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On the cover of this issue of IMPACT! is a Leadbeater’s Possum, *Gymnobelideus leadbeateri*. These tiny marsupials, once known as fairy possums, live in forests not far from Melbourne. Thought to be extinct until its re-discovery in 1961, the species is now listed as critically endangered and numbers less than 2000 in the wild. The Leadbeater’s Possum faces “managed extinction” unless steps are taken to save its old growth mountain ash habitat.

Daniel Wiseman, in his case note, examines the decision of the Victorian Supreme Court in *MyEnvironment v VicForests* [2012] VSC 91, where the group MyEnvironment sought to prevent logging in three coupes in a habitat area of the Leadbeater’s Possum. After a brief background to and analysis of the case, Daniel highlights the importance of public interest cases to the development and enforcement of Australian environmental law, even where a group is not successful on the particular legal issue in dispute. Such cases highlight that legal frameworks often fall short of providing adequate protection to the environment.

Several key State and Federal environmental law and policy frameworks are currently under review, including the key piece of federal legislation, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). In her article, Rachel Walmsley provides an overview of the Council of Australian Government’s agenda for environmental law reform, noting with concern the proposal to ‘streamline’ the process for approvals of major projects. Federal Environment Minister Tony Burke has also noted that the reforms will ‘cut green tape’ – does this mean cutting unnecessary duplication, or giving the green light to controlled actions without sufficient oversight?

Planning law is often the central framework used in seeking to achieve better environmental protection. As Cerin Loane discusses, the NSW planning system is currently under review. Cerin identifies a ‘real risk that new legislation will fall short of ensuring that development in NSW is carried out in accordance with the principles of ecologically sustainable development’.

These pressures on ecosystems from development are set in the broader context of a changing climate. As of 1 July 2012, Australia will have a price on carbon, as part of the Clean Energy Legislative Package, which will transition to an emissions trading scheme in 2015. Ben Winsor examines the importance of and challenges involved in enforcement of emissions reports and permit trading under this new regulatory framework.

Special thanks to Dan Harley for the use of his beautiful image on the cover of this month’s impact. Dan completed his doctorate on the population ecology of the Leadbeater’s Possum, and is currently establishing a captive-breeding program for the species at Healesville Sanctuary. His work for Zoos Victoria focuses on improving the success of captive-breeding and release programs for a range of threatened species.

If you would like to submit an article for publication in a future edition of IMPACT!, please contact the editor at emma.coeks@edonsw.org.au or call (02) 6621 1113.

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**Editor**
Emma Cocks
Victory in defeat: A case note on *MyEnvironment Inc v VicForests* and the importance of public interest environmental litigation

Daniel Wiseman, law student, the University of Melbourne and volunteer, EDO Victoria

On 14 March 2012, the Victorian Supreme Court handed down judgment in the case *MyEnvironment Inc v VicForests*. Osborne J held that the law did not prevent VicForests from logging an area of mountain ash forest near Toolangi in Victoria that provides a likely habitat for the critically endangered Leadbeater’s Possum.

Despite the decision ultimately going against the local environmental group, MyEnvironment, the case demonstrates the critical importance of public interest environmental litigation as a means of testing environmental laws, highlighting the need for reform and achieving practical outcomes for the preservation of endangered species and ecosystems.

After first providing a brief background and analysis of the Court’s decision, this case note will outline why public interest cases, such as the one brought by MyEnvironment, are so important to the development and enforcement of Australian environmental law, even where the particular legal issues in dispute may be decided against the community group bringing the case.

**Background**

Thought to be extinct until it was rediscovered in the 1960s, the Leadbeater’s Possum is listed as endangered under the *Victorian Flora and Fauna Guarantee Act (1988)* (‘FFG Act’). The Possum’s habitat is limited to a very small geographical area in the Central Highlands near Toolangi and it is dependent on the presence of a combination of large living and dead ‘hollow bearing trees’ for nesting, and a dense understorey of acacia trees. The Black Saturday Bushfires in 2009 substantially destroyed much of the ash forest that provides the habitat required by Leadbeater’s Possums and reduced the existing population by almost half. The same fires also destroyed significant areas of ash forest in the areas that were earmarked to become available for timber harvesting. The management prescriptions affecting the forest were formulated prior to the 2009 fires and the impacts of the fires were consequently not in contemplation when the protection measures for the Leadbeater’s Possum habitat were determined.

“This case demonstrates the critical importance of public interest environmental litigation as a means of testing environmental laws and highlighting areas in need of reform.”

In bringing the case against VicForests, MyEnvironment sought to prevent logging from taking place in three coupes in the Toolangi area. In one of the coupes (Gun Barrel), logging had already commenced. In the other two coupes (Freddo and South Col), logging was proposed to shortly commence. According to preliminary ecologists’ reports obtained by MyEnvironment and expert evidence given during the hearing, each of the coupes contained important habitat appropriate for Leadbeater’s Possums.

MyEnvironment sought to restrain VicForests from logging these three coupes on two separate bases. The first basis was that the proposed logging of the three coupes was in breach of protection measures for the Leadbeater’s Possum under the statutory regime regulating the management of Victorian State Forests. The second basis was that the logging of
the three coupes by VicForests was in breach of the precautionary principle, given the logging’s potential to have a serious or irreversible effect on the survival of the Leadbeater’s Possum as a species.

**Statutory regime protecting the Leadbeater’s Possum**

The statutory framework regulating the management of Victorian State Forests involves a number of interrelated pieces of legislation and regulations. Under the Action Statement relating to the Leadbeater’s Possum, prepared under the FFFG Act, areas of potential optimum habitat for Leadbeater’s Possums, identified by reference to particular vegetation characteristics, are required to be conserved. Drawn from this action statement, almost identical requirements are provided for in the Central Highlands Forest Management Plan (‘FMP’) prepared under the Forests Act 1958 (Vic), which VicForests is obliged to comply with pursuant to the Timber Release Plan, prepared for that area under the Sustainable Forests (Timber) Act 2004 (Vic) (‘SFT Act’).

