

Planning for inland rivers

EDO Board

Jeff Angel
Bruce Donald
Felicity Hall
Judy Lambert
Chloe Mason
Paul Murphy
David O'Donnell
Cola Pain
Patrick Quintan

Director

James Johnson

Solicitors

Maria Comino
Lisa Ogle

Administrator

Dorothy Davidson

Administrative assistant

Kylie Bower

Information Officer

Anna Salleh

ENVIRONMENTAL DEFENDERS OFFICE

SUITE 82, 280 PITT ST,
SYDNEY 2000
PH: 261 3599 DX: 722

J. F. Whitehouse
Partner

Dunhill Madden Butler

Paper delivered at one day conference entitled Inland Rivers: Regulatory Strategies for Ecologically Sustainable Management, 8.11.94, Sydney University

Introduction

Charting the course for the management of inland rivers in New South Wales provides a complex challenge. Not merely are the technical and scientific bases for identifying appropriate policy choices poorly understood, but the divergent value systems shared by segments within the community interested in the management of inland rivers result in a significant variation of community objectives sought to be achieved. The two factors of an inadequate scientific understanding of the ecological and hydrological processes driving inland river systems and the lack of congruence in values by community sectors make the processes of charting management directions one fraught with difficulty.

These first order factors significantly impact upon the processes of decision making and upon the institutions established by government with a role in determining appropriate management for inland rivers. Within the context of these first order factors there are a range of second order factors affecting policy development in relation to inland rivers. These are:

- Institutional structures;
- The extent of interest group interest in policy outcomes;
- The socio-economic implications of alternative outcomes;
- Legal factors; and
- Extent and priority of general community interest of the issue.

The purpose of this paper is to identify and discuss some of the institutional and policy

influences on planning for inland rivers. The extent to which these particular influences are of importance needs to be assessed and analysed with particular issues and at particular points in time. Moreover their presence or alternatively their absence can impact upon the policy outcomes achieved.

Issue identification

The first policy and institutional influence on the process of planning and management for inland rivers is the process of issue identification. In the absence of any clear articulation of a particular problem or issue it appears unlikely that agencies will respond with altered policy settings. Moreover tied with the need for issue identification is the problem that in the absence of clear issue identification, there is unlikely to be any support in examining or changing the policy settings amongst senior management of institutions, government, interest groups and the community generally. Issue identification is often complex in natural resource management questions and is often prone to exaggeration or to presentation in stark black and white terms such as to suggest conflict with two clearly identified adversaries.

Continued next page

Contents

Planning for inland rivers.....	1
More talk about water.....	5
Case note: Greenpeace v. Redbank Power Company & Singleton Council.....	10
Book Review: <i>Environmental Outlook - Law and Policy</i>	10
EDO News.....	11
EDO responses to government initiatives.....	12

Generally most of issue identification is the product of adversarial debate and the absence of adversarial debate may often mean that potential issues of importance are never identified and articulated as a primary step for policy review. Further conflict may create opportunities for policy shifts which otherwise may be unattainable.

Problem of delayed impacts and cumulative effects

The development of an adequate understanding of the ecological processes operating in inland rivers systems is a complex and difficult one given the large number of factors impacting upon the systems and the significant variability in the systems' operations. In addition there may well be operating a series of delayed thresholds in inland rivers systems such that many of the changes being observed now may be the results of actions undertaken many years ago. Thus the process of change and degradation of inland rivers systems may continue to occur even though there is no current action such as to provide an immediate trigger. The process of managing impacts which have been delayed for long periods of time is extremely difficult as amelioration measures may require the reversal of actions or works undertaken many years previously. Further in dealing with complex issues of cumulative effects causation is often speculative such as to lessen the confidence of decision makers in postulating policy courses in the absence of high levels of certainty regarding the reasons underlying those suggested changed policy courses.

Interest group capture

A predominant problem in all natural resource management agencies is that of interest group capture whereby a management agency is captured by a group or sector with a stake, often pecuniary, in the decisions made by the management agency. Interest group capture can be either by clients of the agency or by a particular professional discipline associated with that agency. Interest group capture has historically been a major issue of concern in water agencies where there has been capture both by clients in terms of water users and capture by a professional discipline namely engineers such as to focus policy development on a particular course and limit the inputs into policy development. It raises the question of whether water management institutions should emphasise a resource focus or a customer focus.

Integrated versus fragmented mandates

One of the factors influencing the behaviour of natural resource management institutions is the span of responsibility as to whether an institution is responsible for the broad range of matters affecting a particular natural resource or only parts of that process. This issue is closely tied to the question of whether natural resource management agencies would have a customer focus as opposed to a resource focus. Much of the 1970s and 1980s was spent in building comprehensive natural resource management agencies with a broad span of responsibility while in recent times the trend has been the reverse, to segment functions dealing with particular resources including separating planning, management, service delivery

and enforcement. There are advantages and disadvantages of integrated natural resource management agencies as opposed to functionally discrete agencies. The debate tends to focus upon the contrast between a holistic integrated approach with opportunities for feedback and adjustment versus problems of conflict of interest and compromise of the various functions by virtue of the agency's performance in relation to another function. The latter problem is somewhat tritely described as the 'poacher as game keeper problem'. It is suggested that functional separation increases co-ordination problems, heightens issue avoidance by agencies and decreases the likelihood of comprehensive policies and management occurring without any commensurate benefits in the longer term by, for example, enforcement changing management approaches.

