the commencement of the Commonwealth Racial Discrimination Act 1975 on 31 October 1975 where the land was traditional Aboriginal land and traditional owners' rights in the land (native title) had survived. Mabo confirmed the ability of State governments to create freehold estates and other interests in land. Where a government creates an interest in land which is inconsistent with the continued enjoyment of native title, the native title will be extinguished to the extent of the inconsistency *provided that the grant of the extinguishing interest was a valid exercise of power.*

The grant of an interest in native title land may contravene the Racial Discrimination Act 1975 and therefore be invalid.

There are other possible legal bases upon which interests in land which are inconsistent with native title may be defective or invalid.

In order to remove doubt as to the validity of titles granted after 31 October 1975, the Victorian parliament enacted the Land Titles Validation Act 1993. The Act was to be effective when proclaimed.

Subsequently, the Commonwealth enacted the *Native Title Act* 1993 which provided that States could validate titles provided that the validation legislation met certain requirements. The Land Titles Validation Act 1993 did not meet the prescribed requirements and has not been proclaimed.

Land Titles Validation Bill 1994

The Land Titles Validation Bill 1994 was read for a second time in the Victorian parliament on 10 November 1994. The proposed Act will repeal the Land Titles Validation Act 1993 and provide for the validation of titles in accordance with the requirements of the Native Title Act 1993.

The Native Title Act 1993 provides for the validation of "past acts". "Act" is defined broadly and includes:

> the making, amendment or repeal of legislation;
> the grant, issue, variation, extension, renewal, revocation or suspension of a licence, permit, authority or instrument;
> the creation, variation, extension, renewal or extinguishment of any interest in relation to land or waters; and
> an act having any effect at common law or in equity.

The definition of a "past act" is long and complex. However, in general terms, "past acts" are:

> the making, repeal and amendment of legislation before *1 July 1993*; and other "acts" (eg, the creation of interest in land) which took place before *1 January 1994*, *which are invalid to any extent due to native title.* (The Native Title Act 1993 itself does not provide any guidance as to how the existence of native title could invalidate and "act").

Under the Native Title Act 1993, States may enact legislation to validate "past acts" provided that the legislation specifies that validation has a certain effect on native title depending on the nature of the "act" which is validated.

The Land Titles Validation Act 1994 will validate "past acts" in the following way:

- ***The grant of freehold estates, commercial leases, agricultural leases, pastoral leases, and the construction of public works***

  The grant of freehold estates or leases of the kind mentioned above is validated and extinguishes any native title which existed in relation to the land.

  Similarly, the construction of public works is validated and extinguishes native title.

- ***The grant of other leases (except mining leases)***

  The grant of leases other than mining leases and leases covered above which are wholly or partly inconsistent with the continued existence, enjoyment or exercise of native title is validated.

  Native title is only extinguished to the extent of the inconsistency between the lease and the native title rights.

- ***The grant of mining leases and other "past acts"***

  The grant of mining leases and other "past acts" are validated.

  Native title is not extinguished by validation but is *suspended* (wholly or partly depending on the extent of the inconsistency between the "act" and the native title) while the "act" is effective. When the "act" ceases to have effect, the native title revives.

Where validation affects native title, the native titles holders will in most cases be entitled to recover compensation from the State.

The Land Titles Validation Act 1994 will also confirm the following right s in accordance with the Native Title Act 1993:

> the existing ownership by the State of all natural resources;
> the existing rights of the State to use, control and regulate the flow of water; and
> existing public access to and enjoyment of waterways, foreshores, beaches, and areas that were public places on 31 December 1993.

All existing fishing access rights under State law are confirmed to prevail over other public or private fishing rights.

The Act provides that the above confirmations do not extinguish or impair any native title rights and do not affect any conferral of land or water, or an interest in land or water, under a law that confers benefits only on Aboriginal peoples or Torres Strait Islanders.

Ongoing Administration of Native Title Issues

There are other issues in the Native Title Act 1993 which call for legislative responses form the states, for example, the establishment of recognised State bodies and procedures for managing "future acts". In the Bill's Second Reading Speech, the Premier announced that Victoria would not enact further legislation in response to the Native Title Act 1993 until the High Court challenge is expected by April 1995.

The Second Reading Speech also contained a number of statements which provide a useful indication as to how the Victorian Government will manage native title issues, namely:

> The Government and its agencies will adopt a "business as usual" approach to Government business such as land and resources management in respect of the Native Title Act 1993.
> - The Government will follow the "right to negotiate" process where it makes an assessment that there is a prima facie argument that native title exists in relation to land on which there is a proposal to proceed with an "act" mentioned in s26(2) of the Native Title Act 1993 (eg, the grant of exploration and mining licences).
> - Should any interest granted by the Victorian Government be invalid due to native title, the Government will act to protect the grantee so far as is possible under the Native Title Act 1993.
> - The Government will ensure that any part of the grantee's interest not subject to native title is reinstated and that no other applicant unfairly gains competing rights over the intended grantee in relation to any part of the grantee's interest not subject to native title.

It would appear that these statements are designed to provide a degree of comfort to investors in Victoria, particularly the mining and petroleum industries with respect to security of tenure.

Under the Native Title Act 1993, the grant or renewal of resources tenements after 1 January 1994 is invalid unless they are granted or renewed subject to the "right to negotiate" process. The statements extracted above from the Second Reading Speech appear to indicate that where a tenement is invalid in these circumstances, the Government would attempt to regrant the tenement to the original holder in a way which would not result i invalidity due to native title.

It appears that the Government also proposes to prevent parties taking advantage of any invalidity, for example, by "claim jumping" or "over pegging".

The statements in the Second Reading Speech show an intention on the part of Government to mitigate the consequences of tenements being invalid due to native title. While investors are entitled to derive a degree of comfort from the statements,