The key question the court was required to consider was exactly what vegetation characteristics attracted protection measures under the Leadbeater’s Possum Action Statement or the FMP. The language of both the Action Statement and the FMP was ambiguous as to whether timber harvesting exclusion zones applying to Leadbeater’s Possum habitat were to be determined by reference to specified densities of ‘mature or senescing hollow bearing trees’ or to any ‘hollow bearing trees’ at all, in a particular area. The evidence showed that if, on their proper construction, the Action Statement or the FMP referred broadly to any ‘hollow bearing trees’ at all then the coupes would contain the required density to attract the exclusion zone protection and thus logging by VicForests would be prohibited. Conversely, if the Action Statement and the FMP were found to refer more narrowly only to ‘mature or senescing hollow bearing trees’ then the areas in question would not meet the requirements for classification as zones to be excluded from logging activities.

Determining at the outset that the Leadbeater’s Possum Action Statement did not impose the relevant obligations on VicForests independently of the FMP, the Court decided that the relevant language of the FMP referred to ‘mature or senescing hollow bearing trees’ only. Consequently, exclusion zones were only required where more than 12 ‘mature or senescing hollow bearing trees’ could be identified in an area greater than three hectares. Such an area could not be identified in any of the three coupes. In reaching this decision, the Court focused on the text of the FMP and found that, although the section defining the relevant Leadbeater’s Possum Habitat Zones referred broadly to ‘living trees containing hollows’, further sections of the FMP, including the management prescriptions section, indicated that this should be read more narrowly to only include ‘living mature and senescing trees’. In the course of his reasoning, Osborne J also discussed the importance of the context and purpose of the Action Statement and the FMP and concluded that the research papers giving rise to the regulations supported the textual interpretation giving priority to the protection of ‘old hollow bearing trees’. In light of this finding, the first basis on which MyEnvironment put their case failed.

**Precautionary principle**

The second basis for MyEnvironment’s case relied on the precautionary principle, which is contained in clause 2.2.2 of the Code of Practice for Timber Production 2007 (Vic). The Code broadly regulates the way logging is carried out in Victoria – it is made under the Conservation, Forests and Land Act 1987 (Vic), and made binding on VicForests under the SFT Act.

The precautionary principle as contained in clause 2.2.2 of the Code provides that:

> when contemplating decisions that will affect the environment, the precautionary principle requires careful evaluation of management options to, wherever practical, avoid serious or irreversible damage to the environment; and to properly assess the risk-weighted consequences of various options. When dealing with threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

In his decision Osborne J found that VicForests is required to apply the precautionary principle in its timber harvesting operations, despite the absence of further reference to the precautionary principle in the FMP.

Ultimately, however, the Court found that the proposed logging in Gun Barrel Coupe did not contravene the precautionary principle and that the proposal to log the two other coupes was not sufficiently advanced to enable a threat to the Leadbeater’s Possum or its habitat to be specifically identified. His Honour found that the logging did not constitute a real threat of serious or irreversible damage to the Leadbeater’s Possum or its habitat. This was based on a combination of factors, including concessions by VicForests contained in an initial open offer of compromise to only log limited areas within the coupe and their undertaking to implement ‘variable retention harvesting’ rather than
‘clearfell harvesting’ in order to retain potential habitat trees. The lack of direct evidence of Leadbeater’s Possums having been observed in the area and the fact that the proposed logging was a component of a broader FMP conserving other habitat areas also contributed to the Court’s finding that the precautionary principle was not enlivened in relation to Gun Barrel Coupe. Consequently, the second basis on which MyEnvironment brought their case also failed.

**Analysis**

Following the case, Victorian Agricultural Minister Peter Walsh commented that the case was a waste and ‘a deliberate tactic to tie up resources’, and that the decision ‘endorses Victoria’s sustainable forestry practices’. Although he has subsequently apologised to MyEnvironment and retracted his statements, such comments are indicative of a broader view that sees public interest environmental litigation as just another piece of green tape tying up public resources.

What such a perspective fails to take into account, however, is that endangered species such the Leadbeater’s Possum have already been publicly deemed to be worthy of protection through their inclusion in the FFG Act and relevant FMPs. Public interest environmental litigation is necessary to ensure that public authorities are acting in accordance with these protection measures. Perhaps even more importantly, when protection measures are failing to achieve their intended purpose, public interest environmental litigation is essential in testing the legal framework and exposing any shortcomings it may have in protecting a particular species, such as the Leadbeater’s Possum.

Despite an ultimately unfavourable outcome for MyEnvironment, some important practical consequences for the protection of Leabeater’s Possum habitat follow from the case. In response to the arguments and evidence presented by MyEnvironment, during the trial, VicForests agreed to significantly scale back its planned logging in the Toolangi coupes, to exclude certain areas from logging, to refrain from its usual practice of burning the forest after logging, and instead to adopt a ‘variable retention harvesting’ method to retain a greater number of appropriate nesting trees and encourage long term rehabilitation of the coupes. As a result, the environmental damage caused by any logging within the Toolangi coupes will be greatly reduced, if not entirely excluded, as compared to the extensive clear-felling that would have occurred if the case had never been brought.
If VicForests had not made these concessions during the trial, the Court’s final decision may have been very different. If VicForests hadn’t been faced with Supreme Court proceedings, it is unlikely that they would have made such concessions at all.

Perhaps even more importantly, the case highlighted the inadequacy of the legal protections in place for the Leadbeater Possum, particularly following the dramatic ecological changes brought about by the 2009 bushfires. As Preston CJ of the NSW Land and Environment court has noted extra-curially, environmental litigation and the judicial adjudication of it has an important role to play ‘to expose weakness in the law and suggest law reform’.1 In this way, ‘the court serves as a catalyst, not a usurper of the legislative process.’2 Rather than endorsing Victoria’s ‘sustainable forestry practices’ as Minister Walsh suggested, Justice Osborn’s decision shows how our current environmental laws and their implementation are inadequate. Summarising his decision, Osborn J stated that:

the evidence called by MyEnvironment demonstrates a strong case for the overall review of the adequacy of the reserve system intended to protect [Leadbeater’s Possum] habitat within the Central Highlands Forest Management Area. The 2009 bushfires have materially changed the circumstances in which the existing system was planned and implemented and there is, on the evidence, an urgent need to review it.3

This perspective was echoed by VicForests’ Director for Corporate Affairs, who, following the conclusion of the case, publicly supported the Court’s suggestion of a review of the zoning system for Leadbeater’s Possum in light of the 2009 bushfires.4

Conclusion

While the Court’s ultimate decision did not go in favour of MyEnvironment, the outcome of the case was far from a loss for the Leadbeater’s Possum. As the case demonstrates, public interest environmental litigation is about more than the simple resolution of competing legal rights from which clear winners and losers can be determined. The interests of groups such as MyEnvironment are not simply confined to the issues in dispute but concern the broader public interest – in this case, the protection of species or ecosystems that would otherwise be without advocates.