Agency co-ordination

The management of inland rivers impacts upon a broad range of areas of government highlighting the perennial problem of inadequate co-ordination of natural resource management agencies. A lack of co-ordination and a fragmented policy process leads to piecemeal solutions, limited accountability and inconclusive decision making. The results of lack of co-ordination and of fragmented policy approaches can be seen in many of the time honoured strategic games of institutions with classic excuses such as, "it's not my problem", "my hands are tied", "surprise, it's now your problem", "we are dealing with it [when we are really not]", and finally the "it's not my job to solve problems" approaches. In so many circumstances the major creative effort is in avoiding tough decisions and avoiding responsibilities rather than channelling those efforts into policy development.

Building more effective agencies and decision making processes

In a recent discussion examining the reforms needs to improve environmental and resource management in the 1990s and beyond, Dr Steven Yaffee has suggested that an improvement in the institutional setting and decision making processes of natural resource management agencies requires the following

- New mechanisms to bridge the agency/non-agency boundary in order to build understanding and political concurrence.
- Altered approaches to organisational management, including notions of leadership.
- Improved means of gathering and analysing information about resource problems, organisational possibilities, and political and social context.
- Ways to promote a culture of creativity and risk taking to generate more effective options for the future.

It is interesting to note that Yaffee's approach centres upon how natural resource management institutions operate. They do not concentrate upon the form of the institution itself. Australian natural resource management agencies have been characterised by an obsession with structure as opposed to policies and outcomes. In North America and the United Kingdom, the institutional structures within government for

the management of natural resources have been relatively stable, with the major effort focusing upon adapting and changing the policy directions which those institutions pursue. By contrast, in Australia there is an obsession with institutional tinkering, of constantly restructuring and reorganising without any significant attempt to foster and pursue a debate on policy alternatives. As such, the policy debate has suffered significantly. It is noted that the May 1994 White Paper on the management of New South Wales Rivers, Streams and Waterways continues the approach of structural changes to water management agencies emphasising the fragmentation of institutions. Such a process is likely to yield little in terms of building more effective agencies and processes and building better policies.

Privatisation

One institutional approach has been to review the functions undertaken by government and to corporatise or privatise those functions. An alternative approach is to establish a concept of private property rights in natural resources commodities previously belonging to the public. Where an approach is taken of adopting property rights in natural resources, the difficulty arises in setting the sustainable size of the resource and to what extent a part of the available resource should be allocated to non-consumptive use.

The twin problems of over-allocation of water resources beyond sustainable levels and the inadequate allocations for non-consumptive uses have characterised water policy generally. Where proprietary rights exist in allocations of a natural resource, the freedom for public natural resource management agencies to effectively rethink the use and management of water resources is significantly constrained by potential claims for compensation. In effect, the establishment of proprietary rights in natural resources cements current usage practices until such time as a major collapse or crisis operates to devalue dramatically the worth of those proprietary rights.

In addition to the private property approach, there is the corporatisation and privatisation debate. In general, other than those wishing to pursue privatisation or corporatisation based upon ideological preconceptions, the preferred approach is to analyse particular functions and services and to assess whether such functions and services can more efficiently and economically be performed outside government and to what extent the outsourcing of those services and functions will impact upon public interest issues.

Integration of land and water management for New South Wales inland rivers

The Environmental Defender's Office in its report entitled "Inland Rivers: Regulatory Strategies for Ecologically Sustainable Management" (1994) considered the mechanisms for integrating land and water management so far as New South Wales inland rivers are concerned. The report noted that the existing institutional arrangements and co-ordination mechanisms did not provide a sufficient impetus for integrated management.

The EDO Report canvassed a range of options and recommended a two-pronged approach as follows:

- Make greater use of environmental planning instruments under the Environmental Planning and Assessment Act to integrate different planning processes of government agencies and, if necessary, pass facilitating legislation to ensure that the process occurs quickly and with clearly articulated policy direction.
- Amend existing legislation so as to make clear the relationship between and the processes for interaction of legislation relating to inland rivers and the policy and planning processes of agencies that implement them.

There have been steps to utilise the environmental planning system in relation to inland rivers. This has been through two regional environmental plans, namely the Murray River Regional Environmental Plan No. 1: Murray River Riparian Land of 1987 and the more recent Murray River Regional Environmental Plan No. 2: Riparian Land of October 1993.

The Murray REP No. 1 established a formal mechanism for consultation and referral for public authorities involved in the management of the river. Murray REP No. 1 was directed at ensuring consultation between relevant public authorities of a range of notifiable developments or activities being principally in-stream and bank associated developments, while also designating developments such as marinas, vessel repair yards and wharves.

Murray REP No. 2 repeals Murray REP No. 1. Its principal objectives are to ensure that appropriate consideration is given to development with a potential to adversely affect the riverine environment of the River Murray, to establish a consistent and co-ordinated approach to environmental planning and assessment along the River Murray and to conserve and promote the better management of the natural and cultural heritage values of the riverine environment of the River Murray.

The plan identifies a number of planning principles to be taken into account by a Council in preparing a Local Environmental Plan, by a consent authority in determining a development application, or by a public authority or person proposing to carry out development which does not require development consent but which has a potential to affect the riverine environment of the River Murray.

The planning principles provide a general statement of value or some factors which need consideration in relation to particular categories of development. In essence, they look at how particular types of development are to be carried out, not where they are to be carried out, nor the aggregated impacts of development.

Murray REP No. 2 provides a requirement for consultation and establishes a planning control and consultation table indicating whether development is prohibited or permissible with consent and identifying some consultation requirements and heads of consideration for particular categories of development.

