FEDERAL

Marine Policy Developments

Australia's Ocean Territory

A recent comment in this journal described Australia's legislative response to the Law of the Sea Convention (LOS Convention) coming into force (Conroy, Vol 3, Sept 1994 pp 4-5). In that article it was noted briefly that Australia was yet to implement provisions of the LOS Convention pertaining to marine scientific research and environmental protection. Although still eschewing any legislative commitment to implementing these non-resource provisions, the Commonwealth has taken further recent steps in the general policy area of the LOS Convention.

In December 1995 the policy "Australia's Ocean Age: Science & Technology for Managing our Ocean Territory" was released rather quietly by the Prime Minister's Science and Engineering Council. The cornerstone of this partial oceans policy is the Australian Ocean Territory (AOT), a term given to the total area of ocean space to which Australia can lay claim. This area comprises Australia's exclusive economic zone (EEZ); the extended continental shelf adjacent to the mainland; waters surrounding island territories; and waters adjacent to the Australian Antarctic Territory. In total, the AOT covers an area of 16.1 square kilometres. The AOT is not the product of legislation and therefore has no formal legal basis such as is accorded other oceanic zones. The fact that the Commonwealth has articulated the AOT concept nonetheless represents a commitment to developing resources policy for the entire ocean area under Australian jurisdiction.

The Commonwealth is silent as to a comprehensive marine environmental policy, however. Reference to ESD principles is made in "Australia's Ocean Age", but the policy falls substantially short of committing the Commonwealth to implementing Part XII of the LOS Convention, Protection and Preservation of the Marine Environment. A Senate References Committee is currently conducting an inquiry into the Commonwealth's implementation of the LOS Convention. It is hoped that the Senate Marine Pollution Inquiry will make a contribution towards remedying the Commonwealth's neglect of marine environmental policy.

This issue is pursued further in a companion article appearing in EPLJ (Evans, N, "LOS Convention and Senate Marine Pollution Inquiry" (1996) 13 EPLJ 3-5)

Endangered Species Protection Act Listings

An unrelated though very relevant policy development has occurred with respect to endangered species. The wandering albatross has been given protection as an endangered species under Schedule 1 of the *Endangered Species Protection Act* 1992 (Cth) (*ESPAct*). The Commonwealth must now prepare and implement a recovery plan for the wandering albatross (s. 31). More significant is the complementary listing of longline fishing as a key threatening process under the *ESPAct* (Schedule 3). In legal terms, this listing obligates the Commonwealth to mitigate the threats to albatross and other seabirds caused by longline tuna fishing (s. 33). Moreover, this listing implies that the incidental loss of albatross in Australian waters is unacceptable.

The longline listing is noteworthy because it is the first key threatening process added to the *ESP Act* subsequent to its enactment. It is also the only key threatening process relevant to offshore areas. Because tuna fishing occurs only within federal waters, problems arising from the limited application to State areas of the *ESP Act* provisions are therefore avoided. Other fishing-related *ESP Act* listings are being prepared with respect to the incidental take of dugong and turtles by trawl fishing. In this regard, the *ESP Act* represents an unexpected source of legislative protection for marine wildlife. The fisheries sector has hitherto largely been spared external environmental review, but is now compelled to take meaningful steps to improve its environmental performance.

Offshore Oil EIA

A proposal to explore for petroleum in Commonwealth waters adjacent to Western Australia is currently undergoing environmental impact assessment under the *Environment Protection (Impact of Proposals) Act* 1974 (Cth). The Wandoo Full Field Development Public Environment Report is significant because it represents the first time in relation to federal waters that a proponent has been designated under the administrative procedures of the *Impact of Proposals Act*. Several joint Commonwealth State assessments have been conducted where proposals overlap State waters. However, the current development is the first discrete Commonwealth assessment of an offshore oil proposal in the twenty year life of the *Impact of Proposals Act*.

The Wandoo assessment is clearly a long overdue marine-related EIA. It is tempting to conclude that the assessment indicates a shift in the Commonwealth's attitude towards the implementation of Part XII of the LOS Convention.

The current EIA, however, has been motivated at least in part by the Gunns Federal Court decision handed down in January last year. Instead of signalling the beginnings of a coherent marine environmental policy, the spurt of Commonwealth marine activity is rather a series of discrete law and policy incidents coinciding in time.

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Gunns' No.2 : Federal Court Upholds Woodchip Export Licence

On 9 February 1996 the Federal Court rejected a legal challenge to the decision of the Minister for Resources to issue an export woodchip licence (the licence) to Gunns Limited (Gunns) in 1995 The decision follows the judgment of Sackville J., last year setting aside a similar licence granted in 1994 for failure to comply with the requirements of the *Environment Protection (Impact of Proposals) Act* 1974 *(the Act) (Tasmanian Conservation Trust Inc v The Minister for Resources and Anor (1995) 127 ALR 580 (Gunns No 1)).*

Although Gunns No 2 concerns a decision made by the Commonwealth prior to the amendments made to the Administrative Procedures in May 1995 the decision nevertheless assists in interpreting the correct decision making process under the amended Administrative Procedures

Facts

In 1994 the Minister for Resources (the action Minister) gave an "in principle" approval for Gunns to export up to 200,000 tonnes of wood chips each year until the end of 1999 (the longterm proposal). There was not, however, a designation of a proponent by the action Minister under paragraph 1.2.1 of the Administrative Procedures to the Act.