As is evident in the practical outcomes secured by MyEnvironment for the Toolangi coupes, there are real benefits to be realised from holding public authorities to account through the court system. Even more importantly, the testing of environmental laws through the court system helps to remove any ambiguity and highlight specific weaknesses in the law. This is particularly relevant in the environmental context, where ecosystems are subject to constant dynamic changes such as those wrought by the 2009 Black Saturday Bushfires. It is for these reasons that public interest cases like *MyEnvironment Inc v VicForests* are so critical to ensuring that public authorities are complying with environmental laws, revealing when they are failing to do so and highlighting when the laws themselves are inadequate.

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1  This case note expands on a blog post by EDO Victoria solicitor Nicholas Croggon: ‘Why the Toolangi Case was so Important’, Environment Defender’s Office Victoria Blog (15 May 2012), <www.edovic.org.au/blog/why-toolangi-case-was-so-important>.
3  Ibid [12].
4  Ibid [29].
5  Ibid [289].
6  Sustainable Forests (Timber) Act 2004, s 46.
7  Ibid [9].
8  Ibid [214].
9  Ibid [251].
10  Ibid [238].
11  Ibid [200].
12  Ibid [264].
13  See Ibid [33].
14  As reported: <www.abc.net.au/news/2012-03-14/legal-setback-for-environment-group/3889824>.
15  See Peter Walsh, ‘Minister for Agriculture and Food Security’ (Media Release, 30 May 2012) <http://peterwalsh.org.au/_blog/Media_Releases/post/Retraction_And_Apology_To_Myenvironment_Inc_.>.
The COAG environmental law reform agenda

Rachel Walmsley, Policy Director, EDO NSW

The role of the Commonwealth Government in environmental assessment and development approval is under review.

Formally, the 10 year review of the Environment Protection & Biodiversity Conservation Act 1999 ('EPBC Act') commenced in 2009 when the Commonwealth Government commissioned an independent review process ('Hawke review'). The Hawke Review Report made 71 recommendations to strengthen and improve the EPBC Act and clarify the scope and purpose of Commonwealth involvement in environmental matters. While the Hawke review did recommend streamlining some regulatory processes and increasing the use of strategic assessments and bilateral approval processes, it also recommended additional matters of national environmental significance (including an interim greenhouse trigger), establishment of a federal Environment Commission, and improved enforcement, including greater access to courts for public interest litigation.

Almost two years later, in July 2011, the Commonwealth Government made a formal response to the Hawke Review Report, and rejected a number of recommendations aimed at strengthening the EPBC Act. A clear emphasis in the Government response is the aim to 'substantially deregulate and improve efficiency.' A Bill amending the EPBC Act to implement the detail of the preferred reforms is expected to be introduced to Federal Parliament in the 2012 Winter Session.

More recently, in a move that pre-empts the introduction of amending legislation, the Council of Australian Governments ('COAG') announced a concurrent reform agenda. On 13 April 2012, COAG agreed to major reforms of Australia’s environmental and development assessment laws. The reforms, proposed by the business community, target 6 priority areas:

- addressing duplicative and cumbersome environment regulation;
- streamlining the process for approvals of major projects;
- rationalising carbon reduction and energy efficiency schemes;
- delivering energy market reforms to reduce costs;
- improving assessment processes for low risk, low impact developments; and
- best practice approaches to regulation.

“There is no evidence presented to show that the reforms will maintain environmental protection or guarantee public participation in the assessment processes.”

At a first reading, these priorities seem like common sense – no-one is advocating that we need a duplicative or inefficient regulatory system. However, on closer analysis the proposed reforms are extremely concerning for at least three reasons - the existence of sectoral bias; the abrogation of Commonwealth legal
The Commonwealth has an essential role in implementing environmental responsibilities; and because the reform criteria do not relate to improved environmental outcomes.

First, the proposals come from one sector - the business community as represented by the new COAG Business Advisory Forum. No such forum exists for any other sector of the community. In comparison, the Hawke Review process sought and analysed specific feedback on this same issue, involving 220 submissions, 119 supplementary submissions, as well as face-to-face consultations in each State and Territory with industry, NGOs, the community, individuals, research groups and academics, individual corporations and Government agencies from every level of government in every State and Territory. In contrast, the COAG reforms represent the view of one sector.

Second, on a closer examination of what is proposed with regards to the use of approval bilateral, strategic assessment and harmonised standards, the Business Advisory Forum is essentially seeking to effectively remove the Commonwealth from the development assessment process by delegating these powers to the States. This is flawed for many reasons including that:

- States are not legally mandated to act in the national interest;
- States may have inherent conflicts of interest where they are proponents of major projects;
- The Commonwealth is responsible for implementing Australia’s international environmental obligations, for example to protect world heritage sites, Ramsar wetlands and federally listed threatened and migratory species; and
- The Commonwealth has an essential role in requiring consistent environmental standards and oversight of State processes relevant to matters of national environmental significance.

The Commonwealth must not abrogate its legal responsibilities in this area. As noted by the Government itself in the 2011 State of the Environment Report:

Our environment is a national issue requiring national leadership and action at all levels… The prognosis for the environment at a national level is highly dependent on how seriously the Australian Government takes its leadership role.