The procedures in Murray REP No. 2 provide a mechanism for planning control at its most rudimentary and skeletal, in such a manner as to have limited impact upon the major environmental interactions which occur within the River Murray ecosystem. Of particular importance is the limited constraints it places upon the activities of public authorities and its confinement to primarily the manner in which development is carried out or the factors which need to be considered by decision makers rather than broader questions of resource allocation and land uses.

The approach taken in Murray REP No. 2 tends to recognise the general impotence of the environmental planning system in New South Wales in recent times in addressing major natural resource management questions. This reflects a perceived belief amongst government that systematic planning has little to contribute in the management of natural resources as well as the lack of power of planning agencies vis a vis the principal natural resource management agencies in New South Wales.

For planning to provide an effective mechanism in natural resource management, there needs to be a significant shift in the power relations between agencies such that the views and efforts of planning agencies are accorded a higher level of priority within government.

Ecosystem management

The evolving concept of ecosystem management provides a contemporary focus for natural resource management decision making. The growing discipline of conservation biology has focused attention away from specific species or resources to look at entire ecosystems to provide holistic management needed to sustain resources in the complex ecological/political landscape.

Grumbine has defined "ecosystem management" as follows:

Ecosystem management integrates scientific knowledge of ecological relationships within a complex socio-political and value framework towards the general goal of protecting native ecosystem integrity over the long-term.

Grumbine has identified ten dominant themes of ecosystem management as follows:

- Hierarchical context, namely the need to focus upon all levels of the biodiversity hierarchy, including genes, species, populations, ecosystems and landscapes.

- Ecologically boundaries, namely the need for management to work across administrative and political boundaries and to define ecological boundaries at appropriate scales.
- Ecological integrity, namely the need to manage to protect the total natural diversity and the ecological patterns and processes that maintain that diversity.
- Data collection, namely the necessity for more research and data collection as well as better management and use of existing data.
- Monitoring, namely the need to ensure that actions can be monitored and success and failure evaluated quantitatively to provide an ongoing feedback loop into decision making.
- Adaptive management, namely the appreciation that management is a learning process with managers maintaining the flexibility and capacity to adapt in the face of uncertainty.
- Inter-agency co-operation, which arises from the necessity of using ecological boundaries rather than administrative or political boundaries, thereby requiring managers of different agencies to work together and integrate their conflicting legal mandates and management goals.
- Organisational change, namely the need to ensure the structure of land management agencies and the way they operate provides an adequate basis for implementing ecosystem management.
- Humans are embedded in nature, namely a recognition that humans are fundamental influences on ecological patterns and processes and cannot be separated from natural systems.
- Values, namely that regardless of scientific knowledge, human values play a dominant role in ecosystem management goals.

The concept of ecosystem management provides an opportunity for a major shift in the approach taken to natural resource management and the policy and institutional frameworks utilised today. Such a shift towards ecosystem management is considered the most effective way of meeting the challenges facing inland rivers. Moreover, it provides the framework within which institutions and decision making processes can be firmly focused on striving to achieve outcomes.

Inland Rivers: Regulatory Strategies for Ecologically Sustainable Management

*A 165 page report by EDO solicitors analysing the legislation
covering regulation of inland rivers*

Available from the EDO for \$25

More talk about water

Maria Comino

Solicitor

Environmental Defender's Office

It is at least three years since the environmental problems with our inland rivers received broad media and public attention. That attention focussed on some of the symptoms. In particular, the world record breaking algal bloom on the Darling River in November, 1991.

Since that time, there has been much discussion about the rivers and political rhetoric on the need to address the problems. In December, 1992, Prime Minister Paul Keating, in his Statement on the Environment, pointed to water quality as being one of the major problems facing Australians.

The purpose of the recent EDO conference "Inland Rivers: Regulatory Strategies for Ecologically Sustainable Management." was to further identify the problems of inland river management, their causes and options for change. The conference was initiated after the significant response to EDO's report on the legislation affecting inland rivers.

Participation and discussion at the conference revolved around five key areas:

- ♦ A description of current environmental problems.
- ♦ The causes of those problems.
- ♦ The need and goals for change.
- ♦ How to implement change.
- ♦ Scrutinising the quality of change.

Identifying the environmental problems

All speakers recognised the serious physical environmental problems happening in our inland rivers.

Peter Millington, the Director of the Department of Water Resources, noted that river regulation and irrigation have caused profound changes to inland river systems.

Peter Wilson of the National Parks and Wildlife Service, also referred to the profound changes to the inland river system. These included reduced flooding, prolonged flooding, erosion, salinity, species and vegetation loss.

Little doubt was expressed about the impact of these changes.

Bob McCosker from the University of New England referred to the example of the Gwydir wetlands which have contracted to less than 5% of their former area since river regulation.

Peter Wilson referred to the wetland decline as "an indicator of processes that are degrading the inland river system, the economic and social impacts of which are beginning to be felt in cities and towns throughout the inland."

Peter Millington referred to the marked declines in the distribution and abundance of fish species, including a decline in the golden perch population by 74% and the silver perch population by 94% over the last 50 years.

Causes of the environmental problems

Speakers were also clear on the causes of these environmental problems.

