# AUSTRALIAN ENVIRONMENTAL LAW NEWS

No 1/1999 March 1999

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## EDITORIAL

1999 is already shaping up to be a busy year for developments in environmental law and policy. The hearings into the Commonwealth *Environment Protection and Biodiversity Conservation Bill* 1998, the *Regional Forestry Agreements Bill* 1998, and the environmental review of the proposed tax reforms are either well underway or complete; each of the States and Territories are experiencing significant legal and/or policy changes that impact upon the environment; and New Zealand's comprehensive resource management regime is undergoing reform. Many of these changes are reported upon in the current edition of the AELN.

As the new editor, I would like to thank existing contributors for their efforts, and encourage future submissions from other NELA members and readers. The June AELN will be a special edition on indigenous issues of relevance to environmental law and policy. Contributions in this area are particularly welcome, whether they relate to Australian or overseas developments. At the time of writing, the Canadian Territory of Nunavut has come into being, the first new Canadian jurisdiction in fifty years. Making up 20% of Canada's land area and with a population of around 25,000 people - of whom 85% are indigenous inhabitants - many new perspective's on environmental issues will be forthcoming which are likely to be of significant interest to Australia.

I would also like to refer members to the upcoming Annual Conference which will be held in Sydney this September. It will be of great help in compiling the September edition of the journal if those presenting papers to the conference would also consider making submissions of their papers to the AELN. Not everyone will be able to attend the conference, and it is in the interests of all that material is circulated as widely as possible. The same applies to those presenting papers to regional conferences - please consider publication in future editions. The more material we have to work with, the better your journal is likely to be.

# RECENT DEVELOPMENTS

## Commonwealth

*Environment Protection and Biodiversity Conservation Bill* 1998

Senate Review of Environmental Effects of a GST

*Regional Forest Agreements Bill* 1998

*Australian Radiation Protection and Nuclear Safety Acts* 1998

National Environment Protection Measures

Oceans Policy

Environmental Education

Productivity Commission Inquiry into ESD

### *Environment Protection and Biodiversity Conservation Bill* 1998

The *Environment Protection and Biodiversity Conservation Bill* 1998 was reintroduced into the Senate on 12 November 1998, following the October federal election, and has been referred to the Senate Environment, Communications, Information Technology and the Arts Legislation Committee. Public hearings on the Bill are scheduled for February and March 1999, and the Committee is due to report by the second sitting week in March.

An outline of the Bill was provided in the August 1998 edition of AELN (Nos 1& 2, 1998). The Bill proposes to establish a national scheme of environmental and biodiversity protection and to replace five existing Commonwealth Acts. The Bill reflects:

> in-principle endorsement by the Council of Australia Governments (COAG) in November 1997 to a Heads of Agreement on Roles and Responsibilities for the Environment, including agreement that the Commonwealth's involvement in environmental matters should focus on matters of national environmental significance;
> and
>
> proposals for reform of Commonwealth environmental legislation discussed in the Consultation Paper issued by the Commonwealth Minister for Environment, Senator Robert Hill, in February 1998.

The associated *Environmental Reform (Consequential Provisions) Bill* 1998, introduced in the Senate on 10 December 1998, repeals five Acts, makes amendments to another twenty-nine Acts, and makes savings and transitional arrangements.

### Senate Review of Environmental Effects of a GST

As part of the inquiries by the Senate into proposals to introduce a goods and services tax (GST) and other changes to the Australian taxation system, the Senate on 25 November 1998 referred the 'broad environmental impacts of the proposals' to the Senate Environment, Communications, Information Technology and the Arts Reference Committee. The matters to be examined include:

the use of various types of fuel and energy;
greenhouse gas emissions, air pollution, forestry and mining; and
options for a tax system which better achieves environmental objectives, including 'ecotaxes'.

The Committee is due to report by 31 March 1999.

### *Regional Forest Agreements Bill* 1998

The *Regional Forest Agreements Bill* 1998 aims to provides legislative support to Regional Forest Agreements (RFAs) between the Commonwealth and the States and Territories. The Bill:

removes export controls from wood sourced within RFA areas; and

removes the application of Commonwealth environmental impact assessment, heritage and world heritage legislation to forestry operations in RFA areas.

The Bill was passed in the House of Representatives on 9 February 1999 and introduced in the Senate on 15 February 1999. It was referred to the Senate Rural and Regional Affairs and Transport Legislation Committee, with a reporting date of 25 February 1999.

### *Australian Radiation Protection and Nuclear Safety Acts* 1998

A package of legislation, comprising the *Australian Radiation Protection and Nuclear Safety Act* 1998, the *Australian Radiation Protection and Nuclear Safety (Consequential Amendments) Act* 1998 and the *Australian Radiation Protection and Nuclear Safety (Licence Charges) Act* 1998, received assent on 24 December 1998. The legislation introduces a new regime for regulating Commonwealth radiation and nuclear safety activities, including establishment of the Australian Radiation Protection and Nuclear Safety Agency. It also abolishes the Safety Review Committee and the Nuclear Safety Bureau, whose functions have been transferred to a new Radiation Health and Safety Advisory Council. The changes include amendments to the *Australian Nuclear Science and Technology Organisation Act* 1987 and abolition of the *Environment Protection (Nuclear Codes) Act* 1978.

### National Environment Protection Measures

The *National Environment Protection Measures (Implementation) Act* 1998 received assent on 21 December 1998. It provides for implementation by the Commonwealth and Commonwealth authorities of national environment protection measures (NEPMs) made by the National Environment Protection Council (NEPC), through: application of State and Territory laws to Commonwealth places and activities, regulations, environmental audits and environmental management plans.

In December 1998 the NEPC released for public comment a draft NEPM for Used Packaging Materials. The proposed NEPM is complementary to the proposed National Packaging Covenant, released for public comment by the Australian and new Zealand Environment and Conservation Council (ANZECC) at the same time.

Preparation of a draft NEPM for the Assessment of Site Contamination is at an advanced stage, with release of the draft expected in mid-March 1999.

Further information on the NEPC and NEPMs is available from the NEPC website at: **http://www.nepc.gov.au** and from the NEPC (phone: (08) 8419 1200).

## Australia's Oceans Policy

In December 1998, the Commonwealth Minister for the Environment and Heritage, Senator Robert Hill, launched *Australia's Oceans Policy*, and announced the allocation of $50 million for implementation measures. Senator Hill said that 'Australia is the first country in the world to develop a comprehensive, national plan to protect and mange its oceans'. The policy was developed over the last two years, through a wide-ranging process of intergovernmental and public consultation. Features of the policy are:

it sets in place the framework for integrated and ecosystem-based planning and management for all of Australia's marine jurisdictions;

at the core of the policy is the development of regional marine plans, based on large marine ecosystems, which will be binding on all Commonwealth agencies; and

the policy will be implemented through a National Oceans Ministerial Board of key Commonwealth Ministers, chaired by the Minister for the Environment and Heritage; a National Oceans Advisory Group of industry, community and government stakeholders; Regional Marine Plan Steering Committees; and a National Oceans Office, located within Environment Australia.

The policy is set out in two documents, *Australia's Oceans Policy* and *Specific Sectoral Measures*, which are available from Environment Australia (phone: 1800 803 772).

1998 was the International Year of the Ocean.

## Environmental Education

The Commonwealth Minister for the Environment and Heritage, Senator Robert Hill, released in January 1999 a discussion paper on environmental education. The paper, *Today Shapes Tomorrow: Environmental Education for a Sustainable Future*, is the first step towards a Ministerial Statement on Environmental Education, and identifies possible future directions for the Commonwealth Environment and Heritage Portfolio and other sectors. Copies of the paper are available from Environment Australia (phone: 1800 803 772) and are also available on the Australian Environmental Education Network website at: **http://ee.environment.gov.au/** The closing date for public comment is 12 March 1999.

## Productivity Commission Inquiry into Implementation of ESD by Commonwealth Departments and Agencies

The Productivity Commission was asked in August 1998 to report within nine months on the Implementation of Ecologically Sustainable development (ESD) by Commonwealth Departments and Agencies. The Commission released its draft report on 24 February 1999, and expects to complete its final report by May 1999.

The Commission found in its draft report that:

- Commonwealth departments and agencies could do more to implement ESD principles;

  the extent to which Commonwealth agencies have implemented ESD-consistent policies varies widely; and

  there are several impediments that limit ESD implementation by Commonwealth agencies.

Copies of the draft report are available from the Commission on (03) 9653 2141 and the Commission's website at **http://www.pc.gov.au** . The closing date for written submissions on the draft report is 2 April 1999.

John Ashe

# RECENT DEVELOPMENTS

## Australian Capital Territory

Review of the EIA procedures in the *Land (Planning and Environment) Act* 1991

Review of the *Nature Conservation Act* 1980

Statement of Regulatory Intent for Utilities in the ACT

### Review of the EIA procedures in the *Land (Planning and Environment) Act* 1991

In late 1998 the Planning and Land Management Group (PALM) of the Urban Services Department issued a Discussion Paper on a review of Part IV of the *Land (Planning and Environment) Act* 1991, which sets out conditions and processes for EIA. The review was initiated because there had been no major revision since 1991, and a response from the ACT Government was due to the national framework for EIA established in 1992 by the IGAE. The Paper identified six central issues to be tackled which are discussed below. Submissions were invited, with the closing date of November 1998. A response from the Government in the form of a Draft Amendment to the Act is expected later in 1999.

Whether Preliminary Assessments are needed

As the first stage of assessment under Part IV, Preliminary Assessments (PAs) are mandatory for the types of developments listed in Appendix II of the Territory Plan, which is the primary instrument for regulation of development in the ACT. The list in Appendix II includes developments such as mining, manufacturing industries, road construction and wastewater disposal. Other procedural requirements are that the PA must address criteria specified in Schedule 3 of the Act relating to the proponent, the project, existing environmental conditions and potential environmental impacts.

PAs are prepared by the proponent (usually the developer) and submitted to the Environment Minister. The PA is made available for public comment for 3 weeks and the Minister has 6 weeks to decide whether further assessment is required, in the form of a Public Environment Report (PER), an Environmental Impact Statement (EIS) or an Inquiry. The Discussion Paper identified problems such as a very low level of public comment and the excessive length of many PAs. In other states, these problems either have not been encountered or have been avoided.

Whether both Public Environment Reports and Environmental Impact Statements are needed

If further assessment is necessary, the Minister must inform the proponent as to the type and form of this (either a PER or an EIS), the matters to be included, and the relative emphasis to be given to each. Concerns have been raised about inadequate public consultation for PERs and the utility of having both PERs and EISs.

The first requirement for PER documents to be publicly available is when they are tabled in the Assembly. In contrast, an EIS must be available for public inspection as a draft document, and the proponent must submit to the Minister a report on the outcomes of the consultation process. All other jurisdictions require public exhibition of PERs or their equivalent.

Appendix II of the Territory Plan

Appendix II of the Territory Plan contains a detailed list of proposals which are subject to PA under the *Land Act*. The issues were identified as including whether the current thresholds for initiating PAs (such as size of proposed development) are appropriate, and whether the list of activities subject to mandatory PAs should remain part of the Territory Plan or become part of the *Land Act* regulations instead; recent legislation such as the *Environment Protection Act* 1997 and the *Public Health Act* 1997 allows for EIA pursuant to the *Land Act*.

How consultation could be improved

The provisions for public consultation in the EIA process are clearly in need of improvement. Problems experienced include a lack of awareness that PAs are available for public comment, not enough time is allowed for public comment, and there is no express provision in the *Land Act* requiring the Minister to take account of public submissions.

In particular, the length and timing of the public notification period for PAs is unsatisfactory. The date the PA is formally lodged is not the date the PA will be publicly notified. Effectively the Minister has less than three weeks in which to determine whether the PA should go on to further assessment. This causes practical difficulties, particularly where there is considerable public comment on a proposal.

In addition, although the *Land Act* (Part IV) requires PAs to be made available for public inspection, submissions are not specifically required to be made available to the proponent, to the public, or to be considered by the Minister (although the Minister must take all reasonable matters into account when making the decision).

Whether there is a need for an EIA process

One argument which has been put forward is that there is no need for a separate EIA process because the Territory Plan already requires EIA as part of normal planning assessment procedures. This argument overlooks the fact that some decisions subject to assessment may not be made under the *Land Act* or relate to the Territory Plan, such as those made under the *Environment Protection Act* 1997. The ACT is also committed to an EIA process, both as Government policy, and through its commitment to the IGAE.

Who should administer the EIA process

Currently the EIA process in the ACT is administered by the Environmental and Social Planning Unit in PALM. It has been suggested that both the EIA process and the planning assessment process could be administered by officers assessing development applications in PALM, as a means of improving efficiency and minimising costs.

Further details of the issues and options for change may be found in the Discussion Paper for the Review of Environmental Impact Assessment Legislation and Procedures in the ACT. This can be viewed on the internet at: **http://www.palm.act.gov.au/pas/review/eiafinal.htm**

## Review of the *Nature Conservation Act* 1980

In line with its obligations under the National Competition Policy Agreement of 1995 to review any legislation that is potentially anti-competitive by the year 2000, (and, where appropriate, implement reform), the ACT Government has initiated a review of the *Nature Conservation Act* 1980. It will be carried out by an independent body, and will also examine associated subordinate legislation.

A Consultation Paper was made available in December 1998, in which potentially anti-competitive provisions in the Act were identified and public comment was invited. Comments were invited on both the anti-competitive provisions and any provisions which may be redundant, opening the way to suggestions on the broader effectiveness of the Act as an environmental protection tool. The deadline for submissions was 17 March, with a report to be presented to the Minister for Urban Services by 30 June 1999.

The Act commenced operation in 1992 and is the primary legislation for the management and protection of native flora and fauna. It allows for the management of public land reserved for nature conservation, regulates certain activities in relation to some animals other than native animals, establishes the Conservator of Flora and Fauna and the Parks & Conservation Service, and appoints the Flora and Fauna Committee to provide expert advice and make recommendations to the Minister on all aspects of nature conservation in the ACT.

One of the Conservator's tasks is to prepare action plans for species declared vulnerable or endangered, communities declared endangered, and threatening processes in the ACT. Once a declaration has been made, an action plan must be prepared, followed by public consultation, before it is returned to the Conservator to be finalised. At the date of the Discussion Paper (September 1998), several action plans had been finalised, and a number were still subject to public consultation or at the preparatory stage.

The Conservator is also required to prepare a draft nature conservation strategy for the ACT in accordance with the ACT's commitment to the National Strategy for the Conservation of Biological Diversity. The Environment Minister then approves the Strategy. The first Strategy for the ACT commenced in December 1997.

Subordinate legislation to the Act includes the *Nature Conservation Regulations* and several disallowable instruments issued under the Act (such as certain declarations as to protection status).

Although it may be difficult to define markets affected by the Act as many of its provisions do not affect business directly, some examples of markets which could potentially be affected are: tourism and recreation activities; the use of native flora and fauna; mining and agricultural activities; scientific experiments; veterinary services; provision of wildlife reserves; hunting; and others. More specifically, the following restrictions in the *Nature Conservation Act* may be targeted by the Review:

prohibition of certain activities in relation to native animals, plants and timber except in accordance with provisions of a licence
divesting of interest in property and cessation of applicable licence
specification of plant tag types
prohibition of certain activities in relation to prohibited or controlled organisms except in accordance with provisions of a licence
restrictions on business conduct and on activities within reserved areas and wilderness zones

Only one example was given in the Consultation Paper of obsolete, redundant or unnecessary regulation in the Act which may be removed under the Review, although there could be many more such examples. The Paper can be viewed on the ACT Government's website: **http://www.act.gov.au/environ/national.pdf**

## Statement of Regulatory Intent for Utilities in the ACT

In late 1998, the ACT Government invited comment on its proposal for a new regulatory framework for utilities in the ACT. According to the Statement of Regulatory Intent, this framework would regulate the supply of electricity, gas, water and sewerage services. The Statement describes deficiencies in the current regulatory framework, the general principles to be applied in developing the new regulatory framework and matters to be addressed under the new framework.

The main problems identified by the Statement as inherent in existing regulatory regimes include:

inadequate coverage of asset protection and consumer protection
confused accountability arrangements and responsibilities
poor dispute handling arrangements
duplication, and obsolete provisions
no specific environmental requirements such as demand management programs
lack of transparency of decision-making

In recognition of these problems, the ACT Government intends to implement a comprehensive best practice regulatory regime. It is expected to build on the existing ACT regulatory framework and adopt elements successfully employed by other jurisdictions. It is hoped the new regime will achieve major reforms, including:

specifying service standards across all utility sectors, including in relation to supply reliability and technical standards, drinking water quality, and the voltage and frequency of electricity supply
specifying and enforcing enhanced environmental requirements, including in relation to demand management and achievement of greenhouse gas emission targets
becoming consistent with standards in other jurisdictions (except where their standards are inadequate).

Utilities providing electricity, water or sewerage services will be required to hold an operating licence in relation to the provision of those services. Each operating licence will require compliance with relevant Industry Codes of practice and emergency plans, set out environmental requirements and define processes for variation of the licence and dispute resolution. Enforcement provisions will include fines and/or rebates. In extreme circumstances licences may be suspended or cancelled.

Liz Brandon.

# RECENT DEVELOPMENTS

## New South Wales

*Protection of the Environment Operations Act* 1997

The *Protection of the Environment Operations (General) Regulation* 1998

*Contaminated Land Management Act* 1997

*Sydney Harbour Foreshore Authority Act* 1998

**Protection of the Environment Operations Act 1997**
On 24 December 1998 the Act was proclaimed and it will commence operation on 1 July 1999. The following regulations were also proclaimed by the same gazette:

- The *Protection of the Environment Operations (Savings and Transitional) Regulation* 1998;
- The *Protection of the Environment Operations (Amendments and Repeals) Regulation* 1998; and

The *Protection of the Environment Operations (General) Regulation* 1998.
All of these will commence on 1 July 1999.