It is interesting that in recent weeks, notwithstanding the Government’s adoption of the COAG reforms, the Federal Minister for the Environment has been publicly scathing of State-based approval processes. Minister Burke referred to the State-based assessment of the Alpha Coal Project in Central Queensland as ‘shambolic’ in its failure to meet Commonwealth standards. Instead of indicating that dual approval requirements are ‘cumbersome’ or ‘unnecessary’ as suggested by the business sector, the Alpha Coal case study clearly reinforces the need for rigorous Federal Government oversight and the maintenance of high national standards, particularly where an iconic matter of national significance such as the world Heritage-listed Great Barrier Reef is involved.

Third, the reforms are not about ensuring improved environmental outcomes. The two criteria upon which current regulatory processes are judged under the COAG model are: cost to developers and time for assessment. The COAG reforms are therefore essentially designed to reduce cost and time delays for new projects. There is no evidence presented to show that the reforms will maintain environmental protection or guarantee public participation in assessment processes. Conversely, there is evidence to show that schemes to ‘fast-track’ approval of major projects do reduce the rigour of environmental assessment and public participation. The environmental consequences of fast-tracking major projects (including those projects with the greatest potential impacts regarding carbon emissions, water usage, land clearing, pollution, human health, biodiversity and cultural heritage) have not been quantified, nor is there a clear process for accounting for these impacts and assets, and the impacts of major projects on key environmental services. The COAG reforms are incorrectly premised on the assumption that any so called ‘green tape’ is unnecessary, instead of accommodating the unavoidable fact that adequate time must be allowed for comprehensively and accurately assessing the potentially irreversible impacts of a proposed development. Such a short-term economics-based approach is inconsistent with the principles of ecologically sustainable development (to which all Australian governments are formally committed through various legislation and agreements), including principles of intergenerational equity.

While some of the COAG proposals (such as the development of standards), can occur independent of parliamentary processes, it is yet to be seen to what degree the COAG announcements have significantly altered the content of the amending EPBC Bill.

However, in concluding, it is also important to note that the COAG reforms are not just about the EPBC Act or federal legislation, but are relevant to environmental planning and assessment in each State. The ‘streamlining’ agenda is far-reaching. In this context, the Australian Network of Environmental Defender’s Offices Inc (ANEDO) has prepared an initial response In Defence of Environmental Laws. The ANEDO paper identifies a number of public interest benefits
to having robust environmental laws at all levels of government including that:

• Environmental laws lead to better decision-making as, with principles of ESD at their core, they ensure that long-term economic, environmental, social and equitable considerations are all taken into account. Environmental laws ensure, therefore, that complex assessments of long-term impacts are not based solely on criteria of time and costs.

• Environmental laws secure the rights of the community to be involved in decision-making and allow communities to contribute valuable information about developments in their local community.

• Environmental laws promote transparency and accountability by including reporting requirements, access to information and review rights.

• Environmental laws do not just protect the environment. When properly implemented, they can help to address social disadvantage and ‘fairness’ in the legal system. For example, it is not uncommon that individuals from marginalised or lower socio-economic groups are more often exposed to inappropriate developments which lower air quality, water quality or the amenity of an area, with flow-on effects leading to ill-health, reduced land values, disadvantage and disempowerment. Environmental law can, for example, play a crucial role in assisting Aboriginal Australians to protect their cultural heritage.

• Environmental laws can ensure rigorous, objective, science-based approaches are taken to assessing the environmental impacts of development proposals.

For further information on the many public benefits of environmental law and analysis of both the ongoing EPBC Act review process and the COAG reform process, please refer to the EDONSW and ANEDO websites.13

3 Australian Government response to the report of the independent review of the EPBC Act, p 3.
4 Ibid.
11 For example, see analysis of Part 3A of the Environmental Planning & Assessment Act 1979 (NSW), which has now been repealed. Analysis and case studies of Part 3A processes are set out in EDO NSW planning submissions available at: <www.edonsw.org.au>.
12 Available at: <www.edo.org.au>.
The role of planning laws in protecting the environment

Cerin Loane, Policy Officer (Planning), Nature Conservation Council of NSW

When it was introduced in 1979, the New South Wales Environmental Planning and Assessment Act ('EP&A Act') was celebrated as being one of the most progressive planning systems in the world. It was described as 'a system of environmental planning under which decisions on land use and resource management are made within the physical capacity of the environment in order to promote the economic and social welfare of the people of NSW'.

The EP&A Act recognised the value of genuine public participation as an essential component of good governance and democracy which leads to better decisions. It also introduced a robust system of environmental impact assessment that provided a mechanism for identifying and assessing the potential environmental impacts of a development before determining development applications.

Fast forward to 2012, and the EP&A Act has been widely criticised for losing those features that were once held in such high regard. Throughout the last decade some of the key components of the Act have been weakened and the planning system has become, in some instances, complicated and uncertain. Indeed, by the time the State elections came around in early 2011, the NSW planning system had become a strong symbol of community discontent and disconnection.

The repeal of the controversial ‘Part 3A’ major projects provisions, and the announcement of the Coalition government to review the NSW planning system were intended to restore the integrity of and confidence in the system. There is, however, a real risk that new legislation will fall short of ensuring that development in NSW is carried out in accordance with the principles of ecologically sustainable development ('ESD').

A planning system that protects the environment

Land use planning and development is intrinsically linked with environmental protection, nature conservation and natural resource management ('NRM'). This is because actions that may affect the environment and our natural resources are regulated, either directly or indirectly, through the planning system. The impact of planning and development on the environment is therefore a key consideration for decision makers in preparing planning instruments and determining development applications. Conversely, land use planning has the potential to support the achievement of environmental outcomes including the protection and sustainable management of water resources, biodiversity, agricultural land and basic raw materials.

Under the current planning system in NSW, where encouraging ESD is one of ten equally-weighted objects, environmental considerations are often set aside in favour of economic outcomes. With the twentieth anniversary of the Rio Declaration upon us, it is time to re-engage and reinvigorate the commitment to ESD – adopted explicitly in NSW planning and environmental laws in the late nineties – to ensure planning decisions are made ‘within the physical capacity of the environment’.

Starting from a premise that ESD should be the overarching objective of a new planning system, it is imperative that all decisions, powers and functions are underpinned by the principles of ESD. A genuine commitment to ESD requires legislative mechanisms that mandate consideration of environmental matters...
and set minimum environmental standards. It also requires a legal framework that supports genuine and meaningful public participation and ensures that decision makers are accountable.

