

payable are considerably more restrictive than previously.

## 7. Reduced Choice of Representation

IPA excludes lawyers from representing parties in:

- (a) privately initiated reviews of the planning scheme; or
- (b) appeals to the Building and Development Tribunal.

The Queensland Law Society submission argued that:

*"Lawyers should not be excluded from representing participants in the various administrative and dispute resolution processes relating to planning and development, merely because they are lawyers. In this case, the exclusion of lawyers from the review process and tribunal hearings is contrary to modern competitive principles and also to the principle that persons should be able to exercise freedom of choice in selecting their representatives".*

## 8. Designation of Lands for Community Purposes

IPA allows government entities to designate land for community purposes - but leaves individual owners with the burden of continuing to hold the land for up to six years, while the government entity makes up its mind.

## 9. "Teething Problems"

Both the Queensland Law Society and the Queensland Environment Law Association have suggested a broad range of amendments which assumed the government's policy approach, but would have ensured that the objectives of IPA were not frustrated by drafting defects. It is of concern that many of the issues raised by those submissions were not addressed before the legislation was passed and a large proportion have still not been included in the recent amending bill.

## Australian Capital Territory

### The ACT's New Environment Protection Law

June 1, 1998 was an important day for ACT residents: the new *Environment Protection Act* and its pursuant regulations came into force. The previous concoction of laws and regulations governing the various aspects of environmental protection gave way to a more unified approach. The new legislation revamps the laws on air, noise and water pollution, which were previously treated as separate areas<sup>1</sup>. It reinforces several key concepts which are central to effective environmental protection, such as environmentally sustainable development and improved enforcement procedures. It demonstrates a better understanding of the business sector, recognising its need for certainty but enhancing the use of economic instruments to promote compliance with the law. Environmental Protection Policies (EPPs) are the main mechanism by which the new scheme seeks to regulate activities. The range of regulatory instruments facilitates a flexible approach to environmental protection, depending on the type of activity and its harmful effects on the environment. An important aspect of the new legislation is its emphasis on public participation in the decision-making process, as well as on the rights of individuals affected by decisions made under the Act.

### Activities Which Require Regulation

The Act identifies two categories of activities in terms of their impact on the environment and the consequent need for regulation.

Class A activities are identified as those which carry a high risk of environmental harm and therefore require authorisations by the Environmental Management Authority (EMA). They include commercial landfill activities, sewage treatment, feedlots, chemical use and large outdoor events.

Class B activities tend to have less of an environmental impact and in most cases require only an agreement. Such activities include forestry, large-scale concrete production, land development, wastewater recycling and commercial waste collection.

<sup>1</sup> *Water Pollution Act 1984, Noise Control Act 1988, Pesticides Act 1989 and Ozone Protection Act 1991.*

## The General Environmental Duty

Under the Act, each person has a legal duty to take "such steps as are practicable and reasonable to prevent or minimise environmental harm or environmental nuisance caused, or likely to be caused, by an activity conducted by that person"<sup>2</sup>.

## The Definition Of 'Environmental Harm'

The Act defines 'environmental harm' as any impact on the environment resulting from human activity which has the effect of degrading the environment (whether temporarily or permanently)<sup>3</sup>.

'Material environmental harm' refers to harm which is 'significant' or results in loss or damage to property or in necessary remedial action costing more than \$5000.

'Serious environmental harm' is harm which is 'very significant', which causes property loss or damage and costs more than \$50,000 to remedy.

For the more serious offences, there is a requisite mental element of knowledge or recklessness.

## Regulatory Mechanisms

A whole range of regulatory instruments are available under the new legislation, and include environment protection policies, environmental authorisations, environment protection agreements, environmental improvement plans and codes of practice.

## General Regulations

The *Environment Protection Regulations* 1997 set out the more detailed requirements for environmental management and protection, most of which involve everyday activities such as recycling waste. They also stipulate the standards to be used for measuring air and water quality and noise levels.

