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No, you may not approach the Bench: Clamping down on public interest environmental law

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Introduction

In an age that is supposed to be witness to an emerging right to democratic governance in international law and relations[1] -- something liberal states have been striving to achieve since at least the beginning of the 20th Century[2] -- it is sad to observe the increasing governmental attacks on public interest environmental lawyers in Western democracies. These attacks appear to be prompted by a very undemocratic intolerance on the part of elected officials challenged by their constituents over the legality of governmental decision-making concerning the environment.

These governmental critics of public interest environmental lawyers seem to loose sight of several important facts. First of all, everyone makes mistakes -- even Ministers and government bureaucrats. When those mistakes involve a breach of the law, the public has an undoubted right to insist that the breach be remedied. More fundamentally, the public is entitled to accountability on the part of the government, including its observance of the Parliament's environmental laws.[3] Indeed, as early as Bracton the superiority of the law over the King has been emphasised as an norm necessary for any state based on the rule of law.[4]

Another important matter that official critics of public interest environmental lawyers forget is that in a democracy the space for politics, in the Greek sense, must be ample and unencumbered.[5] For that reason, political dissent has a hoary and honourable history in the democratic tradition. The names of Socrates, Henry David Thoreau, Emmeline Pankhurst, Mohandas K. Gandhi, Martin Luther King, Jr., and Eddie Mabo all serve to highlight the enormous salutary influence that political opposition has had on the moral and legal maturation of human beings. Consider how much more a "nasty" and "brutish" place the world might be today without non-violent political protest, including through the courts.

The practice of democracy and the idea of environmental rights flourish only when dissent -- even vigorous dissent -- is not only tolerated, but actively encouraged.[6] This is especially true in pluralistic society like Australia, in which competing ideas of the "good" often come into conflict. As Malcolm Fraser has said, Australia must be "a boisterous, argumentative, alert and tolerant society" in order to be everything it can be.[7]

The Assault on the EDO

Participation and legal challenge are vital to keeping our governments responsive to the needs and desires of ordinary people,[8] and to the environment that sustains all life, including human life. In making demands on the state and engaging in political debate we

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protect the rights of participation and dissent inherent in our Australian democracy.[9] Moreover, we actively empower ourselves and our communities. Unfortunately, in recent times we have witnessed an apparent growing lack of tolerance of dissent by government and a winding back of the right of the public to effectively participate in environmental decision-making. The rights of groups, especially environmental groups, to further environmental interests and values are increasingly squelched through a disturbing cultivation of a symbiotic relationship between government and industrial interests.[10]

One need only recall the recent attack by the Commonwealth Government on the EDOs across Australia to get some idea of the animosity. In February 1997, it became clear that the Government would no longer tolerate, and indeed would try to stop, EDO involvement in representing citizens wishing to challenge its decisions and policy in high public profile litigation. In the challenge to the government's decision to allow the development of Port Hinchinbrook near a protected World Heritage site, the Attorney-General accused EDOs of "chardonnay-set litigation" and serving as "political campaign post[s]" and threatened to cut all Commonwealth funding.[11]

In the end funding was not cut. Instead the government acted perhaps even more insidiously. A condition on funding was imposed prohibiting the EDO from engaging in "litigation activity" with Commonwealth money. In other words, the Government has in fact prohibited the EDO from representing citizens trying to protect significant environmental rights for public benefit in court.

The EDO, of course, is in the business of providing a range of services to the community including legal advice, community education, and law reform and policy services. However, a major (perhaps the major) part of its primary mission is to litigate breaches of environmental law -- to represent individuals and community groups in court in *public interest* environmental cases. This litigation has community-wide benefit in protecting the environment and has helped to establish a framework of important legal precedents that are vital in the protection of the Australian environment.

In a large sense this litigation performs a vital function. Through public interest environmental litigation, the community becomes an environmental watchdog. It allows members of the community to ensure the legality of governmental action and decision-making that affects the environment. It is this challenge from the community to governmental authority that seems to upset elected representatives. It certainly seems that it is the primary reason behind why the Commonwealth government has tried to prohibit the EDO from carrying out its traditional public interest "litigation activities".