**Long-term strategic planning**

An effective planning system must endeavour to provide a clear and structured framework for long-term strategic planning (for example, through a State plan or regional plans), that subsequently set the direction and outcomes for land use planning policies at a local level. An effective strategic planning process allows proper consideration of vital long-term issues such as ESD, biodiversity and connectivity, access to green space and infrastructure, climate change and population planning. Such a framework would require:

- interagency collaboration and sharing of data across sectors;
- baseline studies of environmental and natural resource values;
- strategic environmental assessment that includes mandatory consideration of prescribed environmental criteria, including an assessment of cumulative impacts and climate change;
- consistency with other government strategies, including, for example, in the areas of NRM, transport, infrastructure and health;
- identification of competing land uses and values and mechanisms for achieving environmental outcomes;
- early, sustained and genuine community engagement in strategic and land use planning processes; and
- appropriate statutory weight for, and hierarchy, between planning instruments.

**Ensuring decision makers are required to give proper consideration to environmental impacts and ensure environmental outcomes are achieved**

While there is a general recognition that planning processes need to be improved, the efficacy of the planning system should not be judged solely on its ability to achieve assessment processing timeframes or development approval rates. More fundamental to the effectiveness of the planning system is its ability to produce ecologically sustainable outcomes. Fast approvals that deliver poor quality, high risk or unsustainable development are not in the public interest. As the Productivity Commission noted in its benchmarking report on Australian Planning Systems:

> “…a combination of several benchmarks is often needed to reflect system performance. For example, while longer development approval times may seem to be less efficient, if they reflect more effective community engagement or integrated referrals, the end result may be greater community support and preferred overall outcome.”

“**Land use planning and development is intrinsically linked with environmental protection, nature conservation and natural resource management.”**

A planning system that is heavy with discretionary decision making processes will often result in environmental considerations losing out to development and economic interests. This can be redressed with robust, objective decision making tools that ensure environmental standards are met at the approval stage. For example:

- requiring development to meet threshold tests (such as a rigorous ‘improve or maintain’ test) for key environmental values such as biodiversity, native vegetation, catchment health and water quality, energy and water use, climate change and pollution; and
- prescribing mandatory standards in codes or guidelines that reflect best practice.

Once these objective standards are met, a more subjective, values-based approach can be used for assessing matters such as the suitability of the site, form and design, and whether or not it is appropriate for the decision-maker to consider aesthetic and other planning considerations, such as overshadowing, bulk, and set-backs.

This two-stage approach is consistent with an overarching objective of achieving ESD and ensures that development is undertaken within the physical capacity of the environment. Further, this objective approach has the benefit of reducing uncertainty, ensuring that decisions are transparent and that decision makers are accountable, and helping to restore the community’s confidence in the planning system.

**Genuine and meaningful public participation**

Genuine and meaningful public participation has the benefit of empowering local communities, utilising local...
knowledge and improving decision making by assisting decision makers to identify public interest concerns. It also promotes community ‘buy-in’ of decisions which can reduce potential disputes and can help to ensure fairness, justice and accountability in decision making. Public participation in policy development, combined with greater accountability, is also recognised as being essential to achieving ESD.12

A 2010 study by the Grattan Institute, Cities: Who Decides?, drew comparisons with eight cities comparable to Australia and found:

where hard decisions had been implemented, there was early, genuine, sophisticated and deep public engagement... [and that]... if we want to face our hard decisions in a way that makes our cities better places to live, including residents is not optional.13

The community must therefore be encouraged and able to participate in a genuine and meaningful manner in relation to all aspects of the planning system, from strategic planning, development assessment and post-approval monitoring. The public interest value and benefit of these processes must not be sacrificed simply to increase the speed of development assessment. Further, public participation must go beyond traditional models that simply ‘inform’ and instead seek to ‘engage’ the community.

A preliminary review of the planning legislation across Australia indicates that, in general, Australian planning legislation prescribes traditional, and what would now be seen as minimum, requirements for community engagement rather than best practice. Effective public participation needs to:

- Inform – the information provided should be transparent, accurate and easy to understand.
- Engage – the process is not simply the passive supply of information but seeks to encourage views and engage informed opinion.
- Interrogate – information can be complex but resources should be provided to allow interrogation and translation.
- Facilitate dialogue – there should be attempts to bring various stakeholders together to devise solutions on a level playing field.
- Evaluate – the success or otherwise of the effort is reviewed and lessons learnt.

A new planning system in NSW should aim to drive the much needed improvements in community engagement by incorporating legislative provisions that facilitate genuine and meaningful participation. The provisions should be underpinned by core values of public participation and ensure that consultation processes achieve prescribed outcomes.

**Mechanisms for accountability, compliance and enforcement**

In order to ensure that provisions designed to protect the environment are effective, the planning system must include robust checks and balances to ensure that decisions are lawful, impartial and based on best practice planning principles; and that laws are properly enforced. There are well documented benefits of having court-based review rights in the planning system – including participatory democracy, executive accountability, institutional integrity, improved decision making and rational development of the law.14

NSW is fortunate to have a specialist court, the Land and Environment Court (‘LEC’), to deal with land, planning and environmental law matters. A key theme to the reforms that created the Court and the EP&A Act was the general public’s right to participate in environmental planning processes – particularly through appeal rights and ‘open standing’ to enforce the law.

The LEC has been an innovative model for environmental protection, and a model for other similar courts in Queensland and South Australia. The LEC has also been an important source of Australian environmental jurisprudence, including on the precautionary principle and other facets of ESD. Notwithstanding these advances, there is still room to improve accountability, access to justice and the quality of citizen participation in environmental decision-making, including through the LEC.16

The challenge for the planning system in 2012 is to resolve some of the tensions between competing economic, social and environmental needs of our society, while recognising the declining state of our natural environment and ensuring that it is afforded the protection required to sustain future generations. This can be achieved by adopting innovative environmental assessment methods supported by modern technology that facilitate the sharing of environmental data and to support objective decision making methodologies. The review of the New South Wales planning system should be seen as an opportunity to develop a modern planning system that is consistent with contemporary community expectations and is equipped to deal responsibly with the environmental and demographic challenges that lie ahead.
The Nature Conservation Council of NSW, Total Environment Centre and EDO NSW have recently finalised a report titled Our Environment, Our Communities - Integrating environmental outcomes and community engagement in the NSW planning system. This report looks at various initiatives throughout Australian and overseas, and proposes a legislative framework for integrating environmental outcomes and community engagement in planning processes. For a copy of this report, please phone NCC on (02) 9516 1488 or email policy@nccnsw.org.au.