Professor Ian Lowe referred to the legacies of past priorities in water use:

"Historically natural ecosystems have been the last in the queue for the available water. Priority

has been given to irrigation schemes, few of which have priced water to recover the cost of supply. We have therefore encouraged excess consumption through subsidies. Second call on water has been the supply of rural communities, for the normal domestic purposes such as drinking and washing, as well as for local industries. The riverine ecosystems have been expected to survive on the water left after these other calls have been satisfied. It is now clear that elements of the natural environment are being degraded by reduced flow of water."

Environmental lawyer, John Whitehouse, referred to the

"twin problems of over-allocation of water resources beyond sustainable levels and the inadequate allocations for non-consumptive uses (having) characterised water policy generally."

The sole concern in many allocation decisions has been economic growth. Peter Millington referred to the aim of development in the 60s and 70s, particularly in the north of the state, being "simply economic growth and regional stability".

Environmental factors have not been integrated with other concerns.

Peter Cullen referred to the failure of organisational arrangements to manage natural resources in any integrated way:

"Professional training, professional organisations and agency structures have all evolved in simpler times... Is it any wonder that organisational arrangements developed in simpler times are simply not coping with the increasing pressures and the growing understanding of the complexity of the systems we manage."

He also noted many agencies have been kept ineffective by continued reorganisation.

John Whitehouse made similar observations. He contrasted experience in North America and the United Kingdom:

"Australian natural resource management agencies have been characterised by an obsession

with structure as opposed to policies and outcomes....there is an obsession with institutional tinkering, of constantly restructuring and reorganising without any significant attempt to foster and pursue a debate on policy alternatives. As such, the policy debate has suffered significantly."

Lorraine Cairnes, having held a range of senior management positions in public sector organisations, agreed that in a decade of constant change "the ability to establish and sustain effective working relationships within the government system and with the groups outside it has undoubtedly suffered."

Lorraine highlighted the realities of interagency coordination and cooperation.

Apart from institutions crossing all three spheres of government, agencies are impacted by external and internal factors. The external factors include the constantly changing array of laws, policies, guidelines. The internal factors include changing objectives and directions, and also the human factor of a range of attitudes and cultures of the humans within institutions. There is also the adequacy of the information base at the time of the decision.

Peter Wilson showed what effect that lack of coordination has had on the ground:

"The Service's capacity to manage its wetland reserves is often compromised by actions taken and policies made remote from the areas that they are affecting."

Management of the Macquarie Marshes was cited as illustrative of the tensions that existed between agencies.

Another key concern identified by Lorraine Cairnes was the failure of agencies to share information because of the difficulties of agreeing on "the rules of ownership, access, protection, value, and quality control with the result that much of the information needed for decisions about inland rivers is probably not readily available when and where it is most needed."

The need and goals for change

There was little dispute amongst the speakers that there was a need for change. The key question then became the goals to which change should be directed.

Professor Ian Lowe defined the goal of ecologically sustainable development to mean the need to sustain biodiversity, ecological integrity and "natural capital".

In applying these concepts to inland rivers, Peter Wilson defined the goals as being water in sufficient volume, of good quality and appropriate flows to allow the rivers to maintain their essential functions.

Peter Millington referred to Agenda 21, being the Action Plan that came from the 1992 United Nations Conference on Environment and Development, as influencing water management in New South Wales.

All speakers identified the interdependence of economic and environmental issues. Peter Cullen noted that arguably neither environmental objectives nor economic objectives could be met without the other. This also translated to recognition of the need to look at long term goals and not just short term needs.

Also, implicit in discussion was the goal of open and accountable government.

How to implement change

Discussion on the implementation of change focussed on three areas:

- ◆ The principles directing the change.
- ◆ Tools for achieving change.
- ◆ The role of different players in effecting change.

Principles for Change

Professor Lowe identified key principles to be observed in the formulation of a strategy for achieving the listed goals. In particular, these included:

- ◆ Recognition of the primacy of ecological considerations
- ◆ Adoption of a cautious approach to assessing risks
- ◆ Ensuring social equity within and between generations
- ◆ Cultivation of a long-term, global orientation
- ◆ Optimisation of the efficiency of using resources and energy
- ◆ Encouragement of public participation in the making of decisions

Tools to be used in applying the principles

Tools identified included:

- ◆ Integrated catchment management
- ◆ Planning
- ◆ Ecosystem management
- ◆ Collecting information as a part of the management process and information sharing by agencies
- ◆ Clarity in defining key concepts like "regulated flow" and "unregulated flow".
- ◆ Market mechanisms

Of particular importance, Peter Cullen referred to the need for stronger planning mechanisms, for arriving at community choices as to what species are to be favoured and at what cost to other species and to other possible users of water. He also identified the specific targeting of environmental flows that will not necessarily have undesirable impacts on irrigation farmers and other extractive users.

However, John Whitehouse noted that:

"For planning to provide an effective mechanism in natural resource management, there needs to be a significant shift in the power relations between agencies such that the views and efforts of planning agencies are accorded a higher level of priority within government."

He went on to identify:

“the evolving concept of ecosystem management... (which) provides an opportunity for a major shift in the approach taken to natural resource management and the policy and institutional frameworks utilised today. Such a shift... is considered the most effective way of meeting the challenges facing inland rivers.”

The Players

The Agencies:

Peter Cullen referred to conclusions from the Stockholm Water Conference of 1992 which suggested that:

“efficient and effective institutions need explicit long term goals and the capability to monitor progress towards those goals... (rather than being) kept ineffective by continued reorganisation which ensured they had no capability to learn from the past.”

He also emphasised the need for operators and managers to collect information as an integral part of the management process, which information must be made available to the public, being a public interest which the government should protect.