A Spreading Virus? Attacks on US Public Interest Environmental Lawyers

This trend of governmental intolerance is not limited to Australia. Similar strident assaults on public interest environmental lawyers have been launched in the United States. In 1997, for instance, the Governor of Louisiana attacked a public interest environmental law clinic at the University of Tulane School of Law in New Orleans.[12] In the media the Governor described the clinic as made up of "storm troopers" and a "bunch of modern day vigilantes who are just making up reasons to run businesses out of the state". The Governor has called the law teachers who run the clinic "a bunch of big fat professors drawing big paychecks to run business out of the state".

Nothing could be further from the truth. Indeed, the clinic has been upholding the law where the state seeks its violation. The clinic had been successful to date in halting Louisiana from issuing a permit for a $700 million dollar chemical plant because its location contravenes the developing law of "environmental justice".[13] Environmental justice dictates that harmful facilities be sited away from already environmentally vulnerable minority and low-income communities that bear more than their fair share of pollution.[14] In the Louisiana case, the Parish in which the 3,700 acre polyvinyl chloride complex is to be located is a poor black community that is already home to 12 petrochemical, fertilizer and other industrial plants and has the third-highest rate of pollution in the State.

Similarly, in Texas the State Legislature has passed a law designed to prohibit law professors employed by Texas from engaging in legal action against the State and limiting the types of legal matters that law clinics can handle.[15] The law was specifically passed in response to a law professor's *pro bono* involvement in a lawsuit against the Texas Natural Resource Conservation Commission in an effort to keep a wood-waste incinerator out of a local neighbourhood. The new law will undoubtedly have a negative impact on public interest litigation because most public interest litigants turn to universities to get scientific, technical and legal guidance. Under the new law, this will no longer be possible.

Conclusion

One need only look at recent surveys to find that the vast majority of people are concerned about environmental protection and believe that government needs to do more to effectively regulate environmentally harmful activities.[16] These concerns demand citizen involvement in formulating governmental environmental policy. As the Australian Government has declared: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level".[17]

It should be expected then, that these concerns are naturally translated into legal action when citizens believe that environmental decision-making by public officials or activities by industry have transgressed the law. A democracy under the rule of law requires no less and it is here that the role of the public interest environmental lawyer becomes crucial. The lawyer's training and skills, coupled with his or her responsibility to work toward a more just society, enable public interest environmental lawyers to make a unique contribution.

Environmental decisions raise political public policy issues and democratic principles call for public participation, even when that involves litigation. Public interest environmental disputes involve the interests of many people instead of one or a small number of private parties. The parties to an environmental dispute approach litigation and its judicial resolution as part of

the political process. There are clear social advantages to be gained by using the judicial process as a tool for this political purpose. Litigation grants the right of discovery to its participants. This ensures that facts, documents, and opinions underlying all the adversarys' positions are exposed and tested. Litigation also serves to clarify, crystallise and resolve issues that might be debated endlessly in a purely political forum. Finally, litigation attracts media attention and serves to broaden the debate.[18]

Surely, the Government should be supporting the litigation activities of public interest environmental lawyers, not proscribing them by choking off their funding.

