Central Gippsland

Major Waterways in the Central Gippsland region include the Latrobe, Thomson, Macalister, Avon and Perry Rivers, which flow into Lake Wellington in the Gippsland Lakes system. These waters are used for domestic water supply in regional centres and as part of Melbourne's water supply, natural ecosystems, pulp and paper manufacturing, electricity production, irrigation, aquaculture, commercial and recreational fishing and recreational activities such as canoeing and swimming. Water quality in the Central Gippsland region is affected by activities within the catchments, with the major problems relating to nutrient inputs, which in some cases cause algal blooms, high suspended solids and turbidity and pathogens from unsewered townships and stock contamination of streams.

Changes to the SEPP (The Waters of the Latrobe River Catchment) include:

* significant changes to the beneficial uses protected in different areas, including extension of the areas in which drinking water supply and swimming are protected and upgrading of the protection of aquatic ecosystems;

* a revised set of environmental quality objectives (turbidity, suspended solids, total phosphorus, total nitrogen and chlorophyll *a*) and indicators;

* the attainment program provides for additional mechanisms and key directions to achieve the environmental quality objectives. These build on the statutory tools in the *Environment Protection Act* and allow for co-ordination with provisions under the *Planning and Environment Act, Catchment and Land Protection Act* and *Water Act;* and

* the attainment program focuses on integrated catchment management, with a Water Quality Management Strategy the main implementation measure.

Policy Impact Assessments have been prepared for each of the SEPPs. Public comment is invited by the EPA on both the Policies and the PIAs until 16 June 1995 for the draft Schedule F5 and 19 June for draft Schedule F6. For copies of the documents telephone the EPA on (03) 9628 5622 or EPA Gippsland on (051 76 1744)

Julie Wilkinson
Synnot & Wilkinson
Victoria

WESTERN AUSTRALIA

Environmental Impact Assessment of Mining Proposals

The *Environmental Protection Act 1986* (WA) ("the Act"), s.38, makes provision for a number of ways in which a "proposal that appears likely, if implemented, to have a significant effect on the environment" may be referred to the EPA to determine whether or not the proposal shall be subjected to environmental impact assessment. Any person, a proponent or the Minister for Environment may refer a proposal to the EPA. The EPA itself may require a decision-making authority to refer a proposal. And, importantly, a decision-making authority has a duty to refer such a proposal to the EPA as soon as that proposal comes to the notice of the decision-making authority. The EPA has twenty eight days from the date of referral in which to decide whether the proposal should be subjected to the procedures of environmental impact assessment under the Act. If the EPA decides that a proposal should not be assessed, it may nevertheless give advice and make recommendations to any relevant decision-

making authority on the environmental aspects of the proposal.[6]

On 28 April, the Chairperson of the Environmental Protection Authority ("EPA") and the Director General of the Department of Minerals and Energy ("DOME") signed a Memorandum of Understanding between the EPA and DOME regarding the referral for environmental impact assessment by the EPA of proposals for the exploration for and mining of minerals in the onshore terrestrial environment ("the MOU"). The MOU is now in operation.

The EPA has been developing and using the terms of draft memoranda of understanding with a number of government departments for several years now, but this MOU would appear to be the first that has been officially adopted under the terms of the Environmental Impact Assessment Administrative Procedures, clause 4.2.[7] That Clause provides that all signed memoranda shall be publicly available and may be issued in draft form for public comment. To their credit, the EPA and DOME appear to have consulted quite widely on the formulation of the MOU. Both bodies and other interested departments and persons will no doubt watch carefully the implementation of the MOU, as it is expected to provide something of a model for future memoranda with other government departments.

The key to the MOU is a table which describes the notification and consultative procedures, including environmental assessment by the EPA, to be applied to various situations identified according to the tenement rights to be granted or exercised, the likelihood of environmental disturbance and the category of environmentally sensitive land, eg. national park, nature reserve, State forest, etc. involved. The table also identifies the set of standard conditions to apply to a tenement granted in respect of the particular category of land. These conditions are intended to supplant the sort of advice that the EPA would provide on those referrals it would decide not to assess formally. The aims of the MOU are thus to provide consistency and certainty for all persons concerned in the management of minerals exploration and production activity on environmentally sensitive lands and to better identify those types of proposals which need to be assessed by the EPA.

Environmental Impact Assessment of Plans

In *Chapple v The Environmental Protection Authority, Steedman and the State of Western Australia*[8], the Full Court of the Supreme Court of Western Australia held unanimously that the draft Burrup Peninsula Land Use and Management Plan ("the Plan") was not a proposal that would have a significant effect on the environment and could not be referred to the EPA for assessment under s.38.

The Burrup Peninsula is in the Pilbara region of Western Australia and is noted for its high concentration of Aboriginal sites (including rock art), scenic values, biological diversity values, tourism and its importance as a location for industrial and port facilities for the iron ore and petroleum industries. There is no statutory town planning scheme applicable to the area. The draft Plan was prepared in exercise of executive authority (ie. there was no statutory basis for its preparation or adoption) by the Burrup Peninsula Management Advisory Board whose members were appointed by the Minister for Resources Development and included officers from the Department of Resources Development and representatives from interest groups in the area. The land the subject of the draft Plan was all vacant Crown land, current industrial sites being excluded from the scope of the Plan. In essence, the draft Plan proposed:

* a number of industry zones, a conservation zone and an infrastructure corridor;

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6 Environmental Protection Act 1986 (WA), s.40(1).

