

RECENT DEVELOPMENTS

FEDERAL

REVAMP OF COMMONWEALTH ENVIRONMENT LEGISLATION

by Alan Bradbury, Deacons Graham & James

The Commonwealth Minister for the Environment Senator Robert Hill, has released a consultation paper outlining the long awaited proposed reforms to Commonwealth environment law.

Key aspects of the proposal are:

- * a new Environment Protection Act which will contain the Commonwealth's environmental impact assessment procedures;
- * a new Biodiversity Conservation Act to replace a raft of legislation including the *National Parks & Wildlife Conservation Act 1975*, the *Endangered Species Protection Act 1992* and the *World Heritage Properties Conservation Act 1983*;
- * new heritage legislation (which will await completion of the National Heritage Strategy);
- * new provisions for enforcement and compliance.

Environment Protection Act

The consultation paper recognises that much of the Commonwealth's environmental legislation is over 20 years old and does not reflect current best practice.

The proposed legislation, to replace the current Environment Protection (Impact of Proposals) Act 1974, will focus Commonwealth involvement in the environmental assessment and approval

process on matters of **national environmental significance**. This is to be contrasted with the current system in which decisions with little to do with the environmental significance of a proposal (such as decisions concerning foreign investment approvals, export controls and funding decisions) trigger Commonwealth environmental processes. The difficult issue of defining "national environmental significance" is to be addressed by reference to the likely impact of a project on:

- * world heritage properties declared under the biodiversity Conservation Act'
- * Ramsar wetlands declared under the Biodiversity Conservation Act;
- * places of national heritage significance (which will be defined after the finalisation of the National Heritage Places Strategy);
- * nationally endangered or vulnerable species and communities (defined as species listed as critically endangered, endangered or vulnerable and ecological communities listed as endangered under the Biodiversity Conservation Act);
- * migratory species and cetacean (which will also be defined in the Biodiversity Conservation Act by reference to the Bonn Convention and relevant bilateral agreements with Japan and China);
- * nuclear activities (which will be defined to include all environmentally significant actions involving the mining, processing or transport of uranium as well as the operation of nuclear reactors);
- * management and protection of the marine and coastal environment (this will only cover activities impacting on Commonwealth (rather than State) waters and will not cover fishing activities);
- * other matters of national environmental significance (it is proposed that the regulations will be able to define other

matters of national environmental significance but **only** after consultation with all of the States and Territories).

State and Territory processes will be accredited under bilateral agreements to be entered into between the Commonwealth and the various States and Territories. Where a project is not covered by a bilateral agreement the project will be subject to a case-by-case assessment and approval process under the Act. The case-by-case assessment includes provision for the accreditation of a State or Territory process for a particular project.

- * The forms of assessment generally reflect the status quo with a range of options including public inquiries, environmental impact statements and public environment reports. The Act also provides for strategic environmental impact assessment to deal with projects which involve a series of individual actions which might each trigger the provisions of the new Act.
- * The Environment Minister will be responsible for deciding on the level of assessment for a particular project as well as deciding whether to grant consent to proposals that trigger the Act. There will be no opportunity for merits review of either of these decisions.

Biodiversity Conservation Act

- * The proposed Biodiversity conservation Act is intended to comprehensively address the conservation and sustainable use of biodiversity.
- * For the purposes of the Biodiversity Conservation Act the term "biodiversity" will be defined in the same terms as in the Convention on Biological Diversity to mean 'the variability among living organisms from all sources including terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are a part'. It is intended that the definition will recognise that biodiversity comprises three components - genetic diversity, species diversity and ecosystem diversity.

The new Act will provide for the identification and monitoring of biodiversity

to ensure its conservation and sustainable use and will make provision for the preparation of bio-regional plans in co-operation with the States to assist in its management.

The Consultation Paper proposes that the Act should allow the creation of a range of different "protected areas" comprising:

- * Commonwealth parks and reserves (both terrestrial and marine);
- * World Heritage properties;
- * Ramsar Wetlands; and
- * biosphere reserves.