Endnotes

[1] *See* Thomas M. Franck, The Emerging Right to Democratic Governance (1992) 86 AMERICAN JOURNAL OF INTERNATIONAL LAW 46.
[2] Elihu Root, The Effect of Democracy on International Law (1917) INTERNATIONAL CONCILIATION 5, 8.
[3] *See A v Hayden* (1984) 156 CLR 532 at 562 (per Murphy J). See also *Plenty v Dillon* (1991) 171 CLR 635 at 639.
[4]. BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE (mid 13th Century). *See also* SIR EDWARD COKE, INSTITUTES OF THE LAW OF ENGLAND, 4 pts (1629-1646); JOHN LOCKE, TWO TREATISES OF GOVERNMENT, bk 2, ¶ 149 (1689).
[5]. *See* Robert Cover, *The Origins of Judicial Activism in the Protection of Minorities*, in NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER (Martha Minow, Michael Ryan & Austin Sarat, eds., 1995), pp. 19-21.
[6]. EVA COX, A TRULY CIVIL SOCIETY (1995), chap 5.
[7]. Margot Kingston, *The Assault on Dissent*, Sydney Morning Herald, Oct. 11, 1997, sect. 6, p. 1, col. 1 (Saturday Spectrum).
[8]. *See* DAVID HELD, MODELS OF DEMOCRACY (2d ed., 1996), chap. 6.
[9]. *See* Frank Michelman, *Law's Republic* (1988) 97 YALE LAW JOURNAL 1493.
[10]. See the comprehensive treatment of the this worrying trend in Australia and internationally in SHARON BEDER, GLOBAL SPIN: THE CORPORATE ASSAULT ON ENVIRONMENTALISM (1997).
[11]. Margo Kingston, *Environment Offices Warned: Stop Suing*, Sydney Morning Herald, Feb. 27, 1997, p. 5, col. 1. *See also* Jodie Brough, *Watchdog on the Environment has its Teeth Pulled*, Sydney Morning Herald, May 21, 1997, p. 6; *Watchdog Brought to Heel by Government*, 12 AUSTRALIAN ENVIRONMENT REVIEW 9 (No. 5, May 1997).
[12]. Marcia Coyle, *Governor v. Students In $700M Plant Case*, 20 NATIONAL LAW JOURNAL p. 1, col. 3 (Sept. 8, 1997).
[13]. *See* Presidential Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations* (Feb. 11, 1994).
[14]. Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses* (1993) 78 CORNELL LAW REVIEW 1001.
[15]. Chris Klein, *Texas Tech Prof. Abandons Case to Avoid Violating State Statute*, 20 NATIONAL LAW JOURNAL p. A20, col. 3 (Oct. 20, 1997).
[16]. 16. Bob Beale, *We're All Going Green*, Sydney Morning Herald, June 11, 1994, p. 7A; Bob Beale, *Most Say Environment More Important Than Economy*, Sydney Morning Herald, April 12, 1994, p. 2A.
[17]. Principle 10, Rio Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development, U.N.Doc. A/CONF.151/26/Rev.1 (Vol.I), at 5 (Rio de Janerio, 3-14 June 1992).
[18]. *See* Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law* (1976) 28 STANFORD LAW REVIEW 207.

More than an empty principle? -

the precautionary principle and the new Queensland Integrated Planning Act.

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On 21 November, 1997 the *Integrated Planning Act* ("IPA") was passed by Queensland State Parliament. This is only the second time the precautionary principle has been specifically included in a Queensland Act of Parliamen, the first being in relation to making of national environmental protection measures by the National Environmental Protection Council[1]. The principle has previously been indirectly incorporated in Queensland Acts that make reference to the National Strategy for Ecologically Sustainable Development (endorsed by the Council of Australian Governments on 7 December, 1992).[2] Due to the scope and structure of the Integrated Planning Act, the precautionary principle is expected to be of extensive relevance in Queensland planning and development law.

Integrated planning and development assesment

The IPA, which at time of writing had not commenced, will not only repeal and replace the Queensland Local Government (Planning and Environment) Act 1990[3], it will also provide a framework to integrate planning and development assessment in Queensland. Under the IPA a successful applicant for approval of a development will be able to receive a single development approval, which will incorporate, by way of conditions, the requirements of relevant government agencies called 'concurrence agencies' that now issue separate permits.

Applying the precautionary principle

The object of the IPA is *to seek to achieve ecological sustainability*[4]. If a function or power is conferred on an entity under the Integrated Planning Act, the entity must perform the function or exercise the power in a way that advances the Act's purpose[5], subject to exceptions.