7 Those Procedures were promulgated on 17 December 1993 under the Environmental Protection Act 1986 (WA), s.122.

8 Full Court of the Supreme Court of Western Australia, unreported judgment number 950196, delivered 27 April 1995.

* the establishment of a management authority to advise on the management of the land;

* that the conservation zone be vested in the National Parks and Nature Conservation Authority and the industrial zones be vested in the Minister for Resources Development;

* that both zones of land be managed by the Department of Conservation and Land Management until the industrial land was required for industrial development; and

* a scheme for the management of the land.

The applicant, Chapple, referred the draft Plan to the EPA which initially decided to assess the Plan but subsequently rescinded its decision after a letter from the Chief Executive Officer of the Department of Resources Development stated that it did not view the draft Plan as a "proposal" under s.38, citing legal advice in support of this view. The terms of the Plan itself made clear that environmental impact assessment was contemplated at the stage of specific development proposals. Chapple sought *mandamus* to compel the EPA to assess the draft Plan arguing that the assessment of the alienation of particular parcels of land for specific development proposals "would be piecemeal and restricted by what has gone before whereas the assessment ought to be done, as a whole, at this stage (ie. of the Plan)".[9]

The leading judgment of the Court was given by Pidgeon J.[10] His Honour explained that the process for final approval of the draft Plan would involve preparation of the final Plan by the Management Advisory Board taking into account comments from public review, and consideration of the Plan by Cabinet to give Government approval, following which it could be implemented. His Honour then adopted a two stage process of reasoning to determine whether the Plan could be a proposal within the terms of s.38:

* he ascertained how the Plan could be implemented under existing law; and

* be considered whether this implementation was likely to have a significant effect on the environment.

In order to determine the effect of the implementation of the Plan, his Honour said, "it is necessary to make reference to the existing law in respect of the alienation of vacant Crown land and then to examine how, at law, the recommendations (of the Plan) might be implemented".[11] His Honour reviewed relevant provisions of the *Land Act 1933 (WA)*, the *Conservation and Land Management Act 1984 (WA)* and the *Mining Act 1978 (WA)* and concluded that "it would appear difficult, if not impossible, to grant land in the area under study by way of Crown lease or freehold title under the existing provisions of the *Land Act*". His Honour noted that land in the area already granted to industry had been granted under State Agreement legislation, except for a couple of leases which seemed to have been granted under the *Land Act*. His Honour then examined the extent to which the Plan, if adopted, could be carried out without further legislation. He noted that the land designated for conservation could be vested in the National Parks and Nature Conservation Authority and a management authority established.

However, in relation to industrial zoning, whilst it may have been possible to create a temporary reserve under the *Land Act*, there was no statutory provision for vesting the land in the Minister for Resources Development, as proposed by the draft Plan, or for the alienation of the land for its proposed industrial purposes. His Honour concluded that without new legislation, "the area concerned would remain vacant Crown land and at its highest would be managed by the Minister

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9 Transcript of the unreported judgment of Pidgeon J at 17.

10 Kennedy and Ipp JJ agreed with Pidgeon J; Kennedy J making some additional comments.

11 Transcript of the unreported judgment of Pidgeon J at 13.

as a temporary reserve with the advice of the management authority".[12]

Pidgeon J then considered whether the legal implementation of the Plan made it "a proposal that appears likely, if implemented, to have a significant effect on the environment". In his Honour's view, "this must be interpreted to mean that it is likely to cause some change in the environment. A proposal that aims to preserve the environment in its existing state would not come within that area."

Applying this test, his Honour held that vesting the conservation zone in the National Parks and Nature Conservation Authority and managing it for conservation "aims to preserve it as it is and to prevent any change of use".[13] In regard to the industrial zone, his Honour held that the effect of the Plan is to "preserve the land as it is until it is required for industry". His Honour explained:

> The adoption of the Plan would not, at law, commit the proposed industrial zone to industry. The land would remain vacant Crown land without any zoning until some decision making body makes the decision as to the use of the land. The Plan is no more than a recommendation. A future proposed determination as to use would be required to be assessed. That assessment could well be that that piece should not be used for industry but should be added to the adjoining national park, if such were created.

Finally, his Honour held that the inclusion of the infrastructure corridor on the Plan was merely the identification of a concept that had appeared on earlier plans for the area and did not dedicate the land to such use.

Protection of Remnant Native Vegetation

The Minister for Agriculture for Western Australia has announced a new policy on the retention of remnant vegetation. Under the Soil and Land Conservation Regulations, a person wishing to clear more than 1 hectare must give notice to the Commissioner of Soil Conservation. The new policy states that "further clearing on a property will be restricted where it reduces remnant vegetation or equivalent deep rooted perennial vegetation on a property to below 20 per cent of the total property area". Clearing will also be discouraged where the total remnant vegetation in a shire is less than 20 per cent. Proposals to clear where the 20 per cent requirement cannot be met will still be considered, but the onus will be on the landholder to demonstrate "that the proposed clearing will not cause land degradation or threaten nature conservation values". Proposals to clear where the 20 per cent requirement is met will still be subject to land degradation guidelines.

There may be some debate about what will constitute "remnant vegetation". The media statement's reference to "remnant vegetation or equivalent deep rooted perennial vegetation" could be taken to mean that remnant native vegetation could be cleared so long as there was sufficient deep rooted perennial vegetation growing on the property. The suggestion has been made that the policy will be interpreted to preserve remnant native vegetation.

The media statement says that the policy is to be implemented by revision of the Soil and Land Conservation Regulations. To date, I have not been able to find any The new policy also includes various State Government commitments of new funding for protection of remnant native vegetation and revegetation.

Alex Gardner
Law School
University of Western Australia

12 Transcript of the unreported judgment of Pidgeon J at 18.

13 Transcript of the unreported judgment of Pidgeon J at 19.