Of these regulations, the *Protection of the Environment Operations (General) Regulation* 1998 is the most significant

**The Protection of the Environment Operations (General) Regulation 1998.**
These regulations introduced "low based licensing" into NSW. Low based licensing (LBL) comprises a major overhaul of the Environment Protection licensing system that control emissions. The licensing system applies to approximately 3,500 premises across NSW. The new system will introduce emission load limits into licences and link licence fees to the total amount of emissions (loads) from each licensed premises. The smaller the load, the lower the fee.
The *Protection of the Environment Operations Act* sets out which activities need an environment protection licence. When the LBL scheme commences operation, all licencees will be asked to pay a licence administration fee, and a first group of licences across selected industry sectors will progressively become liable to pay pollution load fees. These load fees will be phased in over a further four year period. Overtime, and after further consultation, it is proposed that other licencees will become subject to load fees.
Licence administration fees have been set to partially recover the government's licence administration costs. The purpose of the pollution load fees is to provide rewards and incentives for licencees to reduce polluting discharges. The load fee varies to reflect the loads and types of pollutants discharged, and conditions in different receiving environments.
The EPA undertook a 2 phase consultation during the making of the regulations. First it issued a draft operational plan and then a draft regulation. A number of major changes have been made to the scheme to address concerns expressed by submissions and through workshops

throughout the state. These include:

an initial year of estimating loads with no load fees payable, meaning that no load fees will be payable before September 2001;

a larger rebate of up to 100% for licencees who commit to three year load reduction agreements, allowing licencees to use their funds for environmental improvement instead of paying fees;

reductions in administrative fees for all licencees compared to those previously proposed;

livestock processing, coal and metal mining and related activities (including quarrying) will not pay load fees;

provision for load fee offsets to reflect off-site emission reductions (eg oil industry could reduce volatile organic compounds in fuel for vehicles and receive a load fee discount for such compounds omitted from the premises);

introduction of additional fee steps to "smooth" the administration fee structure between small and large activities;

provision of a third immediate category of "estuarine" receiving waters;

- adjustment of the fee for certain air emissions to reflect lesser impacts in remote areas; late payment will now be interest based with a 60 day period to pay without penalty; providing for local government representation on the LBL technological review panel; and
- provision for refunds of administration fees where actual activity level is significantly less than licence capacity.

The scheme will commence on 1 July 1999. Licences that expires before that date will be renewed once more under the current system. The industries subject to pollution load fees include the following: agricultural fertiliser production, waste incinerators, brick works, cement production, fuel terminals (large), coke works, electricity generation, glass production, paint and plastics production, paper production, petroleum refining, iron and steel production, non-ferrous metal production, sewerage treatment, waste oil recovery.

**Contaminated Land Management Act 1997**

On 1 September 1998, all the remaining provisions of the *Contaminated Land Management Act* 1997 (other than section 60) commenced operation (CLM Act). At the same time, the *Contaminated Land Management Regulation* 1998 commenced operation. The CLM Act introduces a comprehensive new system for dealing with actual and suspected contaminated sites in New South Wales. It is supplemented by State Environmental Planning Policy No. 55 - Remediation of Land.

Section 60 of the CLM Act, (which requires that a person notify the EPA when they become aware that their activities have contaminated land is such a way as to present a significant risk of harm), will commence on 1 July 1999. The EPA has issued draft guidelines on this section, Significant Risk of Harm from Contaminated Land and the Duty to Report, and is current revising those guidelines. They are expected to be released in final form on 1 April 1999.

The *Contaminated Land Management Regulations* 1998 commenced operation on 1 September 1998. These regulations repealed the *Contaminated Land Management (Site Auditors) Regulation* 1998. The regime for the remediation of contaminated land has been supplemented by the release of the Contaminated Sites Guidelines for the NSW Site Auditor Scheme which details the procedures for carrying out site audits, the issuing of site audit statements and other matters.

**Sydney Harbour Foreshore Authority Act 1998**

On 14 December 1998, the *Sydney Harbour Foreshore Authority Act* received the royal assent. This Act will establish a single Sydney Harbour Foreshore Authority and will replace The Sydney Cove Redevelopment Authority, The Darling Harbour Authority and the City West Development Corporation.

Nicholas Brunton.

# RECENT DEVELOPMENTS

## Queensland

Review of Queensland's Indigenous Cultural Heritage Legislation

Department of Environment and Heritage Renamed

New Water Policy Proposed

### Review of Queensland's Indigenous Cultural Heritage Legislation

The Queensland government is seeking to develop new legislation to deal specifically with the protection of indigenous cultural heritage. It has begun a full review of the *Cultural Record (Landscapes Queensland and Queensland Estate) Act* 1987, with a view to introducing new legislation late in the year. A Cultural Heritage Review Team has been formed in the Department of Premier and Cabinet to co-ordinate the review, and is working in consultation with the Environmental Protection Agency (formerly Department of Environment and Heritage), and the Departments of Aboriginal and Torres Strait Islander Policy and Development, Mines and Energy, and State Development.

According to the discussion paper published by the Cultural Heritage Review Team, the review is necessary because of government concern that the current Queensland legislation does not deliver appropriate and effective protection of indigenous cultural heritage. The review is also being undertaken in light of recent developments at the Commonwealth level; these include the amendments to the *Native Title Act* 1993 (Cth), which require that each State provide effective protection for indigenous cultural heritage; and the Commonwealth's review of its own indigenous cultural heritage protection legislation.

Some of the issues raised for consideration by the review are:

creating certainty and a clear path for the consideration of indigenous cultural heritage in the context of current land use;

developing timeframes for considering cultural heritage in land use planning;

establishing a mechanism for ensuring that all appropriate indigenous people have been consulted; and

developing effective mechanisms for dispute resolution.

The review is being undertaken in consultation with key industry groups and interested parties. Public submissions have been called for, and these will be used in the development of a model for the new legislation. The due date for submissions is March 1999. Further information and the discussion paper can be obtained from the Cultural Heritage Review Team on (07) 3406 2119.

### Department of Environment and Heritage Renamed Environmental Protection Agency

The Department of Environment and Heritage was officially renamed the Environmental Protection Agency (EPA) on 11 December 1998. The formal launch of the EPA was held on 4 March 1999.
The EPA will report to the Minister for the Environment, rather than an independent board, and the Wet Tropics Management Authority will now report direct to the Minister. The former conservation division of the Department has been renamed the Queensland Parks and Wildlife

Service (QPWS). The EPA will work together with QPWS and the Department of Natural Resources through the same ministerial portfolio, to improve co-ordination between the agencies in areas such as off-park conservation, property management planning, biodiversity protection and sustainable land use. It will have a stronger industry focus, and in this regard a new Sustainable Industries Division has been established.

Mr Barry Carbon has been appointed Director-General of the EPA. He has extensive experience in leading both Federal and State EPAs, and was a consultant to the Queensland government on the establishment of the EPA. Under the new structure, divisional directors will report to the Director-General.

The following directors have been appointed:

Corporate Development Division - Mr Brian Carroll

Public Affairs Division - Mr Joseph Begley

Environmental Operations Division - Mr James Purtill

Environmental and Technical Services Division - Mr Chris Pattearson

Environmental Planning Division - Ms Olwyn Crimp

Environmental Policy and Economics Division - Ms Kathryn Adams

Director, Sustainable Industries Division - Dr John Cole

- Director, Corporate Performance and Risk Division - Mr John Gilmour

Dr Ian McPhail has been appointed Executive Director of the QPWS

The EPA's three regions will be divided into 13 districts. District operations include licensing of environmentally relevant activities and conducting licence audits, advising local government in relation to conditions of approval under the *Integrated Planning Act* 1997, responding to environmental complaints and undertaking enforcement action, and the local implementation of waste management actions.

**New Water Policy Proposed**

On 23 November 1998 the Queensland Cabinet approved the release of a draft policy paper entitled "Improving the Water Allocation and Management System in Queensland" for initial consultation. This consultation is limited to peak industry and conservation groups.

The draft paper, written by the Water Reform Unit in the Department of Natural Resources, covers the following issues:

a statutory based water allocation and management planning process to balance the needs of the environment and consumptive use;

- water entitlements separate from land that may be traded by water uses; and

a resource management framework for public authorities, private water suppliers and water users.

After these initial consultations the proposal will be further developed for broader consultation. It is anticipated that there will be a full round of consultations on an exposure draft of the Bill during 1999.

Lisa Lipsky,
Minter Ellison Lawyers

# RECENT DEVELOPMENTS

## South Australia

Waste Disposal (Land-fill) Plan Amendment Report

Planning Bulletin – Waste Infrastructure – Resource Recovery Centres – Discussion Paper

Approval for major land-fills at Inkerman and Uleybury

### Waste Disposal (Land-fill) Plan Amendment Report

On 21 January 1999, the Waste Disposal (Land-fill) Plan Amendment Report ("the draft PAR") was brought into interim operation and was released for public consultation. Written submissions regarding the draft PAR were required to be submitted by 22 March 1999. The draft PAR was prepared by the Minister, and applies to all Development Plans in the State. It guides the assessment of land-fill development, and, according to the Explanatory Statement, has been designed to reflect the intent of the Environment Protection Authority's criteria for the assessment of waste disposal facilities.

The draft PAR has introduced Objectives and Principles of Development Control to guide land-fill development in most Council areas. General provisions include the following:

that land-fill facilities be sited, designed and managed to minimise adverse impacts on surrounding areas;

that land-fills be appropriately buffered by 500 metres, if it is proposed that they receive 20,000 tonnes or greater volume of waste;

that land- fills be sited minimum distances from watercourses and airports; and

that land-fills be subject to general management (eg, litter control, landscaping, fencing, etc).

In addition, the draft PAR seeks to discourage the establishment of major land-fills in many Council areas within 250 km of Adelaide GPO by making land-fills proposing to receive 20,000 tonnes or greater volume of waste per annum a non-complying kind of development in two circumstances. First, in specific zones where major land-fills are considered an inappropriate type of development ,(eg, intensive Agriculture/Horticulture Zones, Rural Living Zones, Coastal Zones, Water Protection Zones, etc). Second, if it is proposed that land-fills are to receive 20,000 tonnes or greater volume of waste per annum, in a variety of other zones, (eg, some General Farming/Rural Zones, Extractive Industry Zones, Hills Face Zone, etc); the only exception is where specified criteria can be met, (eg, maximum land slopes, minimum buffer distances, distances from watercourses, distance from groundwater, distance from airports).

The development assessment process for non-complying development is an onerous one for the applicant. A brief statement in support of an application must be provided, and the primary planning authority, the Development Assessment Commission, ("the DAC"), may refuse a non-complying development without assessing it. The applicant has no right of appeal against such a refusal.

If the DAC proceeds to assess the proposal, the applicant is required to prepare a Statement of Effect which must include an assessment of the expected social, economic and environmental effects of the development on its locality. If the DAC refuses to grant consent to the proposed development after assessing the proposal, the applicant has again no right of appeal. Even if the DAC grants consent, if the Minister for Transport and Urban Planning or the local Council refuses to concur in the granting of consent, the applicant has no rights of appeal whatever. Furthermore, if representations have been received in respect of the application following public notification of the application, the representors do have appeal rights.

## Planning Bulletin – Waste Infrastructure – Resource Recovery Centres – Discussion Paper

The State Government also released a draft Planning Bulletin entitled "Waste Infrastructure – Resource Recovery Centres" for public consultation on 21 January 1999 ("the draft Bulletin"). The last day for receipt of written submissions in respect of the draft Bulletin is 21 April 1999.

Resource recovery centres are described in the draft Bulletin as facilities that *"recover resources from what would otherwise be discarded"*, and include facilities such as drop-off centres for containers, composting facilities, material recovery facilities and concrete recycling plants.

The draft Bulletin seeks to describe general policy directions being explored and developed by the Department of Transport, Urban Planning and the Arts, and to provide information to Councils on potential policy development options for eventual inclusion in Development Plans.

The draft Bulletin states that, *"Integrated resource recovery to meet community, local government and industry needs can be achieved by establishing a network, or tiers, of complementary infrastructure"*. The draft Bulletin envisages a network of recovery facilities comprising a hierarchy of regional, district and neighbourhood facilities with different scales and functions.

The draft Bulletin suggests that Councils could use specified criteria, (eg, compatibility of facility with surrounding land uses, provision of appropriate separation distances, vehicle movement controls, provision of landscaping, treatment of exhaust air from enclosed buildings, stormwater treatment), as the basis for drafting principles of development control relating to resource recovery centres for eventual inclusion in Development Plans through plan amendment reports.

## Approval for major land-fills at Inkerman and Uleybury

Also on 21 January 1999, the Governor granted conditional approvals pursuant to the major development assessment process to two land-fills. One approval is for a land-fill to be situated at Inkerman and the other is for a land-fill to be situated at Medlow Road, Uleybury.

Tiana Nairn, Jamie Botten & Associates

# RECENT DEVELOPMENTS

## Victoria

### Hazardous Waste Strategy

On 3 February, the Victorian Government launched its new hazardous waste strategy, with the stated objective of reducing hazardous waste going to landfill by 50% over the next ten years. The strategy includes initiatives intended to "stimulate and motivate industry to adopt new approaches to minimise the amount of hazardous waste currently going to landfill sites in Victoria".

Specific measures announced include:

a levy of $10 per tonne of hazardous waste going to landfill to encourage industry to find innovative and more environmentally friendly ways of dealing with these wastes;
boosting existing cleaner production programs to help industry adopt low waste technologies and management systems;
carrying out a one-off free collection of excess or deregistered rural chemicals, partly funded from the $10 levy;
encouraging the waste management industry to invest in new technologies to treat prescribed wastes, including soil remediation; and
introducing legislation and regulation to encourage the re-use, recycling of and energy recovery from hazardous wastes.

The Government also announced a review by a consultative committee of management practices for prescribed industrial waste and landfill siting options. The committee has been asked to provide advice on:

the development of a statutory industrial waste management policy which will facilitate resource recovery through setting clear requirements for the treatment and management of hazardous waste as well as clear criteria for storage and disposal to safeguard the environment;
current and future waste generation trends;
world's best practice in all aspects of design and operation of repository/landfill facilities to ensure protection of the environment, and
options for disposal and management of industrial wastes, and for appropriate sites.

The committee will be chaired by the Liberal MP Geoff Coleman, with members from a range of interest groups:

Rob Joy, EPA and EcoRecycle Victoria;
Caroline Hogg, ALP MP for Melbourne North Province;
Brian Boyd, Trades Hall Council;
Professor Ian Rae, Former Deputy Vice Chancellor of VUT;
Mr Harry van Moorst, Werribee Residents Against Toxic Waste;
Dr Nicole Williams, Plastics and Chemical Industry Association;
Mr Kevin Love, Department of Premier and Cabinet;
Mr Leigh Phillips, Department of Infrastructure; and
Mr Ian Munro, Business Victoria.

The committee will also advise the EPA on the implementation of *Zeroing in on Waste*, the Industrial Waste Strategy for Victoria, released by the EPA in April 1998, and the Department of Infrastructure on appropriate siting strategies for new waste facilities. The committee is required to provide a report to Government on a comprehensive approach to waste management within six months.

Steven Munchenberg

# RECENT DEVELOPMENTS

## Western Australia

*Environmental Protection (Miscellaneous Amendment) Regulations* 1998

Drafting Instructions – Amendments to the *Environmental Protection Act* 1986

### *Environmental Protection (Miscellaneous Amendment) Regulations* 1998

Although the *Environmental Protection Amendment Act* 1998 was proclaimed on 1 July 1998, only parts of the amendments came into effect. Regulations were required to make the remainder of the amendments operational. These include penalties for Tier 2 offences, infringement notices for Tier 3 offences, and requirements with respect to seizure and forfeiture. Draft copies of the Regulations were released in September 1998 to facilitate consultation with industry, business and legal representative groups. The Regulations were passed in December 1998 and came into effect in January 1999.

Part 10 of the Regulations details the prescribed ways for dealing with things seized or forfeited under the various provisions of the Act. Under the Act the Department of Environmental Protection may seize liabilities (waste) and assets (equipment). Section 92B sets out when liabilities are to be seized; Regulation 34 prescribes ways of dealing with such things. Section 99W provides that anything forfeited to the Crown must be dealt with in a prescribed way; Regulation 36 sets out those prescribed ways.

Part 11 includes many of the requirements for the implementation of the modified penalty notices, under tier two of the new penalties regime. Part 12 provides the requirements for infringement notices under tier three; specifically, Regulation 41 states which offences are to be subject to infringement notices.

### Drafting Instructions – Amendments to the *Environmental Protection Act* 1986

In May 1997 the Minister for the Environment released a discussion paper for public comment on major amendments to the *Environmental Protection Act* 1986. In December 1998 drafting instructions were released for consultation. The Government has indicated that it expects to introduce the Bill into Parliament in the Autumn session 1999. The WA Division of NELA and the Law Society of WA made submissions on these Drafting Instructions and observed that they contain proposals which will significantly change environmental law and policy in WA. The major amendments outlined include:

Principles and Definitions

The approach taken in the *Contaminated Land Management Act* 1997 (NSW) is recommended for setting out the principles of environmental policy from the IGAE. This would include, for example, the precautionary principle, the principle of intergenerational equity, the principle of the conservation of biological diversity and ecological integrity and principles relating to improved valuation, pricing and incentive mechanisms.

Environmental Harm

It is proposed to qualify the definition of environmental harm by using the words "not trivial and negligible." In this way it is intended to enable the offence of environmental harm to address harm to the environment caused by acts other than "polluting" in the narrow sense. It is also intended to provide a defence for environmental harm which has been duly authorised or is consistent with an approval under specified written laws.

Environmental Permits

The Instructions recognise the need for a quicker method of dealing with smaller and simpler proposals while still being able to set binding environmental conditions. The suggested means is to provide for an environmental permit process enabling the Environmental Protection Authority to decide (in s40(1)) or in its report to the Minister (in s44) that the environmental management of a proposal requires such an environmental permit. This process is not intended to replace the existing works approval or licence provisions.

Changes to Works Approvals and Licences

The Instructions recognise that the Act and Regulations are not clear about when a works approval or licence is required to be held. Proposed amendments to the Act will clarify that: (a) a works approval is required to be held during construction of premises which have the capacity to be "prescribed premises", and, (b) a licence is required (or some other form of authorisation) from the time the premises have the capacity to be used for the prescribed purposes.

It is also proposed that licences be issued in *perpetuity*. The present wording of s 57 of the Act was based upon the expectation that annual fees would be paid and licences reissued yearly. However, this process is inefficient because many licences are large documents and it is not useful to reissue the complete documentation each year.

Changes to Pollution Abatement Notices & Clean-Up Directions

Notices under s 65 of the Act are required to set out what actions are to be taken to abate the pollution. However, there is often not enough information to determine the nature and extent of the pollution and the remediation required. The Instructions propose to amend s 65 so as to enable the Department of Environmental Protection to issue Notices which require investigations of pollution and the preparation of plans for remediation. This proposal will allow a more flexible approach to the content of notices requiring abatement of the harm in a particular manner.