The obligation on those entities that must advance the purpose of the IPA[6], includes ensuring decision-making processes under the Act *apply* the precautionary principle[7]. For example, local government must apply the precautionary principle when making decisions in the preparation of planning schemes[8]. Local government must also apply the precautionary principle when assessing development applications[9] unless certain exceptions apply, such as acting as a referral agency under devolved or delegated powers or performing a code assessment.[10] This obligation to *apply* the precautionary principle may be contrasted with a mere deliberative obligation to 'consider' or 'take into account' a principle.

The definition

The definition of the precautionary principle in the IPA provides that 'if there are threats of serious or irreversible environmental damage, careful evaluation must be made to

avoid wherever practicable serious or irreversible environmental damage including, if appropriate, assessing risk weighted consequence of various options'[11].

The State Coalition introduced the Integrated Planning Bill into Queensland Parliament with no reference to the precautionary principle. On 20 November, 1997 the precautionary principle was included by way of State Opposition amendment to the Bill with the support of the independent member of Parliament, Mrs Liz Cunningham, who held the balance of power. Parliament however did not support the State Opposition's proposed definition of that principle, but instead accepted a definition then proposed by the State Minister for Local Government and Planning, Mrs Di McCauley, who had opposed inclusion of the principle in the first place.

This definition is different to the version of the precautionary principle in the National Strategy for Ecologically Sustainable Development, which is referred to in a number of other pieces of Queensland legislation. A notable difference between the two definitions is that only the National Strategy for Ecologically Sustainable development provides that the lack of full scientific certainty should not be used as a reason for postponing measures to prevent degradation. The implications of this difference in the definition, if any, await exploration by the Queensland Planning and Environment Court after commencement of the *Integrated Planning Act*. The Court has not previously interpreted the precautionary principle, or even referred to it by name, apart from at least once rejecting submissions that the precautionary principle be implied into the *Local Government (Planning and Environment) Act 1990*[12].

Endnotes

[1]. s15(a) Sch National Environmental Protection Council (Queensland) Act 1994
[2]. s4, s7, s44(b), s49(9)(a), s89(b)(ii), s110, Sch 4 Environmental Protection Act 1994, s4, s10(6) Wet Tropics World Heritage Protection and Management Act 1993, and s3(b)&(c) s7 & s12 Coastal Protection and Management Act 1995, Queensland Competition Authority Act 1997 .
[3]. s6.2.1 IPA
[4]. s1.2.1 IPA
[5]. s1.2.2(1)(a)IPA
[6]. s1.2.2(1)(a)IPA
[7]. s1.2.3(1)(a)(ii) IPA
[8]. Part 1, Chapter 2 IPA
[9]. Part 5, Chapter 3 of IPA
[10]. s1.2.2(1)(b), (c), (2) IPA
[11]. s1.2.3 (2) IPA
[12]. G.F.W. Gelatine International Limited v Beaudesert Shire Council and Ors [1993] Q.P.L.R. 342 at 352

What's Sauce for the Goose is Sauce for the Gander:

Regulating the Commonwealth through NEPMs

Donald K. Anton, Policy Officer, Environmental Defender's Office in NSW

Introduction

As part of the current effort to harmonize environmental law across Australia and develop national standards, the federal government recently tabled the *National Environment Protection Measures (Implementation) Bill* ("NEPM Bill" or "Bill"). The Bill seeks to ensure that National Environment Protection Measures agreed to by the States, Territories and Commonwealth will have application in connection with Commonwealth places and performed by, or on behalf of, the Commonwealth and Commonwealth authorities.

The following is a summary of the submission made on the NEPM Bill by the EDO, on behalf of the Australian Conservation Foundation, Greenpeace, and the National Toxics Network. While it is essential that the Commonwealth be bound by NEPMs, and to that extent the general intent of the Bill is good, we believe that there are a number of deficiencies in the details of the Bill. Before addressing the Bill's deficiencies, however, it is important to emphasise once again that the arrangements underlying the Bill are themselves inappropriate for effective national environmental protection and ecologically sustainable development.

