EDITORIAL

Intergovernmental Agreement on the Environment Review

The Intergovernmental Agreement on the Environment ("IGAE") was signed in May 1992 by the Heads of all Australian Governments and the President of the Australian Local Government Assocation. Clause 5.1 of the IGAE provides that the operation of the IGAE will be reviewed every three years. The first such review is now under way.

Clause 5.1 also states that the review will be by way of the presentation of a report from the relevant Ministerial Councils to the First Ministers following consultation by the Chair of the Ministerial Council with the President of the Australian Local Government Association. The preparation of the report is being co-ordinated by the Intergovernmental Committee for Ecologically Sustainable Development ("ICESD"), a committee chaired by a representative of the Commonwealth Department of Prime Minister and Cabinet and with representation from each of the States' / Territories' lead agencies (eg. Departments of Premier and Cabinet) and a key environmental agency. Although the IGAE does not provide for participation by non-governmental organizations, ICESD has invited NGO partipation in the review. The report of the review is likely to be completed in July this year and presented in due course to the Council of Australian Governments; ie. the First Ministers.

The terms of reference for the review indicate that its focus is on progress in implementing matters agreed in Schedules 1-9 of the IGAE and the arrangements and procedures developed and used to achieve such implementation. As well, the review may consider the addition of further schedules to enhance co-operative arrangements to deal with matters not already covered by the IGAE. It is hoped that the report of the review will shed some light on how the IGAE has been working, something which is not easily assessed by even the interested outside observer because the IGAE is so much concerned with the internal bureaucratic processes of federal intergovernmental relations. Nevertheless, I wish to take this opportunity to comment briefly on the publicly observable implementation of the IGAE and possible responses to that implementation.

Implementation of the IGAE

One could easily gain the general impression that there has been little success to date in implementing the objectives of the IGAE. For example, consider the following four matters which are covered by various schedules of the Agreement.

(1) Schedule 2 provides for the accreditation of State land and resource use planning systems and development approval processes. Although there has been some discussion of accreditation of various State processes (eg. the processes of the Land Conservation Council in Victoria) there has to date been no agreement on the accreditation of any State processes. In fact, it appears that there is even fundamental disagreement between the States and the Commonwealth about what accreditation means.

(2) Schedule 3 provides for a general framework agreement on the administration of environmental impact assessment ("EIA") and bilateral agreements for accreditation of EIA procedures. Notwithstanding the significance for these general and bilateral agreements of the Commonwealth's current review of EIA, it is notable that the Australian and New Zealand Environment and Conservation Council ("ANZECC") has not yet finally adopted the general framework agreement after more than five

years of discussions about such. Similarly, there seems to be no sign of agreement on criteria for accreditation of State EIA processes.

(3) Schedule 4 provides for the creation of a new institution to establish national environment protection measures. Although there has been some progress in implementing this Schedule by the enactment of the *National Environment Protection Council Act* by the Parliaments of the Commonwealth, Australian Capital Territory, Northern Territory, Queensland and South Australia, there is delay in New South Wales and Tasmania and outright refusal to participate from Western Australia. The Commonwealth is moving to establish the NEPC Service Corporation but it is not clear when the whole NEPC system will be functioning.

(4) Schedule 6 provides for a national biodiversity strategy and Schedule 9 provides for a national strategy for protection of rare, vulnerable and endangered species. Again, notwithstanding many years of consideration of drafts of these strategies, the adoption of final versions of these strategies by all Australian Governments has not yet been achieved and it appears to be uncertain, or perhaps unlikely, in the case of the Biodiversity Strategy.

As well, regional assessments of forest resources is another process envisaged as part of the implementation of the IGAE[1] that has proved equally difficult of achievement. Even the one regional assessment which was undertaken at the time of preparing the IGAE (that between the Australian Heritage Commission and the Western Australian Department of Conservation and Land Management) seems now to have been departed from, if not abandoned, as incomplete. The struggle between the Commonwealth and the States over the renewal of woodchip export licences for 1995 epitomizes the failure to date to implement effective regional assessment processes. It is acknowledged that the Commonwealth-State debate over the renewal of woodchip export licences has, in the last six months, invigorated the Commonwealth's and States' endeavour to develop the regional assessment process.