It is proposed that the circumstances in which an area might be declared a park or reserve will mirror the existing provisions in the *National Parks & Wildlife Conservation Act 1975* with only minor changes.

World heritage properties will be those which are listed under the World Heritage Convention. It is proposed, however, that the nomination of an area for listing under the convention will proceed only if the Commonwealth has used its best endeavours to reach agreement with the relevant State and any private land holders on the nomination of the area and the preparation of a management plan for it.

An area may only be declared to be a Ramsar Wetland if it is a wetland of international importance and is designated under the Convention on Wetlands of International Importance (The Ramsar Convention).

The part of the proposed legislation which deals with the protection of threatened species and ecological communities will be based on the existing provisions of the Endangered Species Protection Act 1992. The major difference, however, will be the recognition that nationally endangered and vulnerable species and endangered ecological communities are matters of national environmental significance. This means that activities or proposals that may have a significant impact on a nationally endangered or vulnerable species or an endangered ecological community will trigger the Commonwealth's assessment and approval process under the Environment Protection Act.

Heritage Legislation

The consultation paper foreshadows the enactment of new Commonwealth heritage legislation following completion of the National Heritage Strategy.

The proposals in relation to heritage represent a shift in the role of the Commonwealth. It is now proposed that places of only local or state heritage significance will be managed under the provisions of State legislation. Only heritage places of exceptional value and importance to the nation as a whole will be placed on the national list.

It has long been recognised that one of the major shortcomings of the existing Commonwealth heritage legislation is the inability of the Commonwealth to protect places once they are listed. The proposed new heritage legislation will enable the Commonwealth environment Minister to list places on the National list (after considering expert advice) and to have power to protect places once they are included on the list. Assessment and approval processes will be linked to the Environment Protection Act.

Enforcement And Compliance

The new legislation will bring environmental legislation into line with the Criminal code Act 1995. In practical terms this means that the legislation will either explicitly identify the fault element which needs to be established or rely on the default elements in the Code.

There will be a tiered system of offences and penalties similar to those in force in most of the States. Tier 1 offences will be the most serious and will require proof of intention, recklessness or negligence. Tier 2 offences will cover a range of strict liability offences (ie those to which the defence of "honest and reasonable mistake of fact" is available). Tier 3 offences will be minor offences which can be dealt with by 'on-the-spot' fines.

The consultation paper also proposes an improved range of civil enforcement remedies including administrative orders, mandatory compliance audits, the revocation of approvals, permits or licences and the relaxation of current standing requirements

for the commencement of civil enforcement proceedings.

Commonwealth environmental legislation has, in the past, been the subject of numerous court proceedings designed to establish whether a person has the legal ability (or standing) to commence proceedings to enforce compliance with Commonwealth environment legislation. While not going as far as some of the States (which enable "any person" to commence such proceedings) it is proposed to extend the standing requirements to include:

- * any person whose interests are affected by the decision, including a person who has engaged in a series of activities related to the environmental issue the subject of the decision; and
- * an organisation or association whose objects or purposes include a matter related to, and whose activities relate to, the environmental issue the subject of the decision.

Commonwealth Agencies

The proposed new legislation will, of course, apply to Commonwealth agencies. In addition, however, the consultation paper has confirmed the Commonwealth's commitment to taking additional steps to ensure Commonwealth compliance with State environmental legislation (see article by James Prest in this issue). This is not dealt with in detail in the current reform package but, in relation to the proposed changes to the heritage legislation, the consultation paper indicates that Commonwealth bodies are to be required to comply with provisions of accredited State regimes.

NEW SOUTH WALES

New South Wales has undergone one of the most significant phases of environmental and planning law reform in over two decades. The following is a brief summary of the new legislation.

CONTAMINATED LAND MANAGEMENT ACT 1997

This Act was introduced in Act form on 14 November 1997 and received the Royal