Because the NEPM Bill relies on the Intergovernmental Agreement on the Environment ("IGAE" or "Agreement") and the National Environment Protection Council ("NEPC") arrangements, implementation must ordinarily rely on State and Territory legislation. Yet, there is no obligation on a State to legislate to implement a nationally agreed NEPM. Moreover, as the Explanatory Memorandum accompanying the Bill expressly recognises, State and Territory legislation codifying NEPMs can be inconsistent. Surely this is not by any stretch of the imagination a regulatory system that can be called "national". It is a weak *ad hoc* mechanism that is unlikely to bring necessary effectiveness, uniformity, and certainty to national environmental protection in Australia.

It certainly does not meet the aspirations of NEPC, which has stated that the key purpose of NEPMs is to ensure "that the people of Australia enjoy the benefit of *equivalent* protection from air, water, and soil pollution and from noise, where ever they live". Attaining this goal is impossible, not least, because of the voluntary nature of the IGAE and NEPC arrangements.

In the interest of effectiveness, uniformity, certainty, and the avoidance of duplication -- all of which are important to environmentalists, business, and the community at large -- a true national approach to environmental protection, with strong Commonwealth leadership, is required. Such an approach in the area of trade practices -- once thought beyond the constitutional competence of the Commonwealth -- has seen strong leadership by the Commonwealth lead to uniformity and certainty in law across all Australian jurisdictions. In the environmental field such an approach would allow for the States to maintain their own regulatory and administrative arrangements, but within a general framework

set by the Commonwealth. Where those arrangements are at least as protective of the environment as national standards -- standards set in consultation with the States, community groups, and industry -- State legislation should exist along side Commonwealth. Such an approach would recognise the proper role of leadership, support, and direction of the federal government, without simply taking over the field from the States.

Turning to the NEPM Bill itself then, given the structural problems underlying it is a small wonder that the Bill itself has problems. These deficiencies are detailed below.

Weak definitions

Activity

While the Bill is intended to provide for the implementation of NEPMs in connection with activities by or on behalf of the Commonwealth and Commonwealth authorities, the definition of "activity" in the Bill is too narrow. It includes only "physical activities" that have a "direct effect on, or represents a substantial risk of damage to" the environment. Both cumulative effects and indirect effects of activities can pose a substantial risk of environmental damage. Clearly both ought to be included within the Bill's definition of "activity" where they might do so.

Additionally, the formulation of environmental policy and environmental decision-making are excluded from the definition of "activity" in the Bill. It is certain, however, that if Australia is serious about its commitment to a precautionary approach to environmental protection, policy and decision-making should be included in the definition of activity. Indeed, it is at the policy and decision-making level that environmental harm can be prevented.

National Interest

If an activity is of "national interest" it may be excluded from the operation of the Bill completely. The fact that the Commonwealth and the states can agree to transform any matter -- regardless of its nature -- into a matter of "national interest" by simple agreement, is unacceptable. If "national interest" is going to provide an exemption from the law, its definition should be both narrowly tailored and certain. Otherwise, it becomes a potential political expedient that allows tough decisions on environmental protection to be put off indefinitely.

Absolute Ministerial Discretion

In deciding whether any part of the NEPM Bill will apply to Commonwealth authorities or activities, the Environment Minister has complete discretionary authority. Nothing in Parts 2, 3, 4, or 5 requires the Minister to activate the implementation of a NEPM under those parts. Additionally, in making the determination as to which Part of the Bill will apply to a particular Commonwealth place or activity (Parts 2, 3, 4, or 5), the Environment Minister (in consultation with other relevant Ministers), again has complete discretion. There are no criteria or guidelines provided to direct the Minister in the exercise of his or her discretion. This, of course, raises serious problems for Ministerial accountability, in addition to the risk of politically expedient, but environmentally unjustified decisions.