In early 1995 Gunns made an application for a licence for the export of up to 200,000 tonnes of woodchips. The action Minister designated Gunns as a proponent of the proposal to issue the licence on 24 April 1995 in accordance with the Act. The action Minister identified the "proposed action" for the purposes of paragraph 1.2.1 of the Administrative Procedures as the proposed decision to grant the 1995 licence or the physical operations of Gunns' under the 1995 licence.

The Acting Minister for the Environment then determined under the Administrative Procedures to the Act that an EIS or PER was not required in relation to the reissue of the licence for 1995. After considering the Acting Environment Minister's advice (as required by the Act) the action Minister granted the 1995 licence to Gunns.

The Tasmanian Conservation Trust (the Trust) argued that the failure to designate a proponent in relation to the long term proposal infected the decision of the Minister for Resources to grant the 1995 licence. The Trust argued that the action Minister had incorrectly identified the "proposed action".

The Decision

The Trust's contention was rejected. The court held that the Act did not require that in relation to the 1995 licence there be a designation of Gunns' earlier proposal seeking "in principle" approval for exporting up to 200,000 tonnes of woodchips each year to the year 2000. The matter before the action Minister in 1995 was whether to grant the licence for 1995 and not whether to give "in principle" approval to the longterm proposal.

However, Davies J., stated that the term "decision" in section 5(d) of the Act "should not be read in a limited technical sense" but should be construed in its surrounding context. The surrounding context of the Act indicates a wide interpretation.

Davies J., observed that the giving of approval "in principle" and the issue of a licence are both steps which "are part of the decision making process in an industry such as the export of wood chips". This means that the giving of an "in principle" approval by the Commonwealth of a project is a decision which falls within the Act. An action Officer therefore needs to consider whether to designate a proponent pursuant to the Act when considering whether to grant "in principle" approval.

To this extent, his Honour disagreed with the contrary view expressed by Sackville J., in Gunns No.1.

Although the "in principle" approval did not give rise to any legal obligations or rights, in the opinion of Davies J., "it amounted to an expression of assurance that the export by Gunns of 200,000 tonnes of woodchips each year until the end of 1999 had the Government's approval". The action Minister had failed to comply with the Administrative Procedures by failing to consider whether the decision might affect the environment to a significant extent. However the failure to subject the longterm proposal to the Administrative Procedures did not invalidate the grant of the 1995

licence. This was because in 1995 the decision before the action Minister was whether to grant the licence and not whether to approve the longterm proposal.

The wide interpretation of the word "decision" by Davies J., indicates that a large number of policy or principle related decisions of the Commonwealth need to be subjected to the Administrative Procedures. It means that decisions of the Commonwealth such as policy approvals and management plan approvals which do not give rise to legal or statutory obligations or rights may have to be considered in light of the triggering mechanism in paragraph 1.2.1 of the Administrative Procedures.

Davies J., also expressed the view that contrary to what was held by Sackville J., in Gunns' No.1 a "proposed action" for the purposes of the Act was the action proposed on behalf of the Commonwealth (namely, the issuing of the licence) and not the action proposed by or on behalf of the proponent (namely, the woodchip operation). This issue has in any event been clarified by amendments to the Administrative Procedures which now expressly provide that the "proposed action" is the Commonwealth action. However the finding is relevant to decisions made prior to the amendments.

In relation to determining whether an action is an environmentally significant action his Honour noted that action Officers need to give attention to all those actions on the part of the proponent which "might flow" from the grant of the export licence. They also have to consider activities "which the grant of the licence would be likely to generate and the effect which those actions would have upon the environment". This observation further emphasises that action Officers need to consider indirect and cumulative effects in determining environmental significance. For example, in considering granting a wood chip licence it is necessary to consider the actual logging and woodchipping operations and the resulting effects on infrastructure such as roads and constructions arising from the grant of the licence.

Conclusion

Gunns' No.2 provides some further guidance in relation to the operation and correct decision making processes to be employed pursuant to the Act.

If an "in principle" approval of a project is sought from the Commonwealth, then action Officers will have to consider whether to designate a proponent under the Act. This may result in an environmental assessment being required at the very initial stages of a project although it may also mean that subsequent decisions to grant export licences may not need to be designated if the environmental effects of the granting of the licence in each year were adequately assessed in the assessment of the "in principle" approval (pursuant to paragraph 1.2.2 of the Administrative Procedures). This is something which the action Officer would need to consider in each case. However if there was any environmentally significant change in relation to the project the initial environmental assessment could not be relied on in relation to subsequent licence or permit approvals.

A general review of the Act has been carried out by the Environment Protection Agency and there may be further amendments to the Act and the Administrative Procedures in 1996.

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NEW SOUTH WALES

Threatened Species Conservation Act 1995

The Government stated in its election commitments and again after it was elected to office, that it intended to introduce comprehensive endangered species legislation replacing the fauna protection framework established by the *Endangered Fauna (Interim Protection) Act* 1991. However, on Monday 4 December 1995, expecting the support of the Opposition, the Minister for the Environment issued a press release stating that the introduction of the Act would be deferred until next year to allow for community consultation. The support of the Opposition was not forthcoming and the Government was forced by the Independents, Democrats and the Greens to introduce into Parliament the *Threatened Species Conservation Act (No 2)* on Thursday 7 December 1995. The Act was passed on 15 December 1995, received the royal assent on 22 December 1995 and commenced operation on 1 January 1996

Overview of the Act

The object of the Act is to provide for the conservation of threatened species, populations and