The Instructions also propose to introduce a procedure to allow the Chief Executive Officer to issue investigation notices to the owner, occupier or operator where he or she reasonably believes that there is non-compliance with prescribed standards or policies or environmental harm occurring. This proposal represents a significant development given the fairly extensive investigation powers that would be conferred on the CEO.

Changes to the Appeal Process

The Ministerial model is retained by the Drafting Instructions, although the process is to be modified to incorporate improvements in accessibility, openness and accountability provided by other models.

Steps in the appeals process include the appointment of an Appeals Convenor by the Minister, who will be supported by an expert panel of assessors. Upon receipt of appeals, the Convenor would appoint an assessor to scrutinise them. Copies of the ground of appeal would be made available and a response would be invited from the CEO, (for appeals against CEO decisions), the EPA (for decisions against EPA decisions), and any other parties from whom the assessor

wishes to seek an expert opinion. An opportunity would be given for all parties to rebut responses to appeals.

The Convenor would have discretion to conduct a lay hearing to resolve any appeal, preferably by mediation. This would be an informal hearing with no scope for legal representation. There is no requirement to formally determine the appeal if it is resolved by mediation. Where an appeal is not resolved and it falls to the Minister to determine it, the Convenor is to prepare a report to the Minister with recommendations. The Minister would be free to determine appeals any manner, but reasons for the determination must be published.

Although this process is similar to one that presently operates, significant differences are that: the Appeals Convenor will have access to expert assistance; parties to the grounds of appeal will be guaranteed the opportunity to respond; and the Minister is required to publish the reasons for determinations.

Contaminated Sites Provisions

The Drafting Instructions note that it is not possible to establish an appropriate and effective scheme for managing all of the necessary issues relating to contaminated sites by tinkering with existing legislation. The Instructions state that new legislative powers are needed to establish arrangements for the identification, investigation, remediation and ongoing management of existing and potentially contaminated sites.
Features of the proposed arrangements include a new headpower to enable the CEO to require regulatory agencies, polluters, landowners, occupiers and accredited auditors to report known or suspected contaminated sites.

On receipt of a report, the CEO will undertake preliminary inquiries to satisfy himself that there are grounds for possible contamination. If the CEO does not consider that the report provides grounds, the site will be classified as a "report not substantiated" and no further investigations will be necessary. However if the CEO considers that it does, the site will be classified as "possible contamination – investigation required", and will issue an investigation notice to the polluter, landowner, occupier or other party. An investigation report may require further investigation, preparation of a report on the characteristics and extent of contamination on a site, and preparation of a site remediation and management plan.

The Act is to provide a scheme to issue a "certificate of audit (contamination)" – a statement detailing the characteristics and extent of contamination on a site. An environmental protection notice may require the implementation of a site remediation and management plan prepared under an investigation notice.

Rohan Hardcastle.

# RECENT DEVELOPMENTS

## New Zealand

Reform of the *Resource Management Act* 1991

Bill to Limit Costs to Public Interest Litigants

### Reform of the *Resource Management Act* 1991

In November 1998 the New Zealand Government released its proposals for amendment to the *Resource Management Act* 1991 (RMA). Submissions were invited and over 750 were received. The Ministry for the Environment is currently considering them and a draft bill is expected in May.

The RMA is the cornerstone of New Zealand's environmental legislation and the current round of amendments is the most significant since it was enacted. The stated purpose of the reform is to reduce unnecessary delays and costs arising from the RMA process while maintaining the environmental objectives of the Act. As a result, no significant changes have been proposed for the purpose and principles of the Act.

The proposed changes affect nearly every part of the Act, but the most significant are:

- to remove social and economic factors from the definition of "environment".
- to remove considerations of "aesthetic coherence" when taking into account " amenity values".

the introduction of a contestable resource consent processing system whereby private consultants as well as Council officers can process applications.

possible removal of full de novo appeal rights to the Environment Court from decisions of local authorities and to limit appeals to questions of law.

more widespread use of independent commissioners to decide on resource consent applications instead of local authorities as at present.

introduction of the ability to refer resource consent applications to the Environment Court directly .

limiting the effect of proposed plans until their content is settled.

introduction of limited public notification of resource consent applications where the effects are minor.

changes to simplify the factors to be considered for resource consent applications.

increased scrutiny and analysis of proposed plans in an effort to reduce unnecessary and inefficient regulation.

One of the most controversial proposals has been to amend the definition of "environment". The change was promoted in an effort to prevent local authorities from managing social andeconomic matters under the guise of environmental planning. This has attracted a large number of submissions - some from those who believe that managing social and economic conditions is a key element of local authority functions, while others have argued that it has lead to unnecessary intervention in the market, allowing councils to protect trade interests and to "pick winners". The Minister has reported a wide range of views on this issue and it is likely to be one of the most hotly contested amendments should it be included in the draft bill.

Another controversial proposal is the move to introduce contestable, privately managed resource consent processing. Business interests have generally supported the concept, while environmental groups have argued that it will lead to reduced public participation. The majority of Councils support the proposal, but a number of criticisms have been noted by the Ministry. Issues have been raised concerning the liability and accountability for recommendations made by processors; the possibility that processing costs will increase; the inadequacy of the current accreditation proposals; the potential for inconsistent decisions between processors; and removal of the present ability for Councils to act as a "one stop shop" for all local Government approvals.

The Minister has responded by saying that Ministry officials will need to revisit the Government proposals to address a number of these issues and changes are likely to be adopted in the draft bill.

**Bill to Limit Costs to Public Interest Litigants**

The aim of the recently introduced *Resource Management (Costs) Amendment Bill*, is to remove any disincentive to community and environmental groups bringing proceedings because of the possibility of costs being awarded against them. If enacted in its present form, the bill would prevent the Environment Court from awarding costs against such a group unless it had "proceeded in reckless disregard of the law or facts of the case."

Many have questioned the need for such legislation. The Court already makes substantial allowances for environmental groups in exercising its discretion. Over a number of years it has developed a reasoned approach involving consideration of a range of factors, most recently reviewed in *Minhinnick v Watercare Services Ltd* A1139/98 (discussed later in the 'case notes' section of this journal). In view of this, some have argued that the bill is unnecessary, the suggested test too inflexible, and that it will prevent successful parties from being compensated for their costs merely because an opponent is a public interest group. Submitters on the bill will be able to be heard before a parliamentary select committee later this year.

Chris Drayton and Heather Houten,
Resource Management Group, Russell McVeagh, Auckland.

# CASE NOTES

## New South Wales

Locus standi: ***Bateman's Bay Local Aboriginal land Council v The Aboriginal Community Benefit Fund Pty Limited* (1998) HCA 49 (6 August 1998) Unreported.**

Appeal against a finding by the Court of Appeal of New South Wales that the respondents had standing to commence proceedings restraining the appellants from operating a contributory funeral fund business. Question as to whether the High Court modified the existing *sufficient material interest test* so as to broaden it. The effect of this would be to, inter alia, give interested environmental groups standing to sue in public interest environmental matters.

### Facts

The first respondent operated a contributory funeral benefit fund business catering for members of the NSW Aboriginal community. The appellants established a competing NSW Aboriginal Land Councils Funeral Contribution Fund (the ALC Fund). While the respondent's Fund was self-financing, the ALC Fund was to be heavily subsidised by the NSW Aboriginal Land Council. The competitive effect of the ALC Fund would be severely detrimental to the respondent's Fund.

The respondents claimed the establishment of the ALC Fund was unlawful as the functions of the appellants under the scheme were beyond their powers under the *Aboriginal Land Rights Act 1983 (NSW).* In this sense the case involved the position of a statutory body acting ultra vires.

### Issues

The crucial question for consideration was whether the respondents had standing to maintain such proceedings.

The question of standing was considered in terms of equitable principles. Essentially, equity says that in the absence of an interference with a private legal right an individual has no standing in civil courts. As a corollary, it is not the function of such courts to enforce the public law of the community, this being part of the political process. So, the argument runs, if the Attorney-General does not think it is proper to enforce the public law in the courts, then generally speaking this may not be done at the behest of an individual. McHugh J's view was that it is not the role of unelected judges to expand the doctrine of standing to overcome perceived failures of the political process to ensure the law is enforced[1].

The legal authorities on the doctrine of standing can be shortly summarised as follows. The seminal principle is that stated in *Boyce v Paddington Borough Council* [1903] Ch 109 which dealt with an attempt to restrain a public nuisance. The Boyce principle allows an individual who 'suffers damage peculiar to himself' to seek equitable relief in respect of an interference with the public interest. The plaintiff must show some 'sufficient special interest' in the subject matter of the action in which it is sought to restrain the abuse.

[1] Draft Judgement para.86.

This has been a bugbear for the environmental movement for many years. Though it was softened somewhat in subsequent decisions, the application of the principle in *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 meant the ACF only had an 'emotional or intellectual interest' in wetlands protection not the necessary 'sufficient special interest' and this was not sufficient to warrant standing.

The Boyce principle has been interpreted in Australia such that 'special damage peculiar to himself' is taken to be equivalent in meaning to 'having a special interest in the subject matter of the action'. See *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 in which it was held that members of an Aboriginal community had a special interest in the prevention of construction works on land containing Aboriginal relics.

The principle in this form was applied in *Shop Distributors and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552. The Court there held that the expression 'a special interest in the subject matter of the action' should be applied flexibly. The Court interpreted it to mean a sufficiency of interest such as to warrant or support the grant of the equitable relief sought. So the financial interest of a union's members in proposed Sunday trading by retailers was held to be such a special interest.

**Judgment**

The majority (Justices Gaudron, Gummow and Kirby) in this case accepted, and arguably expanded, this interpretation.

Firstly, the Court held that subscribers to the funeral fund could suffer a severe financial detriment from the operation of the ALC fund and thus had the necessary special interest in the subject matter of the action, for which equity would intervene to provide relief.

But the Court went further than this and said:

> 'But it does not follow that such persons alone have standing. It would be wrong to take this as a starting point.'[2]

They argued equity is intervening to protect the public interest by ensuring the observance by statutory authorities of the limitations placed upon their activities by the legislature. If this is so, the question posed is whether the opportunity for vindication of the public interest in equity is to be denied for want of a competent plaintiff. The Court held it should not be. Rather, *the public interest may be vindicated at the suit of a party with a sufficient material interest in the subject matter* (emphasis added)[3]. Furthermore, the Court held that this criterion should be construed as an enabling, not a restrictive, procedural stipulation.

The effect of this reasoning was that the respondents too had such a 'sufficient material interest' in the observance by the appellants of the statutory limitations placed upon their activities for equity to intervene. This was so because unless equity intervened to restrain the appellants from commencing their competitive activities, these activities would cause severe detriment to the business of the respondents.

**Discussion**

Justice Murray Wilcox in his opening address to *EDO: Defending the Defenders Conference* in October 1998[4] says that while the subject matter of this case has nothing to do with environmental law, the majority judgment gives a very wide statement about standing rights which is clearly of great importance to environmental litigation. He says of the judgment:

[2] Draft Judgement,para.50.

[3] Ibid.

[4] M Wilcox, "Opening Address" in *Defending the Defenders: Protest, the environment and the law,* Conference Papers, 24 October 1998, Sydney, 1.

> "Their Honours did not say anyone can sue, but they went close to it. A 'sufficient material interest' clearly doesn't mean (only) a financial interest. In other words, if you can say, 'I am a proper person to represent the interest that is at stake', that is good enough."[5]

He does qualify this and suggest that 'perhaps I'm reading more into it than others would' but it is difficult not to share his optimism that *Australian Conservation Foundation v The Commonwealth* may have 'met its end at last'.

But has it? In spite of the extension created by the majority decision, the 'other persons' (namely the respondents) allowed standing were still seeking equitable relief to protect a financial, rather than, a non-financial interest. The judgment says the respondents' interest 'as a matter of practical reality, was immediate, significant and peculiar to them' for the very reason that they would suffer a detriment in their own funeral fund business from unauthorised competition. Whether this wholly supplants the restrictive dicta from *Australian Conservation Foundation v The Commonwealth,* quoted by McHugh J in his supporting minority judgment:

> 'It is clear that an ordinary member of the public, who has no interest other than that which any member of the public has in upholding the law, has no standing to sue to prevent the violation of a public right or to enforce the performance of a public duty.'[6]

which has so hamstrung environmental groups in the past, remains to be seen.

Tony Foley
University of Western Sydney Macarthur

[5] Ibid., 2.
[6] 146 CLR 493 at 526.

# CASE NOTES

## Western Australia

### Validity of Minister's Notice Questioned: *Donna Selby v Peter Adrian Pennings* (unreported, WA SC, no. 980480S, 26 August 1998)

In this case, the Full Court of the Supreme Court (Ipp, Wallwork and Owen JJ) considered the validity of a prosecution under the *Conservation and Land Management Act* 1984 ("CALM Act"). Donna Selby had been charged as not being authorised to enter an area of State forest known as Sharpe Block. This area had been classified as a temporary control area by notice published by the Minister for the Environment under section 62 of the CALM Act. Section 62(1)(d) of the Act provides that:

> "Subject to this section, the Minister may, on the recommendation of a controlling body...by notice published in the Gazette, classify the whole or any part of land or waters that is vested in that controlling body as –
> ... (d) a temporary control area."

The relevant parts of the notice issued by the Minister read:

> "CONSERVATION AND LAND MANAGEMENT ACT 1984
>
> NOTICE OF CLASSIFICATION OF A TEMPORARY CONTROL AREA
>
> 5. The Commission has recommended to me that, in the interests of public safety, part of the Land be classified as a temporary control area.
>
> Now, pursuant to section 62(1)(d) of the *Conservation and Land Management Act*, I hereby classify the Land referred to in the Schedule to this Notice as a temporary control area."

Ms Selby contended before the Magistrate that the notice was void, being *ultra vires* the powers of the Minister under s 62(1)(d) of the CALM Act. The Magistrate upheld this submission and dismissed the complaint. The complainant appealed to the Supreme Court and Parker J held that the Magistrate had wrongly concluded that the notice was void. Ms Selby appealed to the Full Court.

On appeal the appellant argued that the notice was invalid because the Minister had not received the required recommendation of the Lands and Forest Commission before declaring the temporary control area. Although the Commission made a recommendation in relation to part of the forest, the Minister declared the whole of the forest a temporary control area. Therefore, it was said, the Minister had not acted "on the recommendation" of the Commission as required by section s62(1) of the CALM Act.

The Full Court upheld the appeal. In considering s 62 Ipp J observed that the Minister is entitled to use a degree of discretion in exercising his powers under that section. However, the Full Court held that where the Minister departs from the recommendation, the issue is whether the departure is of such extent or significance that the classification can no longer be seen to be "on the recommendation of a controlling body".

In this case, the Court found that the Minister had departed from the Commission's recommendation because it recommended classification of only part of the forest and the Minister classified the whole of the forest. Therefore, on its face, the notice was inconsistent with s 62(1)(d) of the CALM Act. Ms Selby's appeal was allowed because the Minister failed to establish that the notice was valid. As Wallwork J concluded "[t]he result is that it was not proved before the learned Magistrate in this case that the notice was valid and therefore the appellant was rightly acquitted of the charge."

Significantly, the Full Court considered that the burden of proof for establishing the validity of the notice rested with the Minister. Given that the defendant raised doubts as to the validity of the notice, the complainant had the onus of proving that it was valid. This finding has important implications for future cases because if questions are raised by a defendant as to the validity of a law or administrative decision, the onus rests on the complainant to establish that the law or decision is valid.

In this case the court also held that Ms Selby was entitled to challenge the validity of the notice in the Court of Petty Sessions. The Minister had argued that such a challenge could not be heard in the Court of Petty Sessions but required an application to the Supreme Court. All members of the Court rejected this argument. Both Wallwork and Owen JJ referred to the public interest in providing the community with ready and affordable access to the Courts. Wallwork J observed "many defendants do not have the know-how or the finance to mount a collateral challenge by way of prerogative writ or an action for a declaration in the Supreme Court. If persons are charged in Courts of Petty Sessions they should be allowed to defend in those Courts."

Rohan Hardcastle

# CASE NOTES

## New Zealand

Public Interest Groups and Costs:*Minhinnick and Others v Watercare Services Ltd and the Minister of Conservation* Environment Court, A139/98.

Risk and the Precautionary Approach: *Shirley Primary School v Christchurch City Council* Environment Court, C136/98.

Non-Notification of Resource Consent Application: *Ports of Auckland Ltd v Auckland City Council* (1998) High Court, NZRMA 481

The Scope of Relevant Effects in Environmental Decision Making: *Cayford and Hamilton v Waikato Regional Council and Watercare Services Ltd* Environment Court, A127/98.

Interpreting the Scope of Resource Consents:*Manukau City Council v Warren Fowler Ltd* Environment Court, C124/98

Cost of Providing Infrastructure as an Effect: *Coleman v Tasman DC* High Court (Wellington), AP224/97

Continuing Notification Saga: *McAlpine v North Shore City Council and Green* High Court (Auckland), M.1583/98

**Public Interest Groups and Costs**

In *Minhinnick and Others v Watercare Services Limited and the Minister of Conservation* (A139/98) the Environment Court considered the nature of its discretion in deciding costs applications. In particular, the Court reaffirmed that public interest groups cannot be regarded as generally immune from an award of costs against them. Rather, the circumstances of each case must be considered.

The Court reviewed the law relating to costs against public interest groups as it has developed in Australia and New Zealand.

In *Oshlack v Richmond River Shire Council* (15 ALR 83) the High Court of Australia held that the pursuit of a public interest issue is a relevant factor when considering an award of costs. Where special factors exist, it may be appropriate to let costs lie where they fall, even where the group did not succeed. However, the Court emphasised that litigants pursuing a public interest are not granted an absolute immunity from costs.

In *Kogarah Municipal v Vodafone Limited* (5 May 1998, Pearlman CJ) the Australian High Court held that public interest litigation is a factor to be taken into account in the determination of an award of costs, but in itself is not enough to warrant an immunity from costs. There must be special circumstances such as support from a significant number of the public; litigation motivated to uphold environmental law rather than for private interest; an arguable basis of challenge; or that the proceedings raise and resolve significant issues of statutory interpretation.

In *Peninsula Watchdog v Coeur Gold* [1997] NZRMA 471 the New Zealand High Court held that it is appropriate for the Environment Court to have regard to the desirability of public participation and the testing of issues under the Act when exercising its discretion. The Court held that it would be inappropriate to adopt a rigid practice of letting costs lie where they fall where voluntary organisations were involved, as this would fetter the exercise of the Court's discretion given to it by the Act. The possibility of costs encourages litigants to closely examine whether they have an arguable case and whether they have taken all reasonable steps to limit the issues.