1 NSW Parliamentary Debates, Legislative Assembly, 17 April 1979, 4278, (Hon Mr Haig, Minister for Corrective Services).

2 For example amendments to the Environmental Planning & Assessment Act 1979 (NSW) (‘EP&A Act’) give the Minister wide ranging discretion in relation to making environmental planning instruments. Public consultation with respect to State environmental planning policies is at the discretion of the Minister (s 38, EP&A Act), and with respect to LEPs, public consultation occurs at the ‘gate-way’ stage but is no longer required on draft LEP. Additionally, there is no longer a requirement to prepare a local environment study for the preparation of LEPs. Instead the level of environmental assessment is at the discretion of the Minister (s 54, EP&A Act).

3 ESD principles include, for example, the precautionary principle; inter-generational equity; conservation of biological diversity and ecological integrity; and improved environmental valuation, pricing and incentive mechanisms. See further the Protection of the Environment Administration Act 1991 (NSW), s 6.


6 For example, the former Minister for Planning previewed the introduction of the Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005, which introduced the former Part 3A, with these words: ‘the wellbeing of our economy depends on business being able to work with certainty, a minimum of risk, low transaction costs, and appropriate levels of regulation. This bill demonstrates the Government’s determination to take decisive action to achieve these objectives. By establishing greater certainty in the assessment of projects of State significance and major infrastructure projects, the bill further assists in the Government’s desire to afford opportunities for the private sector to participate in the delivery of our infrastructure programs’. Part 3A has been criticised for weakening integration with natural resource legislation and restricting public participation and accountability through merits appeals.


8 For example, s 79C of the EP&A Act prescribes matters for consideration by the decision maker in determining a development application. Section 79C does not prescribe how the matter is to be considered by the decision maker (for example, it does not prescribe weight to be given to each matter, or any level of satisfaction that the decision maker must reach in considering a certain matter).

9 It is noted that an ‘improve or maintain’ test is already used in some areas in NSW. For example, the Native Vegetation Act 2003 (NV Act) establishes an ‘improve or maintain environmental outcomes’ test with respect to broadscale clearing of native vegetation on rural land. The State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011 requires that development in the Sydney drinking water catchment have a neutral or beneficent effect on water quality. It is also noted that the Western Australian Environmental Protection Authority has proposed a ‘net environmental benefit’ standard in its discussion of biodiversity offsets, and a similar test has been proposed in Victoria.

10 Eg, most industries would have some type of Code or Best Practice Guidelines in place for development or operations. The planning system should facilitate integration with industry standards by requiring industry codes to be in place and development to be compliant with such codes; see also, eg, the draft Australian Standard for Climate Change Adaptation for Settlements and Infrastructure, <http://www.asbec.asn.au/files/DR_AS_5334_Draft_Adaptation_Standard_8Sept2011.pdf> at 4 June 2012.

11 In a similar vein, and consistent with the desire for more objectivity is ICAC’s recommendation that the NSW Government ensures that discretionary planning decisions are made subject to mandated sets of criteria that are robust and objective, Independent Commission Against Corruption ‘Anti-Corruption Safeguards And The NSW Planning System’ February 2012.


15 For further information and references on these matters, see EDO NSW ‘Submission to the Review of the NSW Planning System (Stage 1)’, November 2011, pp 32-33, <http://www.edo.org.au/edonsw/site/pdf/subs/111104review_new_planning_stage_1.pdf> at 14 June 2012.

16 In the area of appeal rights, for example, the balance is tipped solidly in favour of developer proponents. The Department of Planning and Infrastructure’s Local Development Performance Monitoring reports that in 2010-2011 there were 378 developer appeals and only 4 objector appeals. In other words, less than 1% of development determinations are appealed overall, and only 1% of these appeals are made by objectors. This in part reflects the additional resources available to developers, but also reflects the imbalance of when merit appeal rights are available.
The Gillard Government’s fixed price Emissions Trading Scheme (‘ETS’) commenced on 1 July 2012. The scheme applies to entities which emit more than 25 000 tonnes of carbon dioxide equivalent gases (‘CO2-e’) each year, being roughly 500 Australian businesses. These companies will have to purchase carbon permits for each tonne of CO2-e emitted. The system will operate effectively as a tax for the first three years, with a fixed price placed on carbon permits. After this, the permit price will be floated, with an overall cap placed on the number of permits issued each year. This will allow the market to price emissions, allocating permits to where emissions are most profitable, and cuts to where they will be most efficient. While much of the focus of business and the broader public will be on the price effects of the mechanism, lawyers and regulators will need to give particular attention to how compliance will be enforced under the regulation. This article will examine the enforcement of emissions reporting and permit trading under Australia’s newest regulatory framework, the ‘Clean Energy Future Package’. It will focus on the unique compliance challenges in an ETS, examine why a high rate of compliance is so important, and explore how Australia’s policymakers plan to meet these challenges.

On compliance

Compliance in an ETS is important not only for achieving environmental targets, but also for ensuring market integrity, price stability and investor confidence. An ETS is known as a ‘market mechanism’ because it necessitates the creation of a market in tradable emissions allowances. In Australia, these are known as ‘carbon units’ or ‘Australian Carbon Credit Units’ (‘ACCUs’). Market players then buy and sell these units either for investment purposes, or to surrender to the Government to cover their emissions.