If this outright discretion were not enough, a number of additional loopholes are provided in the Bill in order to extricate the Commonwealth from implementing NEPMs. For example, under Parts 2 and 3, reasons of "administrative efficiency", "national interest", and "desirability", all justify the Minister in refusing to make a declaration that the Commonwealth will be bound by an applied provision of State or Territory law. Clearly the ambiguous and inappropriate excuses of "administrative efficiency" and "desirability" should be deleted from the Bill.

Even if a declaration is made by the Environment Minister that State or Territory law applies to Commonwealth activities, the Commonwealth can make regulations to exempt itself from the application of any particular applied provisions as a matter of "national interest". Under Part 4, any matter can be excluded from Commonwealth regulation promulgated to implement a NEPM as a matter of "national interest". The same is true of environmental audits and environment management plans provided by Part 5.

The National Interest Exception

In addition to the concerns about the use of "national interest" in connection with Ministerial discretion, we object to the fact that "national interest" gives the Commonwealth the right to exempt itself from the implementation of NEPMs. Such an exception is backward and counterintuitive. As a matter of principle, in our view, "national interest" dictates that the Commonwealth should *obey* all agreed national standards and protocols, not the other way around. The same is true of taking account of national guidelines and striving to attain national goals. This should be required in all cases, not only when it is easy or convenient.

Ineffective Enforcement Mechanisims

Enforcement of applied state law or applicable provisions of state and territory law against the Crown in right of the Commonwealth is entirely deficient. It is true that criminal prosecution of Commonwealth authorities and individuals employed by the Commonwealth for violations of an applied State or Territory law is permitted. However, when it comes to the Crown in right of the Commonwealth, what is sauce for the goose is not sauce for the gander.

Instead of an effective system of enforcement, under Parts 2 and 3 of the Bill, a hidden system of reporting Commonwealth contraventions of NEPMs is established. The States and Territories have no real enforcement power. Indeed, the Explanatory Memorandum accompanying the Bill explains that the prosecution of criminal offences under the Bill is the responsibility of the Commonwealth Director of Public Prosecutions. Further, civil jurisdiction under the Bill is vested exclusively in the Federal Court of Australia. More importantly, under the non-transparent system for reporting Commonwealth breaches of NEPMs, the public is not even given the right to know about alleged or actual breaches of the law by the Commonwealth, much less the right to bring public interest actions to remedy the violations.

Ministerial discretion is again a problem in connection with enforcement under Parts 2 and 3. Once the Environment Minister receives a reported contravention, he or she is only

required to "take any action that he or she thinks appropriate" where the Minister administers the Department accused of the contravention. There is no public accountability in this respect and the public has no right to know what action, if any at all, has been taken. In cases where another Minister is responsible for administering the relevant Department in breach of a NEPM, the Environment Minister need only make "recommendations that he or she thinks appropriate". These recommendations have no force behind them, and the Minister that they are directed to is not required to give the public any accounting. The entire process is conducted out of public view.

Exclusion of Applied Provisions of State and Territory Laws
Parts 2 and 3 set out a number of instances where the provisions of State and Territory laws that would otherwise apply to the Commonwealth, will have no force. The most disturbing of these exclusions are: (i) the preparation of and environmental impact statement (as defined in section 5), and (ii) judicial or administrative review of a decision. These exclusions are clearly unwarranted.

In connection with environmental impact assessment ("EIA"), it is essential to subject potential impacts of proposed Commonwealth activities to EIA requirements that are relevant to effective implementation of a NEPM. As the Australian and New Zealand Environment and Conservation Council has recognised, there is a need to promote a national approach to EIA in order to ensure that it is used consistently as a means of identifying and evaluating the potential impacts of a development proposal, appropriate mitigation measures, and alternative to the development and its impacts. It should also propose procedures for the monitoring of predicted and actual impacts. There is no good reason why EIA should not apply in connection with the implementation of NEPMS, where required.

In connection with judicial review, it does not make sense not to subject decisions taken under the Bill to the same scrutiny as all other decisions in a particular State or Territory in connection with the implementation of a NEPM. To exclude Commonwealth decisions from judicial review is to play favourites.