In the *Minhinnick* case an application was made for an interim enforcement order one week before construction started on a major sewage pipeline. As a result, the costs to Watercare were much higher than they would have been if the applicants had become involved in the planning process at an earlier stage.

Having regard to the length of the hearing, the extent and urgency of the preparation needed and what the respondent had at stake, the Court held it would be fair and reasonable for the applicants to pay $7,500 towards the costs incurred by Watercare (out of total costs of over $40,000).

**Risk and the Precautionary Approach**

In *Shirley Primary School v Christchurch City Council* (C136/98), the Environment Court approved the establishment of a mobile phone transmitter beside a primary school in Christchurch, despite concerns about potential adverse health affects from radio frequency radiation.

In granting the consent, the Court concluded that any risk to the school children or teachers at the school of developing leukaemia or cancer from radio frequency radiation emitted by the cell site was extremely low and it was impossible to say that there was any causal connection between radio frequency radiation exposure and the alleged health effects of concern to the school (ie, effects on learning and sleep).

The Court reviewed a range of expert and lay evidence, including the most recent epidemiological and biological studies on the issue.

The Court made a number of important findings in the course of its decision in relation to such issues as burden of proof, assessing the reliability of scientific evidence, the relevance of psychological affects and the precautionary principle under the RMA.

A fundamental aspect of the case was how far the applicant, Telecom, had to go to prove that radio frequency radiation from cell sites was safe. It was held that determinations under RMA, particularly in relation to future events (including whether or not natural and physical resources will be sustainably managed) are more matters of judgement and evaluation than proof. As a result, the formal standard of proof was rejected in favour of a persuasive burden on the applicant. This means that even if no evidence is adduced by opponents to an application, consent can nevertheless be declined if that persuasive burden is not met.

The Court also confirmed that an assessment of the reliability of scientific evidence is important to determine the weight to be given to it. Relevant matters in assessing the weight of evidence include the witnesses' qualifications, objectivity and reasoning, the level of acceptance of the science and methodology involved in the scientific community, peer review, and whether the relevant research or papers have been published.

The Court rejected the application of the so called "precautionary principle" of environmental law, as set out in principle 15 of the *Rio Declaration*, on the basis that the Act is inherently precautionary anyway. The meaning of "effect" in section 3 includes any potential effect of low probability which has a high potential impact. To apply the principle under another section would, in the Court's view, lead to a double counting of the need for caution.

The Court held that subjectively based psychological fears held by certain members of the community about the technology involved could only be considered if they were reasonably based on a real risk. As no such risk existed in this case, those beliefs were considered to be unreasonable, and given no weight. The application was allowed.

**Non-Notification of Resource Consent Application**

The interim decision by the High Court in *Ports Of Auckland Ltd v Auckland City Council* [1998] NZRMA 481 relates to the approval of a series of proposed residential developments on land in close proximity to the Port. Considering itself an affected party, the Port company sought judicial review of decisions by the Auckland City Council to grant resource consents for the developments without seeking its written approval under s 94(2) or notifying the applications in accordance with s 93. Although a number of conditions had been attached to the resource consents to address the Port's concerns, the Port company claimed that these were inadequate to mitigate the adverse effects of the developments on the Port (for example, residents complaining about port noise).

The Court found that the sole issue was the adequacy of the conditions. The logic for this approach appears to be that:

> if the conditions were adequate to protect the Port's position, then there was no need to decide whether the Port had been an adversely affected party, since the conditions served to "cure" any error in the notification process; or
>
> if the conditions were not adequate to protect the Port's position, then it follows that the Port must have been adversely affected all along, and the Council's decision that the Port was not so affected, was wrong.

The Court reserved judgment on the issue of whether the conditions were in fact adequate. It found, however, that if the conditions were inadequate, the Port would have successfully made out its case, subject only to the issue of whether it should exercise its discretion (on which a decision was also reserved). The parties were sent away to endeavour to agree appropriate conditions.

Importantly, it was found that the Council had no jurisdiction to impose a condition requiring a "no complaints" covenant on local residents. Although such a covenant could be agreed between the parties, it was not up to the Council (or the Court) to impose such a covenant.

Ultimately, the Court was not required to make any finding on the notification provision itself. As a result the issue of whether consent authorities are entitled to consider the impact of potential conditions at the notification stage was not addressed.

## The Scope of Relevant Effects in Environmental Decision Making

In *Cayford & Hamilton v Waikato Regional Council & Watercare Services Limited* (A127/98), the Court considered appeals against the water company's proposal to construct a new water supply pipeline from the Waikato River to its reservoirs in South Auckland.

The main issue was whether the Court had jurisdiction to impose conditions on the water take permit which would require treatment of the water to ensure its fitness for potable supply and specialised horticultural uses.

The appellants argued that the Act is concerned with the way drinking water is managed so as to enable people to provide for their health and safety. They argued that the present regulatory environment for the quality of drinking water is deficient and offers little protection and reliability. The appellants submitted that the water would be supplied for drinking purposes in Auckland and that there are potential health effects associated with it.

The Waikato Regional Council's position was that as consent authority deciding a water take application, it had no jurisdiction to make any provision for the suitability of the end use.

The issue was therefore the scope and extent of potential effects that the consent authority could properly take into account. The Court found that:

> "Regard is to be had to direct effects of exercising the resource consent which are inevitably or reasonably foreseeable, and also to effects of other activities which would inevitably follow from the granting of consent, but that regard is not to be had to effects which are independent of the activity authorised by the resource consent."

Applying that test, the Court held that the quality of the water and its suitability for human consumption and other purposes is independent from the activity of taking the water. Although adverse effects were possible, they were by no means inevitable or even reasonably foreseeable. As such the Court considered that they were not adverse effects on the environment of allowing the activity and the consent authority was not required to have regard to them. They were not relevant to the application to take water as they did not bear on managing the use of the river water resource in the way contemplated by the Act.

The Court commented that the concept of sustainable management is to be understood as an enabling process. In the Court's opinion, granting the resource consent to take water would enable people and communities to provide for their economic well being and health and safety, but that it was the people and the community who had to make provision for their own well being, health and safety. They could do that by purchasing water which had been treated to standards which they regard as sufficient or further treat that water for their own sensitive uses. The appeals were dismissed.

## Interpreting the Scope of Resource Consents

*Manukau City Council v Warren Fowler Limited* (C 124/98) concerned a quarry, operated by the respondent under a deemed resource consent, which allowed for "the excavation of greywacke rock". The consent contained no express words limiting the operation or the rate of extraction.

In earlier proceedings, the Court had declared that the consent was limited by the original application and further information supplied at the time, which had stated that the extraction of rock should not exceed 20,000$m^3$ in any year.

The Council sought a further declaration as to what rock was included in the 20,000$m^3$ volume and how the rate of extraction was to be measured.

The Court set out the following guidelines for interpreting consents:

> as far as possible the consent should be interpreted on its face subject to consideration of the other matters raised below;
> where possible the words used should be given their ordinary meaning (so that they may be understood by the general public);
> the consent may be qualified by the wording of the wider application;
> the consent needs to be read in the context of the rule which required that consent be obtained;
> the Court may have regard to special meanings of a particular industry;
> regard should be had to the purpose of Act; and
> the use of affidavits to establish meanings is generally discouraged because interpretation is a question of law not fact.

The Court then considered the original application and rules applying at the time consent was granted. If found that in granting consent the Council was not seeking to control the volume of saleable rock, but the number of truck movements past neighbouring residents. The Court therefore declared that the term "rock" included all soil, clay, overburden and other material occurring naturally on the site, not merely "bank" rock.

## Cost of Providing Infrastructure as an Effect

*Coleman v Tasman DC* (High Court, Wellington, AP224/97), was an appeal against a decision to decline consent to subdivide a property for rural-residential purposes because it would create too much extra traffic on an existing road.

The road servicing the valley was narrow, gravelled and generally inadequate to provide properly for even the existing properties in the valley. The Environment Court found that it was unlikely that adequate Council funding would be available to upgrade the road, and that if the valley was further developed, the deterioration of the road would cause severe economic and safety effects. The applicant itself was not offering to upgrade the road.

On appeal to the High Court, the appellant argued that funding issues were not relevant to a resource consent application and should not have been considered by the Environment Court. However, the High Court considered that the state of the road and the likelihood of it being upgraded were matters of fact, and able to be taken into account. In its view, the issue of funding was a relevant consideration.

A second argument advanced by the appellant was that the precedent effect of granting the consent (ie: that it would encourage further development) was not an effect under the RMA. The High Court disagreed and found that if a consent authority was not able to take into account of the potential effect of granting an application, then it would not be able to deal with any cumulative adverse effects. Therefore regardless of whether such an effect is included within s 3, it is something which should be taken into account under the general discretion to consider other relevant matters in s 104.

**Continuing Notification Saga**

*McAlpine v North Shore City Council and Green* (M.1583/98, HC. Auck., 18/11/98, Per Randerson J) was yet another challenge by way of judicial review against a Council's decision not to publicly notify a resource consent application. It follows the recent *Aley* and *Bayley* decisions, which concerned the correct interpretation of the test in section 94 of the RMA, the provision allowing minor types of resource consent applications to be considered without the need for public notification.

In this case the second respondent had to apply for a resource consent to construct two new houses because they infringed the yard and privacy provisions in the district plan. The Council had decided not to notify the application and to grant consent subject to conditions. The plaintiffs, who were neighbours of the second respondent, challenged both decisions.

The Court considered closely section 94(2) of the RMA which provides the relevant test for non-notification and the recent decision of the Court of Appeal in *Bayley* which considered the same provision.

In his judgment, Randerson J observed that he had "difficulty in reconciling" the qualification that the Court of Appeal in *Bayley* had imposed on the decision of the High Court in *Aley*. In *Aley* the Court had held that when assessing whether the effects of a new activity are "minor", they should be considered in terms of the "environment as it exists". In *Bayley*, the Court adopted those words but added "or as [the environment] would exist if the land were used in the manner permitted as of right under the plan". Randerson J observed that "the addition of the word suggested by the Court of Appeal appears to qualify Salmon J's conclusions to the point of negating them", but found it unnecessary to determine the issue.

In the event, the decision of the Court was based on the second of the two limbs of section 94(2), whether anyone would be "adversely affected" by the granting of consent and from whom written approval would be required in order to avoid notification. The Judge followed the dictum *Bayley* to the extent that only "minimal adverse effects" may be disregarded when deciding this issue.

Here the Court found that the Council had acted on the erroneous advice of its planner that no one would be affected. The Judge held that had it been provided with the correct assessment, the Council could not reasonably have concluded as such. One of the proposed houses adversely affected the plaintiffs' property in terms of the available views and privacy in a way that would be more than de minimis.

In its defence, the respondent submitted that the Court should not exercise its discretion to grant relief, principally by reason of the plaintiffs' delay in fringing proceedings. The Judge found that the impact on the plaintiffs' property outweighed any prejudice suffered by the developer and that they were entitled to relief.

The *McAlpine* decision confirms the emergence of a more restrictive interpretation of the test of who may be adversely affected. This approach may be overridden by the legislature in the current round of amendments. The case also highlights the uncertainty created by *Bayley* about whether the decisionmaker is able to consider only those effects not contemplated by the plan as permitted, or whether all effects, permitted or not, must be taken into account.

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# ARTICLES

## Current Developments in International Environmental Law 1998

Felicity Tepper[1]

### *Introduction*

1998 was a busy year for developments in the international environmental law and policy field. This article presents a brief overview of some of the issues that have arisen, summarising activities underway at the moment. It also provides a resource base for readers to obtain further information. The websites and other links provided will assist readers to access other international environmental issues of interest, as well as keeping up-to-date with the issues discussed here.

### *Prior Informed Consent*

The fifth session of the Intergovernmental Negotiating Committee (INC - 5) for an International Legally Binding Instrument for the Application of the Prior Informed Consent (PIN) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade was held at the European Parliament, Brussels, from 9th to 14th March 1998. Following two years of negotiation, the text of the Convention on the PIC Procedure for Certain Hazardous Chemicals and Pesticides in International Trade was finalised by 95 governments (the "Rotterdam Convention").[2] This was completed two years ahead of the deadline set by the Rio Earth Summit in Agenda 21, Chapter 19.

On 10th September 1998, the Conference of Plenipotentiaries adopted the Rotterdam Convention. It was opened for signature on 11th September 1998 and was signed by 62 countries during the Conference.[3] The Final Act of the Conference was signed by 80 governments. The Rotterdam Convention is now open for signature at United Nations Headquarters in New York until 10th September 1999.[4] It must be ratified by at least 50 countries before entering into force. However, an interim procedure on the voluntary implementation of the treaty has been invoked until the Convention becomes legally binding to enable work under it to commence immediately.[5]

The Rotterdam Convention aims to monitor and control trade in dangerous chemicals that have been banned or severely restricted by participating Parties for health or environmental reasons.

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[2] UNEP/PIC, "The Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade", **http://irptc.unep.ch/pic/incs/dipcon/convsumm.htm**, p1 of 3

[3] UNEP/PIC, "Negotiation of an International Legally Binding Instrument", **http://irptc.unep.ch/pic/negotiate.htm**

[4] UNEP/PIC, "Negotiation of an International Legally Binding Instrument", **http://irptc.unep.ch/pic/negotiate.htm**

[5] UNEP/PIC, Press Release, "Rotterdam Convention on Harmful Chemicals and Pesticides Adopted and Signed", **http://irptc.unep.ch/pic/incs/dipcon/Finpress.html**, p1 of 2

Initially this will consist of 5 industrial chemicals and 22 pesticides.[6] Inclusion of further chemicals is decided by the Conference of the Parties and it is thought that hundreds more chemicals are likely to be subjected to the PIC procedure.[7] The underlying impetus of the Convention seeks to achieve shared responsibility for protecting human health and the environment from both importing and exporting countries.[8] Thus, the PIC Procedure is a formal mechanism for obtaining and disseminating the decisions of importing countries and for ensuring compliance with these decisions by exporting countries.[9] To this end, the Convention gives importing countries the ability to decide which chemicals they are prepared to receive and which they do not consider they are able to manage. Hazardous pesticides and chemicals that have been banned or severely restricted in at least two countries may only be exported with the PIC of the importing party.[10] Pesticide formulations that are too dangerous for use in developing countries are also included.[11] Decisions made by an importing country have to be trade neutral.

The Convention provides for the exchange of information; this includes:

a requirement to inform other Parties of each ban or severe restriction that has been implemented nationally;
the ability for developing countries and countries in transition to inform other Parties of problems being caused by a severely hazardous pesticide formulation;
the requirement for the exporting Party to inform the importing Party that the export is occurring before it takes place and annually thereafter;
a requirement that an exporting party include an up-to-date safety data sheet with chemicals to be used for occupational purposes; and
labelling requirements that provide adequate information on the risks or hazards to human health or the environment.

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[6] The chemicals covered by the Rotterdam Convention are: pesticides: 2,4,5-T, aldrin, captafol, chlorobenzilate, chlordane, chlordimeform, DDT, dieldrin, dinoseb, 1,2-dibromoethane (EDB), fluoroacetamide, HCH, heptachlor, hexachlorobenzene, lindane, mercury compounds, pentachlorophenol and certain formulations of methyl-parathion, methamidophos, monocrotophos, parthion, phosphamidon. Industrial chemicals: crocidolite, polybrominated biphenyls (PBB), polychlorinated biphenyls (PCB), polychlorinated terphenyls (PCT), tris (2,3 dibromopropyl) phosphate. These chemicals have been carried over from the current voluntary PIC procedure. Chemicals that are excluded from the PIC process include narcotic drugs, psychotropic substances, radioactive materials, wastes, chemical weapons, pharmaceuticals, food and food additives and chemicals imported for research or analysis in such quantities that are not likely to affect human health or the environment.

[7] UNEP/PIC, "The Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade", above, p2 of 3

[8] UNEP/PIC, "The Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade", p2 of 3; IISD, "Report of the Conference of Plenipotentiaries on the Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade", **http://www.iisd.ca/linkages/vil15/enb1511e.html**, p1 of 14

[9] UNEP/PIC, "The Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade", above, pp1 – 2 of 3

[10] UNEP/PIC, Press Release, "Rotterdam Convention on Harmful Chemicals and Pesticides Adopted and Signed", above, p1 of 2

[11] Ibid, p1 of 2

The Convention also provides for capacity-building in line with current expectations, and requires the Parties to consider the special needs of developing countries and countries in transition. This involves cooperation in promoting technical assistance for the development of infrastructure, and the capacity needed to manage chemicals, and to enable such countries to implement the Convention effectively. The provision of technical assistance should include training. Numerous countries have already indicated a willingness to provide both financial and technical assistance for building infrastructure and capacity.[12]

General implementation of the Convention will be guided by the Conference of the Parties. A Chemicals Review Committee will be set up to review notifications and nominations from the Parties, as well as taking on an advisory role to the Conference of the Parties, especially in relation to inclusion of further chemicals. The Convention requires that each Party designate one or more national authorities to act on its behalf for performing the Convention's administrative functions.