Lorraine Cairnes noted the need for agencies to amend policies and practices to conform with the principles of ESD, and for open and accountable management within agencies. This would enable agencies to be effective advocates for the particular interests in the catchment for which they are responsible.

Effective interagency relationships were needed. This required agencies to share information and have effective working and negotiating relationships within government and outside government.

Reference was made to the Murray-Darling Basin Commission, which has existed over a number of years despite the electoral changes of some of its member governments, as an example of the “benefits of a stable network of relationships that has persisted long enough for the players to develop mutual respect, undertake sustained negotiations and get on with the action.”

A critical factor for change identified by Peter Wilson was the need for bureaucratic and political will to implement change.

The Community:

There was overwhelming agreement that the community has a crucial role to play in effecting change.

The community must of course include all groups, including indigenous groups, as discussed in Andrew Chalk's paper on native title to inland rivers. Though there were many comments seeking to identify who is the community, with distinctions between the interests of the broader community and those of particular sections in the community.

Peter Millington referred to the need for government “to bring a whole range of water and natural resource management policies and strategies to TCM committees” and to the

numerous community based programmes for monitoring and restoring rivers.

Lorraine Cairnes referred to the value of having guidelines endorsed by the wider community to guide bureaucrats when resolving which of the particular conflicting community interests will be supported.

It is clear meaningful public participation is going to be a key challenge for decision makers.

Scrutinising the quality of change

There are two preliminary issues relevant to the process of scrutinising change. These were discussed in the EDO report on Inland Rivers and include:

- The role of the law in effecting change
- The principles of good environmental laws and administrative arrangements.

The role of the law in effecting change

Change inevitably involves a need to regulate conflicting interests and to ensure that the broader public interest is protected.

The law can provide mechanisms to manage and resolve conflicts between different interests in a resource, including unrepresented interests.

The law must also provide not only a mechanism for allocating and developing a resource but also for protecting the public good that comes from maintaining the resource. That again includes representing unrepresented interests such as all forms of life that depend upon rivers for habitat.

The law has a role as an agent of change because it can provide processes and structure institutions so that transition occurs even though society as a whole is not certain where the transition will lead.

Laws can provide processes which are adaptable for the changing circumstances while the overall direction in which they take must be clear.

For these reasons the law has a role in enabling ecologically sustainable management of inland rivers.

The principles of good environmental laws

The quality of change to laws and administrative arrangements affecting inland rivers can be measured in some part having regard to the principles of good environmental laws. Those principles include:

- Clarity of purpose in statutory frameworks. Discretion can still be provided within a framework of clearly defined objectives.
- Political accountability. Political decisions are made by those who are politically accountable and technical decisions are made by those who are technically competent.
- Open decision making. For example this includes giving reasons for decisions, proper recording of decisions and building in structural openness into the processes so that the public can see clearly what the

process has been.

- ♦ Access to information
- ♦ Environmental data. This includes identification of standards for environmental management, obtaining the data necessary to meet those standards, and disclosing the results of environmental monitoring.
- ♦ Provision for independent review of agency decisions.
- ♦ Civil enforcement of legislation ensures the lawfulness of public administration.

These principles are relevant to the achievement of open and accountable government, a goal implicit in the achievement of ecologically sustainable management of the rivers.

Some Examples of Proposed Changes

Public Participation:

There was discussion of "bringing" strategies and policies to catchment management committees.

A key issue is whether the processes for public involvement are clearly identified by decision makers. A true measure of the adequacy of community participation will be whether the community knows what are the processes for its involvement, can see that its input will be seriously considered and that there is an opportunity for the input to be incorporated.

The NSW government white paper on the management of New South Wales Rivers, Streams and Waterways:

Changes proposed in this paper can be criticised for not breaking out of previous past practices or approaches to change. As observed by John Whitehouse, it shows a preference for restructuring rather than effecting substantive change by looking at policy development.

For example, the white paper does not discuss property rights issues, yet it is clear that they are a major policy issue for water authorities.

Another way in which the paper does not break out of previous past practices is that it doesn't identify the need for an effective knowledge base for managing the water. As commented on by Peter Cullen, the planning function demands knowledge and the management and regulatory functions all demand knowledge, about the state of the resource, about how a system functions and about what relationships are important. The paper doesn't follow the principle of requiring adequate environmental data.

Market mechanisms:

Jason Alexandra emphasised the importance of critical analysis of market mechanisms as tools for ESD, to ensure the 80s promises of deregulated wealth in the corporate sector are not now being repeated in the natural resources sector. One can recognise that transferable water entitlements may be a useful means of "clawing" back total allocations, but also there was a need to be aware that they may represent the sale of a subsidy.

The use of market mechanisms must be subsidiary to the overall directional goals of ESD and open and accountable government rather than just being a new means of protecting

pre-existing interests which approaches have become necessary to ensure reliability of supply.

There is a need to analyse comments like those of John Whitehouse that the establishment of proprietary rights in natural resources cements current usage practices until such time as a major collapse or crisis operates to devalue dramatically the worth of those property rights.

Equally, specific suggestions like those made by Francis Grey deserve close attention.

Grounding expectations:

In the process of effecting change, it must be recognised that some demands will not be consistent with the key goals directing change. For example, some demands for economic growth will no longer be able to met.

Also, a demand for explicit identification of environmental needs and regulated river systems may not be achievable. In view of the uncertainty of our understanding of the environment, and though accepting that decisions have to be made in the interim, a process needs to be provided that incorporates principles like the precautionary principle to ensure environmental needs are not compromised on the basis of an overriding concern for certainty in allocations.