## Environment Protection Policies

Environment Protection Policies are administrative documents which are intended to provide flexible guidelines for industry and the community in terms of their interaction with the environment. They outline environmental duties and describe the

standards by which those duties are measured. The policies are prepared by the Environment Management Authority (EMA) and are also designed to assist in the decision-making process and administration of the Act<sup>4</sup>. There are already several EPPs in existence in the ACT, covering air, water and noise pollution, with EPPs on hazardous materials and noise from motorsports currently being prepared. Existing EPPs have used interstate and local standards for measuring pollution levels, and have developed Community Codes to inform and guide the public and industry groups. An EPP can use one or more of the other regulatory instruments outlined below, to help carry out its policy objectives.

## Environmental Authorisations

Environmental authorisations are needed for Class A activities and can be granted by the EMA. Once an application for an authorisation has been made, and the 15-day period for public comment has passed<sup>5</sup>, the EMA is required to make a decision within 20 days. It has four options: to grant the authorisation; to refuse it; to require further information; or to request the Minister to direct an environmental impact assessment<sup>6</sup>. Any person "whose interests are affected"<sup>7</sup> by such a decision (including decisions to vary an authorisation) can apply to have it reviewed by the AAT<sup>8</sup>.

## Environmental Protection Agreements

For the less harmful activities (ie. those in Class B), environmental protection agreements (EPAs) will provide a more flexible option. They involve agreements between the EMA and activity managers, government agencies, industry or community groups. The cooperative aspect of this scheme promotes more effective interaction between the EMA and industry. It emphasises compliance by the self-improvement of industry rather than imposing heavy penalties for non-compliance. Agreements can focus on a specific activity or site (eg. a development site) or facilitate more general partnerships

<sup>4</sup> s24

<sup>5</sup> s48

<sup>6</sup> s49

<sup>7</sup> ss135(1) and (5)

<sup>8</sup> s135 empowers the AAT to review these decisions based on their merit.

<sup>2</sup> ss22(1)

<sup>3</sup> s4

between community sectors or government agencies<sup>9</sup>.

### Environmental Audits

Along with EAs and EPAs, environmental audits use the 'co-regulation' approach to encourage activity managers to reach environmental standards either on their own or in partnership with the EMA. Voluntary audits are generally preferred because they are less costly and improve cooperation between parties. Audits can also be imposed by the EMA as a condition attached to an environmental authorisation, especially where serious or material environmental harm is anticipated<sup>10</sup>. An audit commonly specifies measures for reducing the risk of environmental harm<sup>11</sup>.

### Codes Of Practice

Codes of Practice are designed to provide industry with guidelines for compliance with the general environmental duty to take reasonable steps to prevent or minimise environmental harm caused by an activity<sup>12</sup>. Codes of Practice should be the result of consultation with industry and the public, and must be accredited by the Minister<sup>13</sup>.

### Financial Incentives For Compliance

In a bid to avoid costly and reactive enforcement measures, the Act provides various financial incentives for compliance, especially for the industry sector. There are several types of licences available, some of which reduce their fees to match a reduction in pollution levels ('load-based' licences). In addition, cooperative schemes such as EPAs are preferred environmental regulation tools and therefore tend not to impose fees.

### Enforcement Mechanisms

There are several ways in which the EMA or individuals can enforce the provisions of the Act. The appropriate course of action depends on the extent of compliance (or non-compliance) with the provisions of the Act by the offender. Although the Act has expanded the range of enforcement mechanisms and toughened its punishment for non-compliance,

it has been suggested that measures for effective enforcement by concerned individuals are lacking<sup>14</sup>. This could represent a significant flaw in the effectiveness of the legislation.