PIC Home page: **http://irptc.unep.ch/pic/**
Joint FAO/UNEP Program for the operation of PIC: **http://www.fao.org/ag/agp/agpp/pesticid/pic/pichome.htm**

### *Persistent Organic Pollutants*

The first session of the Intergovernmental Negotiating Committee (INC-1) for an internationally legally binding instrument for implementing international action on certain persistent organic pollutants (POPs) was held from 29th June to 3rd July 1998 in Montreal, Canada.[13] The session was attended by delegates from 92 countries. The delegates concentrated on developing a work program for INC and on identifying the possible elements for inclusion in a legally binding instrument concerned with POPs.[14] The delegates addressed underlying issues and raised the concerns of NGOs.[15] Delegates agreed that an international legally binding instrument should be concluded by the year 2000. Some of the countries indicated that certain substances on the list of POPs to come under the future legally binding instrument were already banned or restricted in their countries.[16]

The legally binding instrument will consist of a list of 12 POPs which have been grouped into three categories: pesticide POPs (aldrin, chlordane, DDT, dieldrin, endrin, heptachlor, mirex and toxaphene); industrial chemical POPs (hexachlorobenzene and polychlorinated biphenyls (PCBs); and, unintended biproducts such as dioxins and furans.[17] Other potential POPs were discussed at the INC, but it was considered important to first establish the criteria and process relating to the suggested 12 POPs before moving onto further POPs.[18]

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[12] UNEP/PIC, Press Release, above p 1 of 2

[13] UNEP, Report of the Intergovernmental Negotiating Committee for an International Legally Binding Instrument for Implementing International Action on Certain Persistent Organic Pollutants on the Work of Its First Session, UNEP/POPS/INC.1/7, 3rd July 1998, **http://irptc.unep.ch/pops/POPS_Inc/INC_inc1finalreport-e.htm** ,para 3

[14] Earth Negotiations Bulletin, Monday 6th July 1998, "Report of the First Session of the INC for an International Legally Binding Instrument for Implementing International Action on Certain Persistent Organic Pollutants (POPs): 29 June – 3 July 1998, p1

[15] UNEP, above n13, para 25

[16] UNEP, above n13, para 26

[17] Earth Negotiations Bulletin, above n14, p1

[18] UNEP, above n13, para29

Other issues raised at the INC session included the need to ensure that technical and financial assistance was provided to developing countries and countries in transition to enable them to implement their obligations under the future instrument, the possibility of making the producers of POPs responsible for their removal and destruction, and the development of a strong and well-defined financing mechanism on a par with the Montreal Protocol financing mechanism.[19]

This INC established a subsidiary body, (the Secretariat), to consider how to assist countries to implement the proposed instrument, including financial and technical assistance.[20] Various international organisations outlined the assistance they currently provided in this respect, as well as what they proposed to provide for implementing the future instrument.[21] The Secretariat was tasked with creating several documents for consideration at the next INC session concerning financial and technical assistance and financial mechanisms and it would commence its work at the second INC.[22]

Following discussions within an informal contact group, the INC adopted the Secretariat's draft terms of reference for a criteria expert group (CEG).[23] The delegates decided that the CEG would be most effective as a small body and encouraged donors to provide supplemental funding to assist in wider participation.[24] The first meeting of the CEG was scheduled for October 1998.

Overall, the first INC for POPS is considered to have been positive in its outcomes and outlook.[25] There were no problems with procedural issues and its work generally appears to have been undertaken by delegates with a spirit of cooperation and shared responsibility.[26] Much remains to give a future agreement substance, however the negotiating details will be awaited with interest to see what solutions the final instrument will incorporate for dealing with POPs effectively. It is certain to be a fast moving and topical issue for the next two years.

For further information see:
Joint UNEP Chemicals/WHO GEENET Project site: **http://irptc.unep.ch/pops/**

### *Biodiversity Conference*

The fourth meeting of the Conference of the Parties to the Convention on Biological Diversity (COP – 4) was held in Bratislava, Slovakia from 4th – 15th May 1998. The agenda was broad, including such topics as marine and coastal biodiversity, inland water, agricultural and forest biodiversity, the clearing-house mechanism, biosafety, access and benefit sharing and national reports. The issue of tourism was used as an example for integration of biodiversity concerns into sectoral activities at the Ministerial Roundtable. The involvement of the private sector in implementing the objectives under the Biodiversity Convention was also discussed.

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[19] UNEP, above n13, paras 30 and 31

[20] UNEP, above n13, item V; Earth Negotiations Bulletin, above n14, p1

[21] FAO, GEF, UNIDO and WHO – UNEP, above n13, para 61

[22] UNEP, above n13, paras 62 and 63

[23] UNEP, above n13, para67 – the sections adopted comprised mandate, participation, meetings, officers, secretariat, proposals and recommendations to the Intergovernmental Negotiating Committee, administrative and procedural matters, agenda and reports.

[24] UNEP, above n13, paras 69 and 70

[25] Earth Negotiations Bulletin, above n14, p9

[26] Earth Negotiations Bulletin, above n14, p9

The COP-4 was faced with numerous administrative and organisational difficulties due to political differences and the lack of prior organisation.[27] Some of the participants felt that this hampered the ability to make definitive achievements. Nevertheless, progress is discernible in the form of some major outcomes. A working group was established for the implementation of Article 8(j) for reporting to the COP, which will meet in conjunction with the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA). The agendas for the next three COPs were also set out, redirecting the work programs to focus on key thematic issues and to develop relationships with thematically linked conventions and institutions.[28] Of significance to the future smooth running of the COP sessions is the establishment of future intersessional meetings to clarify issues before reaching the COP. A major theme of the session was achieving synergy with the Commission for Sustainable Development (CSD) and biodiversity related conventions. As a result, the COP endorsed current joint working plans, requested increased coordination with the secretariats of biodiversity related conventions and emphasised the necessity for ensuring consistency between the Biodiversity Convention and World Trade Organisation agreements.

Other matters covered by COP-4 included:

a decision requesting bilateral and multilateral funding to develop and implement national, regional and subregional clearing house mechanisms as well as requesting that the Global Environment Facility (GEF) be the catalyst in the development and implementation of the Clearing House Mechanism;

review of the GEF resulting in requests for improvement of the financial mechanism, requests that GEF undertake specified actions and requests for increased support from the GEF for various biodiversity activities;

biosafety (see below);

a call for synergising the Biodiversity Convention with the Ramsar Convention and cooperation with the CSD;

recognition of the possible link between coral bleaching and global warming, thereby emphasising the need to synergise with the Framework Convention on Climate Change; and increased collaboration in implementing the work program related to forest biodiversity.

The fifth meeting of the COP will be in the second quarter of the year 2000.
The Convention on Biological Diversity can be located at:
The Secretariat of the Convention on Biological Diversity Documents for the Fourth Meeting Internet Site at: **http://www.biodiv.org/cop4/cop4docs.html**
The Linkages Journal at: **http://www.iisd.ca/biodiv/cop4/**
Report on the Conference in (1998) 28 *Environmental Policy and Law* 152

[27] Earth Negotiations Bulletin, "Summary of the Fourth Meeting of the Conference of the Parties to the Convention on Biological Diversity", Monday, 18th May 1998, p13

[28] For instance, COP-5 will focus on dryland, Mediterranean, arid, semi-arid, grassland and savanna ecosystems and sustainable use including tourism and access to genetic resources; COP-6 will focus on forest ecosystems, alien species and benefit sharing ;and COP-7 will focus on mountain ecosystems, protected areas and transfer of technology and technology cooperation.

### *United Nations Task Force on Environment and Human Settlements*

The Task Force on Environment and Human Settlements was proposed by the Secretary-General of the United Nations in his report on reform, "Renewing the United Nations: A Programme for Reform".[29] It was appointed by the UN Secretary-General to evaluate the effectiveness of existing structures and arrangements. It met four times and was chaired by the UNEP's Executive Director, Klaus Töpfer, and had seventeen members. The Task Force had a mandate to recommend changes and improvements, in order to enhance the work of the United Nations.

A report was presented to the Secretary-General on 15th June 1998.[30] It made 24 recommendations within 7 chapters, which integrated the main findings. Overall, the Task Force aimed to optimise the ability of existing UN structures to deal with global community problems. The Task Force believed that an incremental and practical approach was required to revitalise the UN's work so that the recommendations could be implemented in the short to medium term with accompanying political consensus.

One of the main findings was the existence of duplication and uncoordinated action, resulting in a recommendation that an inter-agency Environment Management Group be established to take an "issue management" approach, as detailed by the Secretary-General in his program for reform. A related finding outlined the overlapping nature of many environment conventions and the lack of coordination between them; the Task Force recommended that a step-by-step approach be taken in future to develop umbrella conventions that could integrate these clusters of conventions. The Task Force also called on the UNEP to build up its scientific and information capacity in support of the conventions. In addition, there was a need to prevent the wide geographic dispersal of secretariats in order to make the best use of human and financial resources. Some of the discussion focused on the UNEP and its location and the United Nations Centre for Human Settlement (Habitat), recommending that the two entities should remain independent legally but that they should be integrated administratively. The report emphasised the need for the UN system to have stable and strengthened headquarters in Nairobi.

The next set of recommendations concerned the intergovernmental framework. Following complaints from environment and human settlements ministers that they had to travel too much to meet their obligations under conventions, the Task Force recommended that an annual, ministerial-level global environmental forum to be convened as part of UNEP's regular session of the Governing Council in Nairobi. In alternate years, there would be a special session of Council held in different venues.

The Task Force stressed the importance of monitoring and assessment for providing information needed for decision-making and recommended that the UNEP and Habitat further develop their capacities to serve as an "environmental guardian" through transformation of Earthwatch.[31] Development of an early warning system was considered essential in improving the global community's response to environmental emergencies such as the Indonesian fires.[32]

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[29] Klaus, Töpfer, "United Nations Task Force on Environment and Human Settlements", [1998] 3 *Linkages* pp1 – 6, **http://www.mbnet.mb.ca/linkages/journal/toepfer.html**, p1 of 6

[30] Press Briefing by Executive Director of United Nations Environment Program, 2nd July 1998, 5pp, p 1 of 5

[31] Klaus Töpfer, above, p4 of 6

[32] Press Briefing, above, p 3 of 5

The involvement of civil society was stressed, and the Task Force recommended a greater involvement of non-governmental groups, industry and business groups and trade unions in the intergovernmental process. The report provided recommendations on stabilising and developing these relationships.

The final set of recommendations concerned the issue of addressing the future. The Task Force suggested that the UNEP's Executive Director undertake wide-ranging consultations on institutional arrangements for dealing with the environmental and human settlements challenges of the future century. Such consultations would include government representatives, civil society and the private sector, concluding with a two-day "environment forum" in 1999. The proposals from this forum would then be presented to the forthcoming Millennium Assembly and Forum in the year 2000.

UNEP home page: **http://www.unep.org/**
Habitat home page: **http://www.unhabitat.org/**

***Forest Fires***

In December 1997, ASEAN approved a Regional Haze Action Plan (Haze) to address the problems of smoke haze in the South-East Asian Region caused by land and forest fires.[33] Progress of the Action Plan has since been reviewed by Environment Ministers at further meetings on 22nd December 1997, 25th February 1998, 4th April 1998, 19th June 1998, 31st July 1998 and 4th September 1998.[34] Matters discussed included National Haze Action Plans, public education campaigns, fire-fighting capacities, establishment of a regional forest fire research and training centre in Indonesia, weather patterns, strict enforcement against open burning and the role of non-governmental organisations and the private sector in regional, national and local efforts to combat, prevent and mitigate fires.

The UNEP has assisted with combating the forest fires in South East Asia. On UNEP's initiative, the GEF adopted a project worth US$750,000 titled "Emergency Response to Combat Forest Fires in South East Asia to Support Existing Efforts to Deal with Fire and Haze".[35] Before the Fifth ASEAN Ministerial Meeting on Haze, the Executive Director of UNEP, Klaus Töpfer, stated that the worldwide problem of forest fires needed global cooperation for the development of early warning systems, other preventive measures and firefighting techniques.[36] He noted their devastating impacts on health, biodiversity, economic stability and the region's image.[37] Mr Töpfer stated that developing a long-term strategy to protect Asia's forests lands from fires and indiscriminate logging "[i]s not just a question for UNEP but for the Food and Agriculture Organisation and the for the International Union for the Conservation of Nature."[38] The ASEAN ministers requested UNEP to combine efforts of the United Nations system to stabilise the situation.[39] Australia's contribution has included $660,000 assistance to Indonesia on firefighting, $250,000 through the World Meteorological Organisation and the Economic and Social Commission for Asia Pacific, and $100,000 for training courses in haze management.[40]

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[33] ASEAN, Joint Press Statement ASEAN Meeting on Haze, 22nd – 23rd December '97, Singapore, **http://www3.itu.international/MISSIONS/Myanmar/jps00001.htm**, p1 of 2

[34] Meetings held: 22nd – 23rd December 1997 in Singapore, 25th February 1998 in Malaysia (Sarawak), 4th April in Brunei, 19th June in Singapore, 30th July in Malaysia and 4th September in the Philippines

[35] ASEAN, Joint Press Statement Fourth Asean Ministerial Meeting on Haze, 19th June '98, Singapore, **http://www.aseansec.org/function/prhaze4.htm** p2 of 3, para 12

[36] UNEP, "Environmental Notes for Parliamentarians", Number 5/6, July/August 1998, p2 of 4

[37] UNEP, Press Briefing By UNEP Executive Director, 6th March 1998, **http://.../idoc?77+unix+_free_user_+www.un.org..80+un+un+br1998+br1998++haz, p2 of 4**

[38] "'A Disaster' : The World Must Come to Asia's Assistance", **http://www.pathfinder.com/asiaweek/98/0313/feat1a.html,** p1 of 2

[39] UNEP, Press Briefing, above n , p2 of 4

[40] ASEAN, Joint Press Statement Fifth Asean Ministerial Meeting on Haze, 30th July '98, Malaysia, **http://www.aseansec.org/amm/haze1.htm**, p2 of 3, para 17.

The worldwide extent of the forest fire crisis is noticeable from a quick overview of where the fire hotspots have been this year. Aside from the Amazonian region of Brazil and South-East Asia, fires have been devastating Greece, Russia, Canada, Florida and Mexico during the Northern Hemisphere summer months. This list is certain to increase and measures to combat fire induced environmental problems will need to be developed quickly and implemented effectively if the world is to safeguard the environment, health, safety and economic and cultural viability.

### *Climate Change*

Since the third Kyoto Conference of Parties COP-3, 39 parties have signed the Kyoto Protocol.[41] The subsidiary bodies of the Framework Convention on Climate Change met from 2 – 12 June 1998 in Bonn, Germany. These meetings constituted the first formal meetings since the adoption of the Kyoto Protocol. At this meeting, both the eighth session of the Subsidiary Body for Implementation (SBI) and the eighth session of the Subsidiary Body for Scientific and Technical Advice (SBSTA) were held. A number of conclusions were reached in relation to cooperation with international organisations, methodology, education and training, national communications and the financial review. A more detailed overview of the results of this meeting can be obtained from the Earth Negotiations Bulletin at **http://www.iisd.ca/linkages/vol12/enb1286e.html.**

The fourth meeting of the Conference of the Parties to the UN Framework Convention on Climate Change will be held in Buenos Aires between 2 – 13 November 1998. A good website for keeping up-to-date on what proceeds on this occasion is at **http://www.iisd.ca/linkages/climate/ba/.** The ninth sessions of the SBI and SBSTA are likely to meet during the first week. In seeking to progress entry into force of the Kyoto Protocol, COP-4 will focus on such issues as joint implementation, emissions trading, the second review of the adequacy of commitments under the Framework Convention on Climate Change and technology transfer. Further information can be obtained from the Secretariat in Bonn, Germany, e-mail secretariat@unfccc.de.

Official Website of the Climate Change Secretariat: **http://www.unfccc.de/**
Department of Foreign Affairs and Trade Climate Change Site: **http://www.dfat.gov.au/environment/climate/index.html**
Outcomes of the Eighth Session of the Subsidiary Bodies To The Framework Convention on Climate Change: **http://www.dfat.gov.au/environment/climate/sbst8.html**

[41] Earth Negotiations Bulletin, June 15th 1998, "Report of the Meetings of the FCCC Subsidiary Bodies: 2 – 12 June 1998

***Prevention of Ocean Pollution by Sea Dumping***

The 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972) was adopted at the Special Meeting of Contracting Parties to the London Convention from 28th October – 8th November 1996, with Australia being one of the 42 Contracting Parties to adopt it. Following its adoption, the Protocol was opened for signature between 1st April 1997 and 31st March 1998. Australia signed the Protocol on 25th March 1998.[42] Although not yet in force, when it does it will supersede the existing 1972 Head Convention. The Protocol requires 26 ratifications to become legally binding. Australia's ratification of the Protocol will require substantial amendment to the *Environment Protection (Sea Dumping) Act* 1981.[43]

The Protocol represents a major change in approach to regulating sea dumping, reflecting developments in international environmental law and the United Nations Law of the Sea Convention (1994). The Protocol incorporates the precautionary principle and polluter pays principle. It also extends the definition of dumping to include storage of wastes in the seabed and toppling or abandonment of man-made structures at sea. Some materials currently permitted to be dumped are prohibited in a deliberate shift in focus to environmental protection.[44]
Unlike the current Head Convention, the Protocol shifts from stating what cannot be dumped to a more positive approach of defining what can be dumped. To this end, the Protocol requires that states prohibit the dumping of any materials that are not set out in its Annex 1. Annex 1 materials are limited to 7 specified substances.[45] For those seeking to dump Annex 1 materials, they must seek a permit first and only where the alternative waste management options are exhausted can dumping at sea occur.

The new requirement for formulating alternative waste strategies is more onerous than that under the Head Convention; Parties must undertake a waste prevention audit, consider waste management options, conduct an assessment of potential impacts, and carry out a monitoring program to ascertain any changes. Consideration must also be given to environmentally desirable alternatives such as re-using, recycling or destroying materials to avoid dumping altogether. In addition, Parties must develop an Action List for screening candidate wastes on the basis of their potential effects on human health and the marine environment. This will entail much more extensive and detailed collection and analysis of data than currently expected of Parties. Another change in direction for the Protocol is its complete prohibition on incineration at sea of wastes or other matter; it also prevents such wastes being exported to other states for incineration or dumping at sea, although emergency incineration and dumping provisions remain.

For further information on the Protocol and changes to the Commonwealth legislation, contact Environment Australia, Environment Protection Group, Air and Water Quality Branch.

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[42] Austlii, Australian Treaty List – Multilateral, **http://www.austlii.edu.au/au/other/dfat/multi/**19700101.html ; Senator the Hon Robert Hill, media release, "Australia Signs Up to Reduce Ocean Pollution", 5th April 1998, **http://www.environment.gov.au/portfolio/minister/env/98/mr5apr98.html**, p1 of 2

[43] Senator the Hon Robert Hill, media release, 5th April, above, p2 of 2

[44] For example, car tyres, munitions, concrete, asbestos and industrial waste.

[45] These are: dredged material; sewage sludge; fish waste or material resulting from industrial fish processing operations; vessels and platforms or other man-made structures at sea; inert, inorganic geological material; organic material of natural origin; and bulky items primarily comprising iron, steel, concrete and similarly unharmful materials for which the concern is physical impact and limited to those circumstances where such wastes are generated at locations, such as small islands with isolated communities, having no practicable access to disposal options other than dumping.

### *Independent World Commission on the Oceans Report*[46]

The Independent World Commission on the Oceans published a report entitled The Ocean : Our Future on 2nd September 1998 at Expo '98 in Lisbon. The Report was four years in the making and details the threatened state of the world's oceans and what is needed to manage this developing 'crisis'. The problems faced by our oceans today include: peace and security threats through territorial disputes, illegal fishing, overfishing, indiscriminate trawling, global climate change, habitat destruction, congested shipping lanes, pollution, species extinction and disruption of coastal communities. The Commission concluded that our oceans are under sustained pressure, which is intimately linked with the pressures on land and the biosphere.