Permit trading in the European Union’s ETS is worth over $118 billion annually, with institutions such as Barclays and Citibank trading the units as commodities. It is desirable to have such investors because this smooths out unit prices over time. Investors aim to buy low and sell high, adding extra demand when prices are low and extra supply when prices are high. Policymakers and businesses have a mutual interest in ensuring high levels of compliance. As businesses in an ETS invest considerably in the unit market, enforcing compliance amounts to protecting their interests. Carbon units are sui generis intangible property rights, reliant on compliance with the scheme underpinning them to give them value. This is not an esoteric legal or economic theory; compliance levels in an ETS have a direct impact on the dollar value of units. High compliance will result in a higher and more stable unit price, while low compliance will result in the opposite. It is therefore in the interests of all market participants that compliance with the scheme be strongly enforced.

For an ETS to have integrity, emissions reports must be reliable, and permit markets must be secure. This article will explore the enforcement framework of Australia’s new ETS, detail how emissions reports will be verified, and examine the legal mechanisms which protect the permit trading market.

The framework

The Clean Energy Future Package, which establishes Australia’s ETS, comprises 19 Acts. The Clean Energy Act 2011 (Cth) (‘CE Act’) establishes the scheme itself, which is administered by the Clean Energy Regulator (‘CER’). The package also includes the National Greenhouse and Energy Reporting Act 2007 (Cth), the Carbon Credits (Carbon Farming Initiative)
The overall package has a clear governance structure. The Government and Parliament has control over policy decisions, such as setting emissions caps. The Minister for Climate Change and Energy Efficiency is responsible for developing regulations to adjust penalties, specifying monitoring and reporting methods, and setting other detailed standards. The CER administers the scheme - running the trading mechanism, investigating breaches, enforcing compliance, assessing offset projects, and overseeing industry assistance programs. The Productivity Commission will report on international emissions reductions, as well as the efficiency of industry assistance and fuel excise arrangements. Finally, a separate and independent Climate Change Authority, similar in structure to the Reserve Bank, will review and recommend emissions caps to parliament.

The clean energy regulator

The CER is an independent statutory body founded by the Clean Energy Regulator Act 2011 (Cth). The CER is established as a strong independent body, similar in design, power and purpose to the Australian Securities and Investments Commission ('ASIC'). The CER assumes responsibility for administering not only the Clean Energy Act, but also the Carbon Farming Initiative, the Renewable Energy Target, National Unit Registers, and the National Greenhouse and Energy Reporting System. Policymakers have sought to promote consistency and efficiency by absorbing the roles of several smaller bodies, and some functions of the Department of Climate Change, into the one national regulator. To perform its functions, the CER may liaise with other agencies, such as ASIC, the Australian Competition and Consumer Commission (‘ACCC’) and the Commonwealth Department of Public Prosecutions. A key role of the CER is ensuring that entities turn in accurate greenhouse gas emissions reports.

Monitoring, reporting and verification

Effective mechanisms for monitoring, reporting and verifying information ('MRV') are crucial for ensuring compliance in any form of environmental regulation. Ensuring accurate emissions reporting is a key enforcement challenge in an ETS. An emissions source has the incentive to under-report emissions so that they don't have to buy as many permits, can sell excess permits, or bank extra permits for later use. Thus, reliable MRV mechanisms are vital:
Misreporting emissions not only allows entities to gain an unfair advantage, the unreported excess emissions will also undermine the environmental integrity of the cap.

“Compliance in an ETS is important not only for achieving environmental targets, but also for ensuring market integrity, price stability and investor confidence.”

It was the US Environmental Protection Agency’s Acid Rain Program which first demonstrated the economic efficiency and environmental effectiveness of Emissions Trading Systems in practice. The program quickly cut sulphur dioxide emissions almost in half by compelling power plants to buy and sell permits to emit sulphur dioxide. The near 100 per cent compliance rate was in no small part due to stringent continuous monitoring technology which automatically generated emissions reports and sent them to the Environmental Protection Agency (‘EPA’). Unlike the gasses covered in the Acid Rain Program, however, greenhouse emissions occur in a variety of industrial sectors, from a multitude of different facilities and services, and at numerous levels of production. Accordingly, more flexible monitoring methods are required. The EU ETS, involving 28 countries, leaves it to each state to establish and enforce MRV mechanisms. Most sources across Europe monitor and report their emissions based on estimates calculated by fuel use. While the result has been a multitude of separate enforcement schemes, the EU system is considered a successful implementation of MRV methods.

The Australian ETS leverages the existing National Greenhouse and Energy Reporting System (‘NGERS’) as a monitoring and reporting framework. NGERS was passed into law in 2007 by the Howard Government in anticipation of an ETS. Companies have been reporting under the scheme since July 2008 and the Clean Energy Future Package has amended the legislation to include all entities liable under the ETS. The scheme uses regulations to specify approved methodologies for monitoring emissions, which must then be reported to the CER. Methodologies may involve a combination of direct measurement, site-specific sampling, fuel input calculations and/or estimates based on activity. The Department of Climate Change and Energy Efficiency intends to encourage staged increases in reporting standards as technology improves and the system becomes more sophisticated.

Amendments to the NGERS have increased penalties to a maximum of $1.1 million for liable entities found in breach of reporting obligations. However, such a penalty pales in comparison to the costs some companies may face by complying. Australia’s largest emitter, Macquarie Generation, will face a carbon price greater than $538 million in the first fixed-price year. More than 30 companies will face liabilities in excess of $50 million. For firms facing such high costs, there will be a significant incentive to under-report emissions despite the $1.1 million fine. To combat this, it is expected that entities producing in excess of 125 000 t CO\textsubscript{2}-e / year will undergo mandatory auditing. The Department of Climate Change also envisages using division 137 of the Commonwealth Criminal Code, which provides a penalty of up to 12 months imprisonment to individuals who provide false or misleading information.

The challenge of verifying the emissions reports under the ETS is dealt with in a similar way to the enforcement of corporate reporting requirements. Similar to taxation regulations, entities are required to maintain comprehensive monitoring and compliance records dating back 5 years. Accordingly, the CER has broad powers to check records, monitor compliance, investigate contraventions and take enforcement action. In its role as enforcer of reporting requirements, the CER has powers comparable to ASIC. The CER may examine records and documents and retain copies, similar to ASIC’s power to inspect company books. Clean Energy Inspectors may also enter premises to search for documents, as well as monitor, examine, measure, test, photograph and inspect anything of interest. A similar warrant exists for ASIC. The CER may also demand the production of information, or require testimony by notice, similar to ASIC’s powers to require a person to give evidence. Just as in the ASIC Act, the CER may compel a person to give evidence or produce documents, even if they may expose themselves to criminal liability. Comparisons between the CER and ASIC extend to the flexible enforcement options available to the CER.