In summary, the co-operative processes of the IGAE are being implemented slowly.

Commonwealth Leadership in Environmental Protection

It is arguable that the Commonwealth needs to show more leadership in the national processes of developing improved systems and standards for environmental management and protection.

One aspect of the implementation of the IGAE which should be given a high priority is the rationalization and harmonization of Australian environmental laws, a task which is central to the process of accreditation. In essence, this task is one of moving towards more uniform and improved environmental laws in Australia.[2] There are, at least, two ways in which this task could be pursued under the IGAE:

(1) the IGAE could be amended by inserting in the relevant Schedules specific criteria for the determination of accreditation or the aspects of environmental laws which should be the subject of harmonization; or

(2) the IGAE could be amended to provide a process for undertaking the task of rationalizing and harmonizing our environmental laws and providing the basis for accreditations.

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1 Especially in relation to National Estate forests - see Schedule 7.

2 This task has been discussed in the paper produced by Jason Alexandra for the Australian Conservation Foundation, "New Zealand Legislates for Sustainable Development: Lesson for Australia", April 1994 and by A Gardner, "Developing Norms of Land Management in Australia", *The Australasian Journal of Natural Resources Law and* Policy 127-165.

The Commonwealth should provide leadership for this task by providing funds to undertake the legal research necessary for ascertaining the essential principles for Australian environmental law.

Whether or not the Commonwealth continues to act through the mechanisms of the IGAE, the Commonwealth should be formulating legislation to set national standards and measures to be applied in environmental laws and management. Even if the Commonwealth decides to act through the IGAE, it will need legislation to provide effectively for accreditation of State processes.[3] Such legislation should provide not only a power to accredit State processes but also set the legal standards to be applied in determining whether a particular State process should be accredited. Subject to the Commonwealth having the constitutional power to legislate on the particular topic, [4] it is clear that the Commonwealth Parliament may legislate to set national standards which State and Territory legislation must conform to in order validly to operate.[5]

If the Commonwealth is to continue within the framework of the IGAE, it needs to set some timelines for implementation of key aspects of that framework so that all jurisdictions have a clear understanding of the expectations to be met. It may be that the IGAE could be amended to provide some dispute resolution mechanisms in order to overcome obstacles in the co-operative process of implementation. In particular, there may be disputes of fact rather than interpretation of the terms of the Agreement itself which could be referred to an independent body to inquire and report upon. It appears unlikely that the parties will want to make the Agreement legally binding, so the Commonwealth should make clear that it will move unilaterally to implement key aspects of the IGAE in the event that some jurisdictions fail to co-operate in its implementation.

Finally, it may be noted that Canada is now seeking to emulate the co-operative framework of the IGAE by proposing their own Environmental Management Framework Agreement ("EMFA"). The December 1994 discussion draft of the EMFA reveals many similarities with the IGAE. However, it may be that we have lessons to learn from the draft EMFA in respect of the topics covered in the Schedules to the agreement (such as Schedules 1 Monitoring, 6 Legislation / Regulations / Policy, and 10 State of the Environment Reporting). Also, it appears that the Schedules of the draft EMFA are a little more precise in setting out key concepts to be implemented in respect of each Schedule.

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3 See A Gardner, "Federal Intergovernmental Co-operation on Environmental Management: A Comparison of Developments in Australia and Canada", in (1994) 11(2) *Environmental and Planning Law Journal* 104, esp. @ 122-130.

4 A question which has been addressed in another place: see R Fowler, *Proposal for a Federal Environment Protection Agency: A report prepared for the Australian Conservation Foundation and Greenpeace Australia Ltd*, 1991, chapter three of which was published in the *Australian Environmental Law News*, Issue no.1, 1993, 51-64.

5 See *Western Australia v the Commonwealth (The Native Title Case)*, 16 March 1995, High Court of Australia, transcript of the unreported judgment of Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ, pp.66-84.