Remedying the problems will depend on large part in addressing issues of fairness so that present and future generations can benefit from the ocean's resources. The Commission believed that existing laws of the sea and international treaties are not enough to prevent this crisis, and the Report highlights six areas which it believes are in need of major adjustments and innovation, grouped under the following headings:

Promoting peace and security in the oceans;
The quest for equity in the oceans;
Ocean science and technology;
Valuing the oceans;
Out oceans : public awareness and participation;
Towards effective ocean governance[47]

The Commission recommended that the high seas be treated as a 'public trust' to be used and managed in the interests of present and future generations. It suggested that navies and other maritime security forces take on a reoriented role that conformed with current international law; this would enable them to enforce legislation concerning non-military threats that affect ocean security, including ecological security. The Commission felt that a Report on Peace and Security in the Oceans in the Twenty-First Century should be prepared to progress ocean peace and security.[48]

To ease the inequity of use of the world's ocean resources, the Commission suggested that: the oceans be regarded as a common resource, that financial initiatives be considered to build the capacity of less-developed coastal states to take charge of the sustainable use of their ocean resources and that special measures be adopted to protect vulnerable groups, especially indigenous peoples and local communities dependent on subsistence fishing. Other equity increasing initiatives suggested include: the establishment of regional systems for sustainable development and related marine science and technology, action orientated studies and the enforcement by governments of international rules governing the security of marine traffic, the operational and environmental safety of ships and the working conditions of seafarers.[49]

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[46] The Ocean: Our Future. Summary of report used for information here – at http://world-oceans.org/iwco/iwco_1.htm.

[47] Page 16

[48] Page 17

[49] Pages 17 - 18

In relation to science and technology, the Commission recommends that it be better directed towards the ocean's capacity to meet basic needs, that systematic efforts be made to test the environmental and social impacts of exploration and exploitation technologies, and that greater emphasis be placed on those initiatives which enlarge the access of developing countries to scientific information and technologies.[50]

The Commission found that past approaches to the economics of oceans have been shortsighted, failing to take into account external costs and resulting in unsustainable exploitation of resources and rapid deterioration of the marine environment. As a result, the Commission recommended that ocean users and polluters bear the true costs of their actions through invocation of user-pays and polluter-pays principles. The Commission suggested that appropriate incentives such as environmental taxes and user charges be introduced to encourage the sustainable use of oceans and that subsidies encouraging waste and overuse of ocean resources be eliminated. The Commission also championed the use of management regimes utilising the precautionary principle at regional levels, with recognition of the importance of taking multi-sectoral and multi-disciplinary approaches.[51]

The Commission considered that increasing public awareness of ocean affairs is crucial. It considered that progress will only be achieved through the creation of arrangements which ensure that information and knowledge are more freely available for public discussion on the future of oceans. The Commission viewed this as an intergenerational responsibility. In progression of the rights to know, be heard and to complain, the Commission recommended the appointment of an independent "***Ocean Guardian***" with a mandate to follow up grievances concerning non-compliance with marine agreements and ocean resource misuse. Such grievances could be made by individuals, organisations or states. The Commission found a disappointing level of public participation in ocean affairs in spite of expectations arising out of the UNCED and Agenda 21. It viewed expanded public participation as vital for democratic, responsive and coherent ocean governance.[52]

Finally but most significantly, the Commission dealt with the issue of effective ocean governance. The Commission supported the Law of the Sea Convention and its implementing agreements as forming the starting point for improved ocean governance. It also acknowledged the relevance of related agreements such as Agenda 21, the Convention on Biological Diversity and the Framework Convention on Climate Change. In addition, it recommended that ocean governance requires more purposeful and responsive policies and programs for the coastal zone, action at every level from local to global and especially cooperation at the regional level. The Commission found a need for stronger political will to ensure compliance with existing ocean law and to adopt effective enforcement measures. In pursuit of these aims, the Commission recommended that discussion of ocean affairs within existing fora of the United Nations system be strengthened and supplemented by a comprehensive review of ocean affairs mandates and programs and that there be a United Nations Conference on Ocean Affairs at the earliest opportunity.[53]

In the main recommendation of the Report, the Commission recommended the establishment of a "***World Ocean Affairs Observatory***". This body would serve as an information focal point, collating various informational sources from many institutions and networks, producing periodic 'state of the oceans' reports and *ad hoc* studies on urgent ocean issues. It would utilise the World Wide Web and establish direct ocean-related electronic linkages. The Observatory would monitor and assess ocean affairs as an independent body, acting as a 'watchdog' over ocean governance. A complementary measure suggested is the convening of an "***Independent World Ocean Forum***" to allow for public assessment of ocean affairs. Actors would be held accountable for the use of ocean space and the management of its resources. This Forum would be held recurrently, outside of intergovernmental processes and would not have decision-making powers.[54]

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[50] Page 19

[51] Pages 19 - 20

[52] Pages 20 - 21

[53] Page 22

[54] Page 23

The Report summary is available on the Independent World Commission on the Oceans Home Page at **http://world-oceans.org/iwco/iwco_1.htm.** This also contains details of the Commission itself. Otherwise, full copies of the report can be obtained from Cambridge University Press.

### *Biosafety*

The fourth meeting of the Conference of the Parties to the Convention on Biological Diversity (as discussed above) continued discussions on biosafety issues in relation to the creation of a protocol on biosafety under the Convention on Biological Diversity. This resulted in Decision IV/3, "Issues Related to Biosafety".[55] In this decision, the COP-4 decided that there would be two more meetings to conclude the biosafety protocol, one in August 1998 and one in early 1999. This decision also provided for the composition of the *Ad Hoc* Working Group on Biosafety (BSWG) Bureau, set the agenda for the extraordinary COP and set a deadline of 1st July 1998 for government submissions with comments on the protocol's proposed provisions.

The fifth session of the BSWG took place on 17th – 28th August in Montreal, Canada. The main aim of the meeting was to consolidate the articles into single options. In spite of remaining bracketed text, substantial progress was made in consolidating the current text of the protocol in the lead-up to the negotiation stage.[56] The negotiating process is expected to reach fruition at the next meeting in February 1999, in Cartagena. Issues needing to be addressed at this session include socio-economic implications, trade effects, scope of the protocol, liability and redress.[57] The next meeting promises to be difficult and will see inevitable compromise, as well as a high level of ministerial interest.

For detailed explanation of BSWG-5, see: Earth Negotiations Bulletin, "Report of the Fifth Session of the *Ad Hoc* Working Group on Biosafety : 17 – 28 August 1998", at **http://www.iisd.ca/linkages/biodiv/bswg5.html**

## Upcoming meetings

### *Convention to Combat Desertification*

The Second Conference of the Parties to the Convention to Combat Desertification is to be held from 30th November to 11th December in Dakar, Senegal.

For further information, see: **http://www.unccd.ch/**

### *International Children's Conference on the Environment*

UNEP will be holding an International Children's Conference on the Environment in Dunedin, New Zealand between 23rd – 25th of November 1999. It is expected to bring together 150 delegates aged between 10 and 12 years to voice their concerns about the environment. The themes for this conference include wildlife in danger, waste and recycling, sustainable development and the media and preparations for the Millennium International Children's Conference.

Further details, including interactive workshops, can be accessed at: **http://www.unep.org/unep/per/ipa/gyf/icc1998.html** .

A good starting point for information on upcoming international environmental meetings can be found at the Linkages site:

**http://www.iisd.ca/linkages/updates/upcoming.html**

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[55] Decision IV/2, "Issues Relating to Biosafety", at **http://www.biodiv.org/cop4/FinalRep-/3.html**

[56] Earth Negotiations Bulletin, "Report of the Fifth Session of the *Ad Hoc* Working Group on Biosafety: 17 – 28 August 1998", Monday 31 August 1998,p12

[57] Earth Negotiations Bulletin, above, p12

### *Conclusion*

It is fair to say that there is an overall trend in the international environmental law and policy sphere to integrate and coordinate existing conventions and commitments to a much greater extent than before. The desire to reform the UN will also affect UNEP and related institutions, as the international system gears up to meet the challenges of the twenty first century. The impetus provided by the encroaching millennium and its psychological trigger for springcleaning will inevitably see some significant developments in the direction of international environmental law and policy, particularly over the next two to five years. As a result, it is likely that we will observe rapid and dramatic transformation of international environmental law and policy over the next decade as the global community accepts greater responsibility for environmental protection and conservation and increasingly acts to effectively implement the last three decades of commitments it has made.

# ARTICLES

1998 NELA ESSAY COMPETITION WINNER

## Redefining Political Responsibility for Environmental Laws· The Proposed New Federal/State Co-operative Arrangements

Lara Horstead[1]

### *Introduction*

Balance in a federal system is as much an aspiration as it is an achievable reality. As constitutions are interpreted by the judiciary over time, and as the world's consciousness about issues such as environmentalism grows and changes, so too do understandings of the relationships between levels of a federal jurisdiction. The past thirty years of Australian environmental law and policy have been a history of constitutional debate, and perceptions of the relative powers of the states and the Commonwealth have fluctuated. Legal frameworks and political accords have not and do not always synchronise. The High Court and Commonwealth governments of the 1970s and early 1980s grew into a vision of the Commonwealth's expansive involvement in the environment, but those new boundaries were retreated from in subsequent years because of political conflicts between the states and the Commonwealth over the meaning of federalism.

Most recently, the Commonwealth Government's *Environment Protection and Biodiversity Conservation Bill* 1998 (the Bill), which incorporates the concepts of the Council of Australian Governments' *Heads of Agreement*[2] (COAG) and the *Intergovernmental Agreement on the Environment*[3] (IGAE) before it, appeals to a cooperative notion of federalism. While explicitly recognising a role for the Commonwealth in the environment, the Bill and these agreements have pared back its significance and substance. This leaves unsatisfactorily answered the question as to what is more important : a federalism which avoids conflict and demonstrates administrative efficiency, or strong leadership in the field of the environment which, after all, transcends political boundaries. The current Commonwealth Government is claiming both, but in reality its Bill threatens to institutionalise the political retreat of the central government from domestic environmental involvement.

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[2] Council of Australian Government (COAG) *Review of Commonwealth/State Roles and Responsibilities for the Environment.* November, 1997.

[3] *Intergovernmental Agreement on the Environment* (IGAE), May 1992.

## Background

To appreciate the current redefinition of political responsibility, it is instructive to look to the regime established under the *Environment Protection (Impact of Proposals) Act* 1974 (Cth) (the EPIP Act) which is due to be repealed if the Bill is passed. This legislation was based on the Commonwealth's powers to legislate in respect of matters incidental to its other powers[4] and it made provision for protection of the environment "in relation to Projects and Decisions of, or under the control of, the Australian Government"[5]. The EPIP Act was designed to make the most of the Commonwealth powers as they were understood at the time, which meant superimposing procedural requirements over existing Commonwealth functions[6]. Although the concept of states' reserved powers had been exploded decades earlier[7], it was still conventionally believed that the environment fell primarily in the states' jurisdiction.

The ultimate scope of the Act is to be found in its objects. In the formulation of proposals[8], the carrying out of works[9], the negotiation, operation and enforcement of agreements and arrangements[10], the making of, or the participation in the making of, decisions and recommendations[11] and in the incurring of expenditure[12] by or on behalf of the Australian Government, matters affecting the environment to a significant extent have to be fully examined and taken into account to the greatest extent practicable[13]. Implicit in such procedures is the notion that the environment is a relevant consideration for all decision making by the Commonwealth[14]. Furthermore, according to the *Administrative Procedures* under the Act, a Minister responsible for a Commonwealth action has to refer the matter to the Environment Minister who can then make recommendations which must be taken into account, which theoretically incorporates the impact of proposals on the environment into the decision making process in a substantial way[15].

This approach was confirmed in *Murphyores Incorporated Pty Ltd v The Commonwealth*[16] in which Mason J stated that "(i)t is no objection to the validity of a law otherwise within power that it touches or affects a topic on which the Commonwealth has no power to legislate".

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[4] Commonwealth Constitution s 51(xxxix)

[5] *Environment Protection (Impact of Proposals) Act* 1974 (Cth), (EPIP Act) Long Title.

[6] Robert J. Fowler, "Environmental Impact Assessment: What Role for the Commonwealth? - An Overview" (1996) 13 *Environmental and Planning Law Journal*, p247.

[7] Helen Mould, "The Proposed Environment Protection and Biodiversity Conservation Act - the Role of the Commonwealth in Environmental Impact Assessment", (1998) 15 *Environmental and Planning Law Journal*, p276 referring to the *Amalgamated Society of Engineers v Adelaide Steamship Company* (the *Engineers' Case*) (1920) 28 CLR 129.

[8] *Environment Protection (Impact of Proposals) Act* 1974 (Cth), s 5(1)(a).

[9] Ibid, s 5(1)(b).

[10] Ibid, s 5(1)(c).

[11] Ibid, s 5(1)(d).

[12] Ibid, s 5(1)(e).

[13] Ibid, s 5.

[14] Mould, op. cit., p 277.

[15] Ibid, p 277.

[16] *Murphyores Incorporated Pty Ltd v The Commonwealth* (1976) 136 CLR at 2, 15-27 in Zada Lipman (ed.), *Readings in Environmental Law* (hereafter *Environmental Law*) Volume Two, Sydney: Macquarie University, 1998, 8-74 at 8-78.

A capacity in the Commonwealth to consider and affect the environment was acknowledged at this point. In terms of federalism, this recognition fuelled the belief that there was a centralist role to be filled by the Commonwealth government regarding environmental protection. This was consolidated by the interpretations of the High Court in controversial cases such as *Tasmanian Dam*[17] . The corporations[18] , trade and commerce[19] , financial[20] and external affairs[21] powers could all, to varying degrees, be used as the basis to legitimate Commonwealth control over the environment[22] . The potential of Commonwealth power over the environment lay in the uniformity and harmonisation of standards which a national force could create.

The form that legislation takes, however, can differ markedly from the way that it is politically applied. The *Administrative Procedures* under the EPIP Act were amended in 1987 and 1995 in ways that fostered the recognition of state processes equivalent to the Commonwealth ones[23] . Suggestions to amend the Constitution in the 1980s so as to give the Commonwealth a head of power over the environment were not embraced. These events are indicative of a broader political shift which occurred in response to the conflict that characterised the Federation in the 1980s. Consequently, a "lack of political commitment"[24] impaired the exercise of the relevant Ministerial discretion[25] and "deference to the sensitivities of the states"[26] meant that the EPIP Act has never been applied to its fullest capacity. In the meanwhile, the states have been developing and entrenching environmental impact assessment regimes of varying levels of sophistication[27] .

Today, the EPIP Act is being criticised for triggering assessment in "an ad hoc and piecemeal"[28] and "arbitrary"[29] way through non-environmental criteria[30] . Its procedural means of addressing the environmental ramifications of projects and activities in which the Commonwealth is involved is condemned for its inefficiency, uncertainty and duplication[31] . What this critique demonstrates is the disparity that can exist between legal structure and political meanings. Currently, the EPIP regime does not represent a politically satisfactory solution to the question of overlapping jurisdiction which constantly recurs in a federal system. It is the political negotiations between the states and the Commonwealth over the federal balance that explain how this situation came tobe.

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[17] *Commonwealth v Tasmania* (1983) 46 ALR 625 as discussed in R.J. Fowler, "Proposal for a Federal Environment Protection Agency" Report prepared for ACF and Greenpeace, January 1991 in *Environmental Law* , Volume One, 5-3 at 5-6 to 5-11.

[18] Commonwealth Constitution, s 51(xx).

[19] Ibid., s 51(i).

[20] Ibid., ss 51(ii), 81-83, 96.

[21] Ibid., s 51(xxix).

[22] Fowler (1991), op. cit note 16.

[23] Fowler (1996), op. cit note 5 at pp 248-250.

[24] Mould, op. cit., p 277.

[25] C. Wood *Environmental Impact Assessment*, Longman, 1995, 64 in *Environmental Law* Volume Two, at 8-62,8-70.

[26] Mould, op. cit., p 278.

[27] For example, the *Environmental Planning and Assessment Act* 1979 (NSW).

[28] *Reform of Commonwealth Environmental Legislation: Consultation Paper* , issued by Senator the Hon. Robert Hill, Department of the Environment, Canberra, 1998, p 2. (Hereafter *Consultation Paper*).

[29] Fowler (1996), op. cit. note 5, p 256.

[30] *Consultation Paper*, p 3.

[31] For example, Atticus Fleming, "Future Directions for the Commonwealth - National Environmental Significance" in *Conference Proceedings* : Managing Our Natural Environment - A Shared Responsibility 16th Annual National Environmental Law Conference (NELA) Adelaide, April 1997 at p 46.

As political cooperation[32] increasingly became the framework under which environmental management was supposed to occur, a plethora of Ministerial Councils and policy statements emerged in the 1980s and 1990s. This 'executive' mode of federalism collapsed hierarchical distinctions between the states and the Commonwealth by bringing all parties (or representatives thereof) together. The IGAE was a specific effort to delineate the responsibilities of, and eliminate duplication between, the states[33] and Commonwealth, as well as develop strategies for managing particular areas of environmental concern[34], such as National Environment Protection Measures[35] (NEPMs) and Environmental Impact Assessment[36] . In this agreement , the Commonwealth's role regarding the environment was defined in terms of "safeguarding and accommodating national environmental matters"[37] . This included foreign policy concerns, ensuring that state practices do not result in adverse external effects and facilitating the co-operative development of national environmental standards[38] . The role is better characterised in terms of its international, administrative and facilitative qualities, rather than leadership. "National interest"[39] was defined as something greater than the Commonwealth's concerns, for which each level of government has responsibility.

The states' responsibilities and interests, by contrast, included the policy, legislative and administrative frameworks for managing environmental resources, as well as participation in the development of national standards[40] . The cooperative solution put forward to resolve the problem of overlapping jurisdiction was ultimately that the Commonwealth could "approve or accredit" state processes. In substance, this removes the Commonwealth from direct involvement whereas the wide range of responsibilities that lie with the states, implying a capacity in them to take action, recognisably appeals to the conventional idea of the states' broad jurisdiction over the environment[41] . The identification of a national role for the Commonwealth and accreditation, with "full faith and credit"[42] , of state processes, are both key components of the Bill to be found in this agreement in nascent form.