Scrutiny of change will involve reviewing whether there has been a shift in emphasis in decision making to reflect ecological considerations, and whether any new shift in emphasis is of sufficient weight having regard to the stated short and long term goals.

To the extent that we compromise, dilute or accept mediocrity in the application of the key principles that are to guide the change - by not elevating ecological considerations in our priorities, and leaving other interests linger higher in priority - we will be compromising, diluting and accepting mediocrity in our progress towards achieving ecological sustainable management of our inland rivers.

What is the vision?

Scrutiny of change must be done in the context of knowing what are the broader social, economic and environmental goals one is wanting to achieve. As discussed by Jason Alexandra, these goals must be identified before one begins designing, trialing or refining tools for change.

Point 3 above sought to identify goals. However, it was the speakers presenting different community perspectives who elucidated the nature of the competing interests and therefore the context for the goals and for the vision for ESD.

Gary Donovan, Director of the NSW Irrigators Council referred to a report of the Department of Foreign Affairs and Trade that identified the large population growth in Asia that will drive growth in demand for food and agricultural products. The report highlighted the potential for a five fold increase over the next 16 years or almost 30% increase per year for Australian agricultural products, requiring continued commitment to the development and growth of the agricultural sector and irrigated agriculture in particular.

Gary observed that in New South Wales agriculture "remains the backbone of country" and referred to estimates of every

\$1 of production from irrigation, having a \$5 flow on benefit in other sectors of the economy, with half of that effect accruing to urban areas primarily in Sydney, Newcastle and Wollongong. A five fold increase in exports in sixteen years would mean irrigated agricultural production in New South Wales would need to increase by \$48 million each year.

There was therefore a need for water policies that supported the development and growth of irrigated agriculture.

Growth on that scale would depend on new sources of water either by new storages or inland diversions. New proposals to provide those sources were now being considered. They included proposals for inland diversion of the Clarence River - where 5 million megalitres of water flows into the sea each year, and which source could be supplemented by cloud seeding.

Such goals appear unconnected to an appreciation of the current environmental problems happening in inland New South Wales identified by other speakers and which would be exacerbated by further development of water storages.

Such goals also appear to fall into the same economic growth patterns identified by the Director of the Department of Water Resources, Peter Millington as being the reason for the current problems in the inland rivers.

Growth in the terms proposed must be measured against ecological groundrules.

Practical insights into those groundrules were provided by Tom Faithful, both grazier and environmentalist. He explained what has been the effect of the regulation of watercourses in his environment of the lower Gwydir and Gingham watercourse area. Tom has become accustomed to floods which:

"on the whole floods are slow moving events with the depth being between one's shin and six inches above the knee (mine anyway). Sure we've had our losses and problems but they are part of the life in the watercourse - after the event, there is feed for at least nine months and this is what has enabled us to weather droughts in the past."

"However, I question the loss of 150 ewes and 180 lambs on the Gingham block in 1984 when a flood came down the Gingham channel far earlier and in greater amounts than down the Gwydir, where I was preparing for the usual flood. I believe this was solely due to the Tyreel regulator and works done for the irrigation

industry just west of the town of Morce - There is now a limited flow rate in the Gwydir channel."

Approaches to future economic growth will no doubt be more sophisticated seeking to take greater account of environmental factors in recognition of the dependence of the economy on environmental well being.

These included approaches identified by Clive Thomas, chairman of the Lachlan Catchment Management Committee and member of the Murray Darling Basin Community Advisory Council. He referred to options for moving away from "bad farming".

These included incentives and regulation:

"The next decade of natural resources management may well be an era of regulation which will be interesting because it will confront the anthropocentric culture of rural Australia."

In his view, yet to be accomplished is the need to integrate water distribution with the water needs of crops, that is "with the world beyond the irrigation outlet"; using the potential to accumulate a considerable volume of water for reallocation. Integration would involve "an agronomic exercise as well as an engineering task."

Improved farming techniques will improve water efficiency.

However, discussion at the forum highlighted the need for expansive community debate on the broad direction and scale of agricultural and irrigation growth in Australia. This would include whether the environment will be able to cope with growth on the scale contemplated in the report of the Department of Foreign Affairs and Trade and approaches to resolving the conflicts.

Future decision making must take account of our understanding of ecological groundrules. Those rules include, as observed by Professor Lowe, the need to regard water shortage as an intrinsic feature of this country.

If these core issues are not fully addressed, it will be too easy to fall into the decision making patterns of the past. Any "change" will be veneer thin.

The issue now for government is to review its decision making and involve the community in that process so all issues can be addressed.

Refreshingly, participation at the conference showed an eagerness to resolve the conflicts. Let's hope others will facilitate opportunities to progress the debate and to implement new ideas and solutions emerging from that debate.

*Seasons Greetings
to all Impact subscribers!*

Case Note – Greenpeace v. Redbank Power Company & Singleton Council, Pearlman J, 10/11/94, 10217 of 1994

The EDO acted for Greenpeace Australia Ltd in proceedings in the Land & Environment Court challenging the grant of development consent to Redbank Power Company by Singleton Council for a coal fired power station in the Hunter Valley in New South Wales. The power station is designated development and the proceedings were in Class 1 of the Court's jurisdiction.

The case was heard during September 1994 and judgment was handed down on 10 November 1994.