### Environmental Improvement Plans

Voluntary action is encouraged by way of environmental improvement plans (EIPs), which are undertaken by activity managers. However, they can also be required by the EMA if it considers there is a breach of an environmental authorisation, EPA or environmental protection order (see below), that this breach results in serious or material environmental harm, and that this harm could be reduced by changing the method of conducting the relevant activity. EIPs should state how the harm is to be reduced to the maximum extent reasonably possible, and could identify alternatives for conducting the activity<sup>15</sup>.

### Emergency Plans

If the EMA believes that serious or material environmental harm could be caused by pollution discharge while an activity is underway, it can also require an emergency plan. This is intended to minimise harm, by describing how activity managers should prepare for, and deal with, emergency situations<sup>16</sup>.

### Environmental Protection Orders

For situations where a breach of the Act or of the conditions of an environmental authorisation has been made, an environmental protection order (EPO) can be used as an enforcement mechanism. An Order allows the EMA to direct the relevant party to take certain action or stop a particular activity<sup>17</sup>.

### Injunctions

The Supreme Court can grant an injunction if two requirements are satisfied: first, that an environmental authorisation, EPO or a provision of the Act is being (or is likely to be) contravened; and second, that the contravention would result in serious or

<sup>9</sup> Peter Burnett, Seminar Proceedings, 7 May 1998, Canberra.

<sup>10</sup> s76

<sup>11</sup> s74

<sup>12</sup> s22(1)

<sup>13</sup> s31, s32

<sup>14</sup> Alan Bradbury, Seminar Proceedings, 7 May 1998, Canberra.

<sup>15</sup> Rosemary Budavari and Peter Burnett, Seminar Proceedings, 7 May 1998, Canberra.

<sup>16</sup> s80, s81, s82

<sup>17</sup> s125

material environmental harm. An injunction can be sought by the EMA or other persons, although an application by the latter must be of sufficient public interest to gain leave of the Court.

### **Prosecution**

This is an option where the available regulatory mechanisms are inappropriate or where efforts at enforcement have been ineffective. The Act creates offences and penalties of varying degrees of 'seriousness', the assessment of which depends on the type of environmental harm caused. Offences range from minor pollution offences, with a fine of \$120, to the most serious cases of environmental harm, which can involve penalties of up to \$1,000,000. Apart from fines and sentences, the Court can make orders requiring the offender to mitigate the harm caused and/or to pay compensation and clean-up costs.

### **Opportunities For Public Participation**

Public participation is promoted at all levels by the provisions of the Act. Of particular importance are the allowances made for public contributions to decision-making and policy-making processes.

The EMA is required to invite public comment on regulatory instruments such as Environment Protection Policies and Environmental Authorisations. Certain other instruments, such as Codes of Practice, do not necessarily require consultation with the public, but it may be considered desirable. The EMA must take public contributions into consideration when making decisions, such as granting EAs or varying an EPP. Public notice of an application or decision concerning EAs or EPPs must also be given.

Public inspection of documents provides another means for concerned persons to make valuable contributions. This may in fact be the only avenue available for members of the public where notification of a decision by the EMA is not required (such as EPAs, EPOs, and Emergency Plans). Documents which are available for public inspection include all of the regulatory instruments mentioned above, as well as those documents relating to some enforcement mechanisms (EIPs, Emergency Plans and EPOs). The results of some tests and monitoring procedures may also be

accessible. One limitation of the right to inspect documents may be that persons providing the documents can apply to have certain parts excluded, for example to protect trade secrets.

### **Review Of Decisions Made Under The Act**

Any person whose interests are affected by a decision made under the Act can apply for review of that decision by the Administrative Appeals Tribunal<sup>18</sup>. Affected persons may be either the activity managers themselves, or third parties (such as residents), and need to demonstrate a sufficient connection between their interests and the disputed decision. Organisations may also seek review if the decision affects the objects or purposes of the organisation<sup>19</sup>. A description of decisions that are reviewable by the AAT is found in ss135 and 136 of the Act.

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<sup>18</sup> ss135(1) and (5)

<sup>19</sup> s25