The IGAE may only have political status, but its broad principles have been enhanced in other formats such as COAG, which defined the role of the Commonwealth so that its assessment and approval processes should only be triggered by activities which may have significant impact on particular specified matters of national environmental significance[43] . Instead of the environment

[32] R.J. Fowler,"New National Directions in Environmental Protection and Conservation" in Ben Boer, Robert Fowler and Neil Gunningham (eds.) *Environmental Outlook Law and Policy* Sydney: The Federation Press, 1994, p 118.

[33] For IGAE, COAG, the *Consultation Paper* and the Bill, a reference in this paper to states con generally be taken to include territories (ACT and NT).

[34] Linda Pearson, "Intergovernmental Relations, Federalism and Environmental Policy" in 'Environmental Justice and the Legal Process' Conference Proceedings , Environmental Law Unit, South Africa, and the Environmental Law Centre, Australia, April 1998, p 193.

[35] IGAE, Sch 4.

[36] Ibid, Sch 3.

[37] Ibid , para. 2.2

[38] Ibid, para. 2.2.1

[39] Ibid, para. 2.5.6

[40] Ibid, para. 2.3

[41] Fowler (1994), op. cit. note 31 at p 126.

[42] IGAE para. 1.5

[43] *Consultation Paper,* p 4.

being a consideration in potentially all proposals that the Commonwealth had involvement with under the EPIP Act, the Commonwealth's attention has become focussed on a very narrow field of environmental impact. The significance of the COAG definition in terms of political responsibility for the environment is that it has been enshrined in the Commonwealth Government's proposed legislation, the *Environment Protection and Biodiversity Conservation Bill* 1998. The most disturbing aspect about the adoption of this definition is perhaps the way that the COAG Agreement has been heralded as the first time there has been a role for the Commonwealth in the environment. Although this may be the first occasion of overt acceptance by the states[44], this suggestion obscures the possibility of a centralist leadership role. In emphasising the significance of a specific role for the Commonwealth, the Government is using federalism to hide the reduction of the Commonwealth's part which the COAG definition actually accomplishes.

## The *Environment Protection and Biodiversity Conservation Bill* 1998

The Bill can be conceptualised as a regime which is constantly reduced by the exemptions that it grants from its own operation. It will give legal imprimatur to a narrow definition of the Commonwealth's role in the environment and a system of agreements which effectively contract out of its own regular functioning. The potential to devolve aspects of the Commonwealth role, as restrictively defined as it is, will be institutionalised, and the means provided by which the Commonwealth can ultimately bow out of the environmental arena, particularly its domestic manifestations[45].

Any comments about the Bill must be qualified by a reminder that, as it has not yet been passed, its ultimate form could be quite different. Moreover, the absence of regulations also influences any possible reading of the regime it will establish. Be that as it may, however, there are several aspects of the Bill which make credible the proposition that the Commonwealth is devolving what responsibilities it has to other parties, in the name of administrative criteria such as certainty, efficiency and timeliness[46] under cooperative federalism.

In particular, the reductionist approach towards the Commonwealth can be identified in three ways: the narrow definition of its role; the capacity to make various kinds of agreements and declarations that are then excluded from the ambit of the Bill; and the absence of substantive environmental content from the application of the Bill, combined with significant Ministerial discretion.

As mentioned earlier, the definition of the Commonwealth's role in the Bill is derived from the COAG Agreement. The recognition of an "appropriate role" is apparently achieved by "focussing Commonwealth involvement on matters of national environment significance and on Commonwealth actions and Commonwealth areas"[47]. Seven matters are identified as falling

[44] S. Munchenberg, "Commonwealth Environment Legislation Review" (1998) 15 *Environmental and Planning Law Journal* 77 in *Environmental Law*, Volume Two, 8-94.

[45] Greenpeace Australia's *Submission to the Senate Environment, Recreation, Communications and the Arts Legislation Committee on the Environment Protection and Biodiversity Conservation Bill* 1998, August 1998, "Protecting Australia's Environment" describes the policy direction underlying the Bill as one which divests the Commonwealth of responsibility and requires that the states and territories accept it, based on the "totally erroneous" assumption that the regimes of the states and territories are themselves adequate.

[46] *Consultation Paper* p 5; Donald K. Anton, "Environmental Laws for the 21st Century: What Role for the Commonwealth" (1998) 50 *Impact* 1.

[47] *Environment Protection and Biodiversity Conservation Bill* 1998 , cl 3(2)(a).

within that definition, namely: World Heritage properties; Ramsar wetlands; Heritage places of national significance; nationally endangered or vulnerable species and ecological communities; migratory species and cetaceans; nuclear activities and management and protection of the marine and coastal environment[48]. Although there is the potential for further matters to be included in this category, that decision is to be made in consultation with the states and territories[49]. Those seven triggers for the Bill, however, came from a list of thirty nationally significant matters as identified by COAG[50] and, in the main, they can be referenced to international obligations on Australia[51]. The Commonwealth sphere is narrowly established by the use of this "relatively safe, minimalist"[52] definition.

This represents a loss of triggers from the EPIP Act, such as governmental authorisation[53], as well as a failure to address broader environmental issues such as climate change, greenhouse gases, ozone depletion, soil salinity and desertification[54]. Given the recent trend towards privatising Commonwealth agencies, Commonwealth funding as a trigger is perhaps more important than it has been hitherto[55]. Furthermore, within the seven recognised matters, there is a further siphoning away of the Commonwealth's influence, in so far as there are only particular values of those matters which are actually protected. The 'world heritage' values of declared World Heritage property, the 'ecological character' of declared Ramsar wetlands, the 'listed' species within endangered and vulnerable categories[56] are the characteristics actually protected, meaning that the other values of the matters in question will require attention from the states. This potential for duplication[57] is solely the product of restricting the Commonwealth's responsibility even within matters of national environmental significance, and yet, when deciding whether or not to approve a proposal, the Minister is expected to take all social and economic factors into account[58]. Consequently, the role of the Commonwealth in terms of the actual environmental substance is very limited indeed.

The Consultation Paper constantly reiterates the goal of reforms to "maximise the potential for Commonwealth reliance on state processes and, in some cases, state decisions"[59], which displaces substantive Commonwealth responsibility. There are multiple mechanisms by which the Commonwealth's regime can be avoided. If a proposal triggers the Bill, and is covered by a

[48] These are listed within the *Consultation Paper* p 4, but in the Bill appear as the Subdivisions of Part 3, Division 1.

[49] *Environment Protection and Biodiversity Conservation Bill* 1998, cl 25(3).

[50] James Prest and Susan Downing, "Shades of Green? Proposals to Change Commonwealth Environmental Laws" *Research Paper 16*, 1997-98, Laws and Bills Digest, Parliamentary Library, in "Background to the Process: COAG Heads of Agreement of November 1997".

[51] Pearson, op. cit., p 196.

[52] Munchenberg, op. cit. at 8-95.

[53] *Environment Protection and Biodiversity Conservation Bill* 1998, cl 524.

[54] Susan Downing, "Environment Protection and Biodiversity Conservation Bill 1998", *Bills Digest No 8 1998-99*, Bills Digest Service, Information and Research Services, Department of the Parliamentary Library, 1998, p 2 ; see also Environmental Defender's Office *Brief Commentary on the Bill from the Environmental Defender's Office Ltd*, Section 4.; Greenpeace Australia, op. cit., "Introduction"; Anton, op. cit.

[55] Environmental Defender's Office Ltd *Submission to the Senate Environment, Recreation, Communications and the Arts Legislation Committee on the Environment Protection and Biodiversity Conservation Bill* 1998 , Recommendation 13.

[56] *Environment Protection and Biodiversity Conservation Bill* 1998, cl 34.

[57] Environmental Defender's Office, op. cit. note 53.

[58] *Environment Protection and Biodiversity Conservation Bill* 1998, cl 136(1)(b).

[59] *Consultation Paper*, for example p 4,9, 10, 12.

bilateral agreement between the state and the Commonwealth, that proposal will be measured by the bilateral agreement rather than the case-by-case procedure of the Bill[60]. This is part of the process of diminishing the Commonwealth to the status of administrator while the states "perform on-ground management"[61]. With specific regard to the management of World Heritage properties in states and self-governing territories, a bilateral agreement could provide for its implementation[62]. Conservation agreements are available to "enhance the conservation of biodiversity" for private or public land or marine areas. They, too, may declare that specified actions do not have to be assessed under the Bill and, in addition, are legally binding. Strategic assessment is available for plans which envisage a series of proposals which would each trigger the Bill, and also make possible the potential avoidance of many of the Bill's procedures.
Apart from the cumulative impact of these provisions, which is to strip away the substance of the Commonwealth regime, these exceptions further diminish the Commonwealth's standing in the environmental field. The Bill is marked by an absence of substantive criteria for the agreements. For example, a bilateral agreement can be formed to achieve any one of the objects specified in cl 45(2). One of those objects is "minimising duplication...through accreditation"[63]. Processes that meet administrative goals can therefore be taken out of the Commonwealth's regime on the basis of non-environmental criteria[64]. The argument that the accreditation mechanism is one by which the Commonwealth could increase and harmonise the standards of environmental protection is undercut by such non-environmental criteria. The exercise of Ministerial discretion is also a concern in this context because the lack of standards, safeguards and public participation leaves the processes open to manipulation. When the prescribed criteria for making a bilateral agreement, for example, are the Minister's satisfaction that the agreement accords with the objects of the Bill and meets requirements set by regulations[65], particularly when there are no regulations, there can be no certainty of the environmental worth of the agreement.

## Conclusion

As the Bill stands, there is almost no capacity for the Commonwealth to institute normative standards[66], making the progressive values that are incorporated, such as ecologically sustainable development in the form of the precautionary principle[67], less securely entrenched. In such circumstances the Commonwealth's place in environmental law seems more and more diminished.

Defining political responsibility for environmental law is an ongoing process. At a time when the judiciary seemed to offer an extremely broad realm for Commonwealth action regarding the environment, the political costs in terms of federalism caused a retreat from those opportunities. Currently, the Coalition Government is claiming to have found the appropriate role for the Commonwealth, and, in promoting it, is hiding the substantive withdrawal from environmental involvement that such a role signifies. The fear has been raised that the proposed regime will position the Commonwealth as just one more state among many[68]. Whether that is to be the case, however, can not be known until the enactment of the Bill[69]. Just as political accords and a particular exercise of discretion reduced the domain of the Commonwealth under the EPIP Act, so too may discretion and amendments expand its role from within the Bill's apparently narrow confines. The potential endangerment of the environment, however, seems a high price for political uncertainty.

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[60] *Environment Protection and Biodiversity Conservation Bill* 1998, cll 45-49.
[61] *Consultation Paper,* p 13.
[62] *Environment Protection and Biodiversity Conservation Bill* 1998, cl 321 and note.
[63] Ibid, cl 45(2)(a)(iv).
[64] Downing, op. cit. p 7.
[65] *Environment Protection and Biodiversity Conservation Bill* 1998, cl 50.
[66] Mould, op. cit. p 284.
[67] *Environment Protection and Biodiversity Conservation Bill* 1998, cl 391.
[68] Environmental Defender's Office, op. cit. note 54 at "Opportunities Lost?".
[69] Munchenberg, op. cit., 8-99.

## BIBLIOGRAPHY

### Books and Papers

Anton, D. "Environmental Laws for the 21st Century: What Role for the Commonwealth" 50 *Impact* 1.

Downing, S. "Environment Protection and Biodiversity Conservation Bill", *Bills Digest No 8 1998-99*, Bills Digest Service, Information and Research Services, Department of the Parliamentary Library, 1998.

Environmental Defender's Office *Submission to the Senate Environment, Recreation, Communications and the Arts Legislation Committee on the Environment Protection and Biodiversity Conservation Bill* 1998

———— *Brief Commentary on the Bill from the Environmental Defender's Office,Ltd* 1998.

Fleming, A. "Future Directions for the Commonwealth - National Environmental Significance", *Conference Proceedings*, "Managing our Natural Environment - A Shared Responsibility", 16th Annual National Environmental Law Conference, NELA, April, 1997.

Fowler, R.J. "Proposal for a Federal Environment Protection Agency" Report prepared for ACF and Greenpeace, January 1991 in Zada Lipman (ed.) *Readings in Environmental Law* Volume One, Sydney:Macquarie University, 1998.

————"New National Directions in Environmental Protection and Conservation" in Ben Boer, Robert Fowler and Neil Gunningham (eds.) *Environmental Outlook Law and Policy* Sydney: The Federation Press, 1994.

———— "Environmental Impact Assessment: What Role for the Commonwealth?" (1996) 13 *Environmental and Planning Law Journal* 246.

———— "Law and Policy Aspects of National Standardisation" in Ben Boer, Robert Fowler and Neil Gunningham (eds.) *Environmental Outlook Number 2 Law and Policy* Sydney: The Federation Press, 1996.

Greenpeace Australia *Submission to the Senate Environment, Recreation, Communications and the Arts Legislation Committee on the Environment Protection and Biodiversity Conservation Bill* 1998

Lipman, Z. (ed.) *Readings in Environmental Law* Volumes One and Two, Sydney: Macquarie University, 1998.

Mould, H. "The Proposed Environmental Protection and Biodiversity Conservation Act - the Role of the Commonwealth in Environmental Impact Assessment" (1998) 15 *Environmental and Planning Law Journal* 275.

Munchenberg, S. "Commonwealth Environment Legislation Review" (1998) 15 *Environmental Planning Law Journal* 77 in Zada Lipman (ed.) *Readings in Environmental Law* Volume Two, Sydney:Macquarie University, 1998.

Pearson, L. "Intergovernmental Relations, Federalism and Environmental Policy" at "Environmental Justice and the Legal Process" Conference, Environmental Law Unit South Africa and Environmental Law Centre Australia, April 1998.

Prest, J. and Downing, S. "Shades of Green? Proposals to Change Commonwealth Environmental Laws" *Research Paper 16*, 1997-98, Laws and Bills Digest, Parliamentary Library.

Wood, C. *Environmental Impact Assessment* in Zada Lipman (ed.) *Readings in Environmental Law* Volume Two, Sydney:Macquarie University, 1998.

### Political Documents

Council of Australian Government (COAG) *Review of Commonwealth/State Roles and Responsibilities for the Environment.* November, 1997.

*Intergovernmental Agreement on the Environment* (IGAE), May, 1992.

*Reform of Commonwealth Environmental Legislation: Consultation Paper* , issued by Senator the Hon. Robert Hill, Dept. of the Environment, Canberra, 1998

### Legislation

Commonwealth Constitution

*Environment Protection (Impact of Proposals) Act* 1974 (Cth)

*Environmental Protection and Biodiversity Conservation Bill* 1998 (Cth)

# ARTICLES

## Proposed National Enviroment Protection Measure on Contaminated Sites

Rachel Baird
and
Eileen Sexton[1]

### *Introduction*

On 13 July 1998, the National Environment Protection Council Committee released a discussion paper entitled *Towards a National Environment Protection Measure for the Assessment of Contaminated Sites*. The discussion paper was open for public consultation and submissions for two months, until 4 September 1998.

### *National Environmental Protection Council*

The National Environment Protection Council ('NEPC') was established following the Special Premiers' Conference held in 1990. Following the conference, the Intergovernmental Agreement on the Environment (IGAE) was signed by the Commonwealth, States and Territories on 1st May 1992. Under Schedule 4 of the IGAE the Commonwealth and States agreed to set up a Council to be called the National Environment Protection Authority.

In 1994 the Commonwealth Government passed the *National Environment Protection Council Act*, section 8 of which established the NEPC. The States and Territories subsequently passed reciprocal legislation to facilitate the establishment and operation of the NEPC.[2]

One of the functions of the NEPC is to draft and issue a National Environmental Protection Measure (NEPM) outlining agreed national objectives for protecting particular aspects of the environment. Section 14 of the Commonwealth Act picks up those agreed areas listed in the IGAE in relation to which the NEPC may establish measures. One of those areas is the establishment of general guidelines for the assessment of site contamination.

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[2]*National Environment Protection Council (Tasmania) Act* 1995, *National Environment Protection Council(South Australia) Act* 1995, *National Environment Protection Council (Queensland) Act* 1994, *NationalEnvironment Protection Council (New South Wales) Act* 1995, *National Environment Protection Council(Victoria) Act* 1995, *National Environment Protection Council (ACT) Act* 1994 and *National Environment Protection Council (Northern Territory) Act* 1994

### *Discussion Paper - Background*

The Discussion Paper was drafted by a project team drawing experts from the Western Australian, Victorian and Queensland Governments and the National Health and Medical Research Council (NHMRC). It was proposed that, following the close of public consultation in early September 1998, a draft NEPM be prepared and made available for public comment by March 1999.

The time frame outlined in the discussion paper proposes to have the final NEPM completed by November 1999.

One of the main goals in developing an NEPM on contaminated site assessment is to provide an accepted common basis for use throughout Australia to assist assessors, environmental auditors, developers and regulators, to avoid costly duplication in the development of methods for site assessment.

### *Application of NEPM*

Currently the only guide for persons involved with contaminated site assessment is the Australian and New Zealand Guidelines for Assessment and Management in Contaminated Sites 1992 (the 'ANZECC Guidelines').[3] Although widely recognised and followed, the ANZECC Guidelines have no formal status.

The discussion paper proposes that implementation of the final NEPM and legislative responsibility for contaminated site assessment and management will rest primarily with the States and Territories. This will allow for flexibility in dealing with different local circumstances and conditions.

The paper also contemplates the tabling of annual compliance reports to the NEPC, which will be made publicly available. This will facilitate the ongoing review of the NEPM to determine if the objective of a consistent national approach to contaminated site management is being met.

### *Policy Framework & Guidelines*

The Discussion Paper proposes the establishment of a draft policy framework for the assessment and management of pre-existing contaminated sites in Australia. It is not clear exactly what will be contained within the framework; however, it is likely to contain a number of statements on issues such as:

availability of contaminated site information;

planning controls, in particular for land historically used for potentially contaminating activities;

community consultation;

[3] Guidelines published by the Australian and New Zealand Environment Conservation Council (ANZECC) and the NHMRC in January 1992. It is intended that the NEPM will supersede the ANZECC guidelines.

cultural and spiritual significance attaching to the land;

education;

human health;

site assessment; and

remediation options and goals.

The framework will be expanded upon by 10 core guidelines addressing specific problems or priorities. The Guidelines will cover issues such as data collection and laboratory analysis, assessment of ground water contamination, protection of human health and the environment, accreditation of auditors and assessment of on-site contamination.