Greenpeace argued that there was no present need for power to be generated, NSW currently having 50% surplus capacity. Greenpeace also argued that future need could be addressed at the time the need arose either by demand management or by alternative technologies and that coal fired power stations produce greenhouse gases and therefore have a significant adverse affect on the environment.

Her Honour dismissed the appeal and granted development consent in almost identical terms to the consent granted by Singleton Council.

The case is significant because it makes clear that the Federal government's responses to its obligations under the Framework Convention on Climate Change are not binding and are having no effect on local government or industry where decisions are being made.

At page 8 of her judgment Her Honour says:

Book Review: *Environmental Outlook – Law and Policy* eds. Ben Boer, Robert Fowler & Neil Gunningham – Federation Press 1994

Environmental Outlook - Law and Policy is the proceedings of a conference held by the Australian Centre for Environmental Law (ACEL) in November 1993. The event gathered some of the keenest minds on environmental law including the EDO's David Mossop, to discuss global trends, regional developments, national developments and examination of green and brown issues.

Although few will find the proceedings exciting bedtime reading, they do provide a valuable up to date comparative summary of environmental law and policy in various jurisdictions with footnoted references to sources.

If you are looking for a detailed treatment of developments, community participation and access to information, however, you will be disappointed. Both speakers and papers are dominated by industry and government perspectives. Penny Wensley, who does point to the growing role of NGOs, was "startled to find the chair of a meeting of the ad hoc committee on Parties to the Basel Convention giving the floor to the representative of Greenpeace to negotiate as an equal with governments on drafting language".

"There is an important aspect to note in relation to both the IGAE and the NGRS. In both documents the Australian Local Government Association is represented as a party. However both documents expressly recognise that Local Government Authorities cannot be bound to observe the terms of either (IGAE clause 1.11, NGRS page 5).

At page 16 Her Honour states:

"It is important also to bear in mind that the framework convention, the IGAE and the NGRS do not constrain individual action. There are as yet no specific directives or obligations cast upon individual operators in the energy field. This may come, as a result of the development of further response measures, that thus far the response to the enhanced greenhouse effect is in the realm of government policy."

These two statements highlight the deficiencies in the Federal government's action to date. The glossy document which is the National Greenhouse Response Strategy is having meaningful effect.

The evidence discloses the project is most likely to emit 19% more greenhouse gas emissions than even an equivalent production from existing coal fired power stations. This would result in a net increase in CO₂ emission from power stations of approximately 47%. The danger is to regard this as of little consequence in the national context. The construction of the power station is another example of the tyranny of small decisions leading to death by a thousand cuts.

Mossop discusses the important role of the community in ensuring compliance with the law. One current trend in environmental law and policy is to talk about "beyond compliance". This means a proactive and voluntary commitment to environmental protection which exceeds current regulation. Gunningham acknowledges the importance of pressure from the public in achieving this shift in corporate environmental policy. In particular he identifies consumer pressure and the importance of "truth in advertising" legislation.

In short, the trend to move "beyond compliance" is a response to public values. Two key components are needed:

- The community needs access to information about the costs and benefits of environmental decisions, including the impacts of decisions as consumers.
- There needs to be an effective way of communicating public values to those in government and industry.

As Mossop summarises:

"If the public at large is involved in the decision making process and is made aware of the environmental outcomes, the problem will obviously be addressed in a different manner than if the question is left up to a regulatory agency which has been licensing the pollution for years".

With the National Pollutant Inventory in progress, it will be interesting to see how much pressure is brought to bear by industry on government. The NPI is a gentle encouragement to companies to move beyond compliance but companies fear the disclosure of information about the pollution they emit into our environment.

John Bradscn's paper on Biodiversity Conservation in Australia examines the key aspects of the Endangered Species Protection Act 1992 and finds them wanting, both in their purported objectives and in the implementation of the

Biodiversity Convention. For example, speaking of an interim assessment conservation order, Bradscn says:

"This tangle of complexity is absurd for an interim order".

His reasoned analysis stands in star contrast to Ros Kelly's assertion in her opening address that:

"As time goes by, it will be seen as one of the most positive actions in the environment in more than ten years in government".

EDO NEWS

New South Wales

Endangered fauna

During the last session of Parliament, the Forestry (Environmental & Fauna Impact Assessment) Bill 1994 was introduced. The bill attempted to reduce the authority of the Director of National Parks & Wildlife and to exempt the Forestry Commission from Part V of the Environmental Planning & Assessment Act. Because of the definition of "forestry operations" the bill would have had far reaching operation including the clearance of coastal heathland, the harvesting of fruit, grapes and cotton.

Clause 10 of the bill purported to add to the matters which the Director of NPWS must take into account under s.92B(6) the following:

"The fact that forestry operations have ministerial planning approval and the terms of that approval".

This amendment sought to impose the "whole of government" approach because the Minister for Planning has approved of an operation the presumption must be that the National Parks & Wildlife should grant a licence because implicitly that is the will of the government. In other words because the Minister for Planning has given an approval in the absence of strong reasons to the contrary the NPWS should grant an approval.

Clause 12 of the bill purported to force the Director of NPWS to make a decision on a fauna licence application within 40 days. Currently s.92C(5) of the NPW Act provides that where a Director fails to grant an application for a licence within 40 days, the licence is deemed to have been refused. This is unless the Director notifies the applicant of a longer period which is required to consider an application in a particular case.