**Enforcement options**

The Government has provided the CER with a range of enforcement options to address non-compliance under the ETS. The CER may issue infringement notices and administrative fines; seek enforceable undertakings;
or pursue civil and criminal penalties. This allows the CER to address minor contraventions, which might otherwise go unpunished, with infringement notices or minor penalties (one fifth of the maxima). The ability to use ‘enforceable undertakings’ will allow the CER to accept undertakings from an entity to ‘do a particular thing directed to compliance with their obligations under the Act, or to not do specific things which are not in compliance’. ASIC, which has a similar power, describes it as ‘one of our most flexible and effective remedies to improve and enforce compliance with the law’. The powers and discretion afforded to the CER reflect the importance of strong enforcement and high compliance under the ETS.

Permit trading
Emissions Trading Systems necessitate the creation of permit trading markets. These markets ensure that emissions cuts are made in the most efficient areas of the economy by putting a market price on pollution. This enables an ETS to be roughly 80% more efficient and cost effective than standard environmental regulation. In the Australian ETS, legal title to emissions permits stems from registration, in a similar way to the way property is dealt with under the Torrens System. Permit traders are required to register their ownership on the Australian National Registry of Emissions Units. The Clean Energy Act 2011 grants legal title to registered owners and protects bona fide purchasers for value who rely on the register. This approach limits disputes over legal title and gives certainty to transactions, encouraging the development of a stable market. Given the ability for carbon units to be treated as commodities and be traded in complex transactions, there also exists the ability for equitable interests to be registered. The effect of this provision is, as yet, unclear. Registered equitable interests may be treated in a manner similar to the Torrens caveat system. The Torrens System, however, does not allow equitable interests to gain indefeasibility through registration. The motive for recognising equitable interests in this manner may be to facilitate the development of markets in derivatives and other financial products, which may promote further price certainty. In any case, the clear intention of the registration and title process under the ETS is to promote market confidence and transactional certainty.

Register security
While legal security of title is critical, experience in Europe has shown that the practical security of trading markets is also highly important. In January 2011 the European Commission called a halt to trading across the entire EU ETS after 2 million units, worth more than €28 million, were stolen from accounts in Greece, Austria and the Czech Republic. This followed an attack in late 2010 in Romania which resulted in 1.6 million credits being stolen. EU account holders have also lost more than €3 million through phishing, which involves online fraudsters posing as authorities to request access codes. The European experience has shown that permit markets are susceptible to fraud because of the intangible nature of carbon units, the immediacy of transfers, and the ease of confirming payment. It may be tempting to think that Australia will not be as vulnerable because it lacks the sophisticated organised criminal networks which plague Europe. However, as noted by PricewaterhouseCoopers, physical location is irrelevant for cyber-criminals. To deal with this, the Regulator has been endowed with powers to delay and refuse transfers, suspend Registry accounts, and impose restrictions on the operation of accounts. The Australian Crime Commission has been consulting with the Department of Climate Change on these challenges. Their advice, however, remains classified.

Expectations
ETSs are complex regulatory frameworks which combine market regulation with environmental reporting. Experience has shown that ETSs are capable of delivering impressive environmental outcomes with even more impressive economic efficiency. In achieving this, compliance is critical. All aspects of the ETS, from environmental reporting to permit trading, must be strongly and effectively enforced. The Australian Government has taken note of the successes and failures of international schemes and has cherry-picked successful mechanisms from other forms of regulation. The CER has been provided with a strong legal foundation and flexible investigative and enforcement powers. For success, however, the CER must also be well resourced, and pursue effective and efficient enforcement strategies. Australia was the pioneer in using ETSs to combat greenhouse gas emissions. The NSW Greenhouse Gas Reduction Scheme, established in 2003, was the first time an ETS had been used to tackle climate change. Since then, however, Australia has been overtaken by regional, national and international schemes in Europe, New Zealand, Asia and the United States. Given the multitude of international experiences, and the prolonged political development of Australia’s National ETS, expectations for the scheme will justifiably be high.
1. CO₂ refers to carbon dioxide or greenhouse equivalent gases. Equivalent gases are measured by their greenhouse effect referenced against the greenhouse effect of carbon dioxide. The Australian ETS will cover CO₂, CH₄, N₂O and PFCs, with other greenhouse gases covered by existing legislation.


3. Allowances issued by the government under the overall emissions cap are known as carbon units. Units issued to organisations engaging in offsets projects, such as tree planting to reclaim carbon, are known as ACCUs.


15. Clean Energy (Consequential Amendments) Act 2011 (Cth) sch 1 pt 2 items 293, 308.


20. Based on 2009/10 NGERS reports.


23. Email from Department of Climate Change and Energy Efficiency / Clean Energy Future Contact Centre to Ben Winsor, 8 November 2011; Commonwealth Criminal Code 1995 (Cth) divs 1371-1372.


26. ASIC Act s 35.

27. Clean Energy Act 2011 (Cth) s 221; ASIC Act s 19 (2).

28. Ibid s 225; ASIC Act s 68.


30. Ibid s 267.


32. ASIC Act, s 93A-AA; ASIC, Regulatory Guide 100, Enforceable undertakings (ASIC, 2007).


34. PricewaterhouseCoopers, above n 6, 8.

35. Clean Energy Act 2011 (Cth) s 103A, see also Real Property Act 1886 (SA) ss 69, 186.

36. Clean Energy Act 2011 (Cth) s 103A.

37. Ibid ss 109A.


39. PricewaterhouseCoopers, above n 6, 8.


41. PricewaterhouseCoopers, above n 6, 8.

42. Clean Energy (Consequential Amendments) ACT 2011 (Cth) Sch 1, pt 1, item 22.


45. Maslyuk, above n 14.
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