***Remediation Goals/Soil Criteria***

Sites will be classified into one of two types, being sites suitable for their current or proposed use and sites not suitable for their current or proposed use. Sites will be classified as not suitable for their use where human health or environment is at significant risk.

Where sites are classified as 'not suitable', the paper recommends remediation to levels where the current use can continue without risk to health or the environment. Where possible, it is suggested that remediation maximise potential future uses of the site. What 'potential future uses' means is not clear. Does it mean foreseeable uses, (which could include a wide range of uses from industry to residential), or future uses of the same type? (eg limited to industrial use) This issue should be clarified, for full-scale site remediation is often unjustified in circumstances where an industrial or commercial use will continue indefinitely. For example, there is no point in incurring substantial expenditure to remediate soil to background levels, if the site will continue to be used as petrol station.

***Omissions***

Whilst the discussion paper specifically addresses chemical contamination, it does not address contaminants such as unexploded ordinance radio-active substances or biologically pathogenic materials or waste.

The paper is also silent on the important issue of lender liability. This issue has been tackled without success in the USA through the implementation of the Superfund. This has led to protracted litigation as lenders attempt to distance themselves from potential liability.

ANZECC released a Position Paper on lender liability in 1994 aimed at establishing agreed national principles for attaching financial liability for contaminated site remediation. The Position Paper contains 15 recommendations, formulated from 57 submissions received from industry and commercial entities. Like the ANZECC Guidelines, the Paper has no formal status. The draft NEPM is the perfect opportunity to address lender liability and introduce consistent standards across the nation.

### *Conclusion*

As can be expected the Discussion Paper is written in general terms without much detail on the mechanisms which will be implemented to assess and manage contaminated sites. It is expected that the draft NEPM due for release in March 1999 will contain much more practical detail on the actual 'how' and 'who' of site assessment, management and remediation.

# ARTICLES

## National Environment Protection Measure on Ambient Air Quality and the Movement of Controlled Waste

Mark Beaufoy[1]

### *Introduction*

The main function of the National Environment Protection Council (the Council) is to make National Environment Protection Measures (NEPMs).[2] Within five years of its establishment, the Council has made or is in the process of making NEPMs concerning the creation of a national pollutant inventory, the assessment of contaminated sites, the movement of controlled waste, ambient air quality, used packaging materials and diesel fuel emissions.[3] The NEPM for the national pollutant inventory is now in operation and was translated into law in Victoria as an Industrial Waste Management Policy made on 6 October 1998.

The Council has recently made three further NEPMs concerning ambient air quality, the movement of controlled waste and use packaging materials. Preparatory projects are also underway for the development of a NEPM for diesel fuel emissions. The NEPMs for ambient air quality and the movement of controlled waste were both made on 26 June 1998 and notified in the *Commonwealth Government Gazette* on 8 July 1998. However due to Parliament being prorogued for the last federal election, the disallowable period has only recently ended. The draft NEPM for used packaging materials proposes to provide a national regulatory framework for the recovery, re-use and recycling of used packaging materials. It is anticipated that this NEPM will be made in June 1999.

This article provides a summary of the NEPMs concerning ambient air quality and the movement of controlled waste which now have the force of law, subject to their implementation through the State legislative schemes.[4] A summary of the NEPMs in the process of being made will be provided in a future update.

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[1] BA (Hons) LLB, Solicitor, Clayton Utz, Melbourne.

[2] The National Environment Protection Council is established under the *National Environment Protection Council Act* 1994 (Cth). The commitment to establish Council was expressed in Schedule 4 of the IGAE. The provisions establishing the Council and providing for its functions and powers are reproduced in complementary legislation of each State and Territory, namely: the *National Environment Protection Act* 1994 (ACT), *National Environment Protection Council Act* 1994 (NT), *National Environment Protection Council Act* 1994 (Qld), *National Environment Protection Council Act* 1995 (Tas), *National Environment Protection Council Act* 1995 (SA), *National Environment Protection Council Act* 1995 (NSW), *National Environment Protection Council Act* 1995 (Vic), *National Environment Protection Council Act* 1996 (WA). Each State and Territory has developed its own legislative scheme for the applications of NEPMs. The recently enacted *National Environment Protection Measures (Implementation) Act* 1998 provides for the implementation of NEPMs to Commonwealth places and activities within States.

[3] Copies of the NEPMs can be found on the National Environment Protection Council's website at **http:/www.nepc.gov.au**

[4] The NEPM on ambient air quality was recently implemented in Victoria through a State Environment Protection Policy (Ambient Air Quality) made 9 February 1999.

### *NEPM for Ambient Air Quality*

The NEPM on ambient air quality sets uniform standards for national ambient air quality standards. "Ambient air" is defined to mean the external air environment, specifically excluding the air environment inside buildings or structures. The NEPM provides for national standards to be met for six major pollutants:

nitrogen dioxide;
particles;
carbon monoxide;
ozone;
sulfur dioxide; and,
lead.

The NEPM requires the Commonwealth and each State and Territory to establish monitoring procedures, and commence assessment and reporting in accordance with the Protocol set out in the NEPM within three years of June 1998. The Protocol requires that participating jurisdictions establish monitoring plans and implement specified methods of measuring and assessing the concentration of pollutants. Performance against the standards set out in the NEPM will be assessed through measurements made at measuring stations or by equivalent methods approved by the Council. Equivalent methods could include the use of emission inventories, dispersion modelling and comparisons with other regions.

The lack of available data and the limited number of monitoring stations have presented difficulties in determining existing levels of pollutants and monitoring compliance (for example, in relation to particulate matter). The NEPM will provide an impetus for establishing additional monitoring stations for assessing compliance with the NEPM standard. A Peer Review Committee is meeting to advise on the establishment of the jurisdictional monitoring plans which will be available to the public. A series of reviews of the standards will commence in 2001, with the particle standard the first to be considered followed by sulfur dioxide and ozone in 2003 with a review of the Measure itself scheduled for 2005.

Participating jurisdictions are required to submit a report on their compliance with the NEPM in an approved form by 30 June with respect to the preceding year ending 31 December. The report is to include an evaluation of performance against the standards and goal of the measure as meeting, not meeting, or not demonstrated for the period. A ten year compliance time frame has been chosen as providing an achievable level of compliance without significant social and economic disturbance.

The Impact Statement on the NEPM acknowledges that air quality management will be more complex and will need a different monitoring approach in certain localised areas (eg. a road tunnel, next to a major freeway or heavily trafficked road, or a major industry) than for a "average" representation of air quality in an air-shed. The NEPM is intended to apply to the latter.

The primary obligation of the NEPM is on governments to monitor and assess air quality. States and Territories have a responsibility to implement NEPM to reflect local context and regional variability of pollutants. Companies should note variations of the national standard in their respective State or Territory which may provide for a more stringent standard, particularly in relation to localised air polluting activities. Existing air pollution control strategies may need to be reviewed to ensure compliance with relevant new standards.

### *NEPM for Movement of Controlled Waste between States and Territories*

This NEPM ensures that controlled wastes to be moved between States and Territories are properly identified, transported, and handled in ways that are consistent with environmentally sound practices. The NEPM replaces the inter-jurisdictional agreement to develop a system of tracking the movement of waste between jurisdictions embodied in the *ANZECC National Manifest and Classification System* (1994).

In addition to minimising the impact of controlled wastes on the environment by ensuring that controlled waste reaches licensed or approved facilities for treatment, recycling, storage and/or disposal, one of the objectives of the NEPM is to establish a nationally consistent mechanism for gathering information about controlled waste, including where it comes from, how it is transported, where it goes and how it is ultimately treated.

The movement of wastes which the NEPM seeks to control is waste originating from commercial, trade, industrial or business activities. Management systems to be applied include: tracking systems which provide information of assistance to emergency services; prior notification systems to assess the appropriateness of proposed movements; and, licencing of transporters and regulation of procedures and facilities, so that tracking and notification functions are compatible with participating State and Territory requirements. The NEPM provides guidance on steps to be taken to encourage licensing and mutual recognition between each of the jurisdictions. Such management systems are to be implemented within a two year time frame within which any necessary changes to administrative and legal frameworks are to be made.

> The measure has a comprehensive list of wastes which are to be controlled. Controlled wastes with specific characteristics are listed in the Schedule to the NEPM which includes wastes or constituents of wastes such as acids, various chemical compounds, asbestos, grease trap waste, contaminated soil, sewage sludge and tannery wastes. If a waste is a "controlled waste" specified information must accompany its movement (eg. description of waste, licensing details of the producer and transporter, the type of treatment at facility, etc.).There is also a reporting requirement. The NEPM envisages that failure by a producer, transporter or facility operator to furnish required information is to be punishable by an offence to be enforced by a relevant State or Territory agency.

There is a comprehensive list of exclusions to the NEPM including intrastate movement of controlled wastes (however there may still be reporting and tracking requirements in a local jurisdiction, for example, as required by the Victorian EPA by virtue of the *Prescribed Waste Regulations* 1998). An emergency which requires urgent action to protect human life, the environment and/or property or the movement of unwanted farm chemicals by a farmer or property owner for the purposes of delivery to a designated collection place are other examples of exclusions. In addition, controlled waste destined for direct reuse without prior treatment or processing as an input into the manufacture of a product can classify for exemption from certain requirements of the NEPM.

### *Conclusion*

Companies will need to be aware of how the NEPMs for ambient air quality and the movement of controlled wastes are implemented in their respective States or Territory, and what national standards are applicable to the company's operation. It should be noted that the implementation of the NEPMs may result in a more stringent standard than the existing local controls relating to emission of pollutants to air or the movement of controlled waste. Companies should review and, if necessary modify, their existing practices and environmental management plans to ensure compliance with these new standards.

# BOOK REVIEWS

Bates, G and Lipman, Z (1998)
**Corporate Liability for Pollution**
Law Book Company, Sydney. ISBN 0 455 21611 8. 361pp. (Price not stated).

This is a very useful book. Gerry Bates and Zada Lipman have successfully collaborated in co-authoring this work which tackles complex and wideranging issues of responsibility for environmental harm. While the title implies a focus on the private sector, much of the material is equally applicable to the public sector; indeed, most of the statute law cited no longer exempts the Crown.

Chapter 1 discusses the basis of liability, defines pollution and environmental harm, and examines the delegation (and dereliction?) of Commonwealth responsibilities, to the States. Chapter 2 considers the policy context of Ecologically Sustainable Development, the introduction of National Environmental Protection Measures, and the myriad carrot and stick tools available to authorities charged with preventing and managing pollution. The use of each of these regulatory and economic incentives illustrates that the law is but one method of ensuring compliance; cooperative, preventative approaches may prove far more successful in the long run.

Chapters 3, 4 and 5 set out the administrative, civil and criminal liabilities and remedies for pollution incidents. Advantages and disadvantages of each approach are helpfully illustrated, and defences are discussed; the use of due diligence is given particular attention, which emphasises the importance of establishing an effective environmental management system. The precautionary, polluter and user pays principles are shown to underlie much of the law, and the need to incorporate them in any system is stressed.

Chapter 6 examines the important and topical issue of contaminated land, with a particular focus on remediation and financial liability. Common and statute law approaches Australia-wide are discussed. Chapter 7 considers marine pollution, which is included for the sake of completeness; this deserves extensive treatment in its own right, and it is recommended that any consideration of this Chapter be supplemented by one of the many other detailed texts on the subject.

The authors must however to be commended for this significant and comprehensive work, which provides a detailed explanation of Australian pollution control law, and highlights weaknesses in existing regulatory regimes; as such, it is of interest to both the practitioner who must advise his client on practical liability issues, and the academic who is interested in the potential for law reform. Weaknesses identified include the lack of integrated resource management, the 'whole of government' approach that is so urgently needed to respond to diffuse source pollution.

Preventative measures for avoiding liability are given extensive attention in the book, which is particularly important. Environmental management systems, environmental improvement plans and programs, environmental auditing, risk assessment and insurance protection are all discussed at some length. In practice, prioritising such measures will prevent or minimise future occurrences of environmental harm, and avoid the need for recourse to the law.

Indeed, some restructuring of the book could be beneficial to focusing the corporate mind on measures of these kinds, the cost effectiveness of which has been proven time and again. While the nature of any defence is such that it is rarely considered until a charge has been laid, perhaps a section (or Chapter) could be included much earlier in any future editions, collectively examining the preventative measures that may be employed to avoid liability. This is the best way to avoid corporate liability for pollution.

Simon Marsden.

# BOOK REVIEWS

Harvey, N (1998)
**Environmental Impact Assessment:**
**Procedures, Practice and Prospects in Australia**
Oxford University Press, Melbourne. ISBN 0-19-553809-9. 233pp. (Price not stated).

There has been a need for a standard text on EIA in Australia for some time, and Nick Harvey, Director of the Mawson Graduate School of Environmental Studies at the University of Adelaide, may be commended for this work. The little known and poorly updated *EIA in Australia* by Thomas (1998), and the more widely available *EIA: Cutting Edge for the 21st Century* by Gilpin (1995), (which relies heavily on Australian examples), fail to provide the level of detail required for todays student or practitioner.

The book begins with an overview of the evolution of EIA, together with methods and procedures, before setting out in Chapter 2 the legislative and administrative requirements of each of the states and territories. Chapters 3, 4 and 5 discuss these requirements with regard to the 'before, during and after' of EIA in Australia: screening, scoping and levels of assessment; EIS preparation and public participation; and assessment, decision-making, monitoring, auditing and appeal rights.

Chapter 6 considers EIA practice in Australia with reference to a number of case studies from the states and territories. It describes and analyses a varied selection of significant, controversial project EISs produced to date, including: Sydney Harbour Tunnel (NSW), Tindal Airbase (NT), Magnetic Quay (Qld), Hindmarsh Island (SA), Mt Lyell Mine (Tas), Mornington Marina (Vic), and Quicklime (WA). A number of conclusions are reached which highlight the inadequacies of current processes.

One of these is the difficulty that is caused by overlapping EIA regimes, particularly between the states, territories and the Commonwealth. The requirements of the latter are presently subject to substantial legislative overhaul, and new provisions will attempt to overcome this difficulty through accreditation. In Chapter 7, Harvey evaluates the existing legislative and administrative arrangements of the Commonwealth, again with reference to the 'before, during and after' of EIA. The example of the Sydney third runway is examined, before the EIA review process is briefly outlined.

The final chapter is entitled 'prospects for Australian EIA in the 21st century'. This includes a discussion of comparisons between the procedures and practice of EIA in each of the Australian jurisdictions, future changes to EIA legislation (as at November 1997), an examination of the policy context of EIA in Australia, reference to the International Study into the Effectiveness of EIA, and an analysis of SEA, which is particularly recommended.

The primary criticism of Harvey's book relates to structure. It would have been very helpful if the policy context and the requirements of the Australian Commonwealth had been introduced much earlier. References are often made in Chapters 3-5 to documents such as the Intergovernmental Agreement on the Environment, the National Strategy for ESD and the National Agreement on EIA, and an understanding of these together with a discussion of the Commonwealth EIA requirements from the outset would have given a useful framework to the need and scope for requirements elsewhere.

Nevertheless, the book is an extremely well written and welcome contribution to the literature on Australian EIA. Harvey draws heavily on recent EIA texts available elsewhere to draw comparisons and emphasise global trends. The need for a list approach to screening proposals, EIS auditing, system monitoring and strategic environmental assessment are all identified, and given the likely Commonwealth legislative changes, a number of these matters may be required in the near future. Hopefully when these take effect, Harvey's book will be appropriately updated to becomes the standard text on EIA in Australia that it deserves.

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## MEMBERSHIP APPLICATION

**1999**

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Membership of NELA is for a full calendar year and includes:
the quarterly publication Australian Environmental Law News
the NELA Bulletin
discounts to conferences and seminars

# AUSTRALIAN ENVIRONMENTAL LAW NEWS
## STYLE GUIDE

1. Italics should be used for case names, legislation, book and journal titles.

2. Cases should be cited as follows:
*North Coast Environment Council Inc v Minister for Resources* (1994) 127 ALR 617

3. Statutes should be cited as follows:
*Environment Protection (Impact of Proposals) Act* 1974 (CTH)

4. Sections in statutes should be cited as follows:
"under section 5 of the Act".

5. Books should be cited as follows:
G Bates, *Environmental Law in Australia* (3rd ed, Butterworths, Sydney, 1992)

6. Journal articles should be cited as follows:
V Davies, "*Mediation and Planning Appeals: Jumping on the Band Wagon?*" (1995) 1 AELN 65

7. Authors should use gender neutral language.

8. Contributions should be in their final form.

9. Headings should be clearly identified in bold and not underlined.

10. Abbreviations and acronyms should be fully spelt out where first occurring in the text, with the abbreviation or acronym following in round brackets. The abbreviation should then be used in the remainder of the text. e.g. The Environment Protection Agency (EPA).

    "ibid" is used when referring to the immediately prior reference
    "op cit" is used where the reference is not the immediately prior reference, but is referred to previously in the text.

11. All reference and quotations must be accompanied by a citation. Footnotes should run from 1 to the end.

12. Dot points should be used when listing matters.

13. Submit contributions in hard copy and on disc (pc Word 6 doc), or email.

14. Authors are solely responsible for the accuracy of their materials. Authors are responsible for defamatory or litigious material and the editors accept no responsibility for such material.

Please contact the editors or the NELA office for further information.

# National Environmental Law Association

## NELA AWARD

for the

**Best Environmental Law Essay by a Student**
on the topic

"Environmental problems do not respect the artificial administrative boundaries created by central and local government devolution of responsibilities. Modern environmental protection and management can only be effective if a 'whole of government' approach is adopted, and integrated environmental management is encouraged by government policy and reflected in environmental laws. To what extent is this already happening in Australia, and what remains to be done?"

**Entries close 30th November 1999**

This Award will be made for an essay on the above topic, written by an undergraduate student at a tertiary institution. The undergraduate status must be viable for the whole of the year in which the essay is entered.

**The Award will be presented at the NELA Annual Conference of the following year.**

The winning essay will be published in the Australian Environmental Law News, and the author will receive a framed certificate, airfare to the conference, and free conference registration.

The decision of the judges will be final and no correspondence will be entered into.

Entries should be typed, and presented in hard copy and disc (Word 6 pc preferred).

The cover page should clearly show the name, address and contact numbers of the author, together with a photocopy of the author's student card.

Enquiries should be directed to the NELA office.

Entries to be sent to:

National Environmental Law Association
PO Box 348
FYSHWICK ACT 2609

Ph: 02- 6239 3715
Fax: 02- 6239 3717
email: nela@effect.net.au