It appears that there is legitimate concern that the law as it stands leaves the matter too open for the Director of NPWS. The Director could in theory seek six months or a year in which to determine an application. From a biological point of view, and from an ecological point of view this may be necessary. For example studying a wetland during a drought may give a static and misleading picture of the species which

use the site and its importance. A site may also be of importance although only occupied on a seasonal basis.

A 40 day time limit however is simply impracticable. The Director is obliged to advertise and call for submissions on the application for a fauna licence and take the submissions into account.

It could well be that this aspect of the law needs to be addressed. Any changes should of course follow consultation to ensure that the Parks Service is able to continue to play its important role. The current open ended provision may be replaced with a fixed limit of for example 120 days, after which the application would be deemed to have been refused.

Parliamentary deliberations on Waterboard

The Water Board (Corporatisation) Act 1994 has been passed by parliament. The Board will become "Sydney Water" from 1 January 1995. The bill as originally introduced underwent substantial change as a result of hard fought negotiations between the government, Independent Peter McDonald and conservation representatives, particularly Jeff Angel of Total Environment Centre and Tony Simpson of the Australian Conservation Foundation. The act now provides for open standing for enforcement of the legislation, the clear separation of the functions of regulation and operation of the water supply and sewage disposal system and clear environmental targets which must be met.

Tree plantations bill

The Tree Plantations (Resource Security) Bill 1994 happily fell off the government's agenda. The bill appears to have been drafted with minimal consultation, surprising even plantation owners with its introduction. The bill sought to remove protection for endangered species and to remove the operation of the Environmental Planning & Assessment Act from tree plantations.

The bill provided for codes to regulate the harvesting of trees in tree plantations. The EDO argued that these codes should apply to the management as well as harvesting of tree plantations. Further the code should be developed and

adopted prior to accreditation so that "the goal posts" are clear for plantation owners.

The bill only provided for accreditation after a tree plantation had been established. Given that the aim was to encourage investment, the EDO recommended that plantation owners be able to apply for resource security in advance of the establishment of the plantations. Finally, there was no provision for open standing for enforcement of the bill.

New year – new board

The EDO held its Annual General Meeting on 23 November. Earlier in the year, the EDO's Memorandum and Articles of Association were changed to allow for a voting membership. The AGM provided the first opportunity for this new membership to elect the board. The EDO wishes to thank Ben Boer, Andrew Chalk, Aden Ridgeway and Harvey Sanders (who did not seek re-election), for their dedication and contribution while board members. We welcome Bruce Donald, Felicity Hall, Judy Lambert and Nicola Pain, who have joined re-elected members Jeff Angel, Chloe Mason,

Paul Murphy, David O'Donnell and Patrick Quinlan to make up the new board.

PNG project goes into print

The EDO's AIDAB funded project to educate PNG land owners on environmental law has progressed to another stage with the printing of a Pidgin version of the handbook "Law for Landowners". Like the English version, it was written in conjunction with the Individual and Community Rights Advocacy Forum (ICRAF) in Port Moresby.

New solicitor joins EDO

The EDO would like to welcome Lisa Ogle who commenced work as a solicitor with the Office in November. Lisa brings broad litigation experience from her work with Minter Ellison - the firm from which former EDO principal solicitor Nicola Pain also came. Lisa is particularly interested in mining, forestry and native title issues.

Information officer, Anna Sallch will be leaving this month to take up a research position with ABC TV's science unit

EDO responses to government initiatives

The following is a list of some of the responses to government initiatives the EDO has been asked to provide this year:

NSW Government

- ♦ Submission on the Homebush Bay Regional Environmental Plan
- ♦ Submission on the Sydney Regional Environmental Plan
- ♦ Submission to the NSW Government Inquiry into Red Tap
- ♦ Submission on and participation in briefings on drafting of amendments to Schedule Three of the Environmental Planning and Assessment Act
- ♦ Submission to and appearance before the Endangered Species Legislation Committee
- ♦ Submission on State Environmental Planning policy 33 on Hazardous and Offensive Industry
- ♦ Submission to the EPA on Environmental Auditing
- ♦ Submission to the Department of Fisheries on draft Fisheries Legislation
- ♦ Discussions with conservation and Land Management, the EPA, the Department of Water Resources, Murray Darling Basin Commission, ATSIC, Department of Agriculture and Catchment Management Committee Coordinators regarding Inland Rivers Regulatory Strategies Paper
- ♦ Attendance at NSW EPA Workshop on Public Participation
- ♦ Attendance at a briefing on and making submissions regarding the draft of Stage Three Water Legislation.
- ♦ Attend meeting with CEPA regarding environmental impact assessment review process.

- ♦ Attend regulation review workshop for the Environmental Planning and Assessment Regulation and prepare submission to the Dept of Planning.
- ♦ Attended Department of Planning workshop on changes to Part 5
- ♦ Meet with Minister for the Environment and peak conservation groups.

Commonwealth Government

- ♦ Submission on the National Registration Authority
- ♦ Attendance at a workshop conducted by the Administrative Review Council
- ♦ Submission on AIDAB's Ecologically Sustainable Development Policy
- ♦ Attendance at Tripartite Workshop on Environmental Impact Assessment conducted by CEPA
- ♦ Attendance at CEPA Workshop on the National Pollutant Inventory and preparation of detailed submission
- ♦ Submission to the Government on the Access to Justice Report
- ♦ Attendance on EPA Advisory Board

....and they were just some of the things that EDO did in 1994

IMPACT is published by the Environmental Defender's Office Limited, a Sydney-based independent community legal centre specialising in environmental law.
Printed on 100% recycled paper.