Inadequate Environmental Auditing and Management Plans
It seems hard to believe that "implementation" of the law can take place through environmental auditing and management plans. These are tools that are used to evaluate and "benchmark" environmental performance in light of regulatory requirements, not mechanisms to fulfill regulatory requirements in themselves.

In addition to their inappropriateness as a means of implementation, the way in which the auditing and planning is to take place under the Bill is deficient. First of all, "national interest" again allows Commonwealth activities to be exempt from environmental auditing and planning. Secondly, the entire environmental auditing process is secretive. There is no provision for public notice, involvement, or comment in the auditing process. Moreover, the audit report itself remains at all times hidden from public view or scrutiny. Third, the audit report is inadmissible as relevant evidence in both criminal and civil proceedings against the Commonwealth or a Commonwealth authority. While there is some justification for inadmissibility in criminal proceedings (ie the right not to self-incriminate), there is little, if any, reason for inadmissibility in civil actions.

Turning to the environmental management plans, the most serious omission is the lack of requirement that subsequent audits and plans monitor and report on how well the goals contained in the management plan have been met. The management plan needs to provide, as a basis for comparison is subsequent audits and plans, a statement outlining the progress (or lack thereof) with meeting the requirements of the relevant NEPM.

Another problem is that the public is only involved in the development of the plan, and even that seems to be at a late stage. No provision is made for the public to see and comment on the preliminary plan that is required to be prepared under the Bill. Also missing are provisions for community involvement in monitoring the implementation of the plan. Additionally, all reporting on the implementation of the plan should be made readily and freely available to the public over the Internet in a form that is easily understandable.

Miscellaneous Provisions
Perhaps the most disturbing aspect of the miscellaneous provisions contained in the Bill, is that a person who "indirectly" discloses information acquired in a lawful search is subject to imprisonment for up to two years. Such a draconian measure is telling when compared to the punishment that can be meted out for violation of the regulations implementing a NEPM under Part 4. Intentionally harming the environment by violating a NEPM involves no jail time under Part 4, only the payment of a fine. Clearly, it appears that the government is more concerned with secrecy than protecting the environment, if gauged by the sanctions contained in the Bill.

Another disturbing aspect of the miscellaneous provisions is the attempt to do away with the inherent power of a court to compel the production of potential evidence. It is doubtful that the Parliament has the ability to do away with the intrinsic powers of the courts -- the very things that make them courts. In any event, such a provision is clearly inappropriate in legislation designed to promote environmental protection through the implementation of NEPMs. The same is true of the ability to exempt premises from search and limit the class of people and identity of individuals who are able to conduct searches under the Bill.

Conclusion
As demonstrated above, there are a number of serious deficiencies in the NEPM Bill as currently drafted. A large part of the problem can be traced back to the ineffective system of national environmental protection embodied in the IGAE and the NEPC arrangements. However, the Bill suffers critical problems in its own right in terms of definitions, enforcement, secrecy, uncircumcribed ministerial discretion, unwarranted exceptions, the use of auditing and management plans, and punishment.

AGRICULTURAL LAND USE: SUSTAINABLE AGRICULTURE IN TASMANIA

By Susan Gunter, Solicitor, Environmental Defender's Office (Tasmania)

Introduction

The concept of sustainable agriculture is based on the maintenance of diverse opportunities for humans and the ecosystems upon which we depend. It assumes the need for diversity of a range of landforms, for a diversity of microclimates, soil types and catchment areas. This should in turn create an associated diversity of opportunities and choices for future generations to be able to engage in, for example, broadacre farming (including cropping or grazing), and/or more intensive agriculture (eg berry farming). If the land has become badly eroded, contaminated by chemicals, or is now under asphalt and cement in an industrial park, or carved up into 5 acre hobby farms, it will be less available or totally unavailable for food production. Long-term its sustainability for agricultural uses is diminished, without costly and intensive inputs.

Degradation of the potential for productive agricultural long-term use may arise from:

- creating areas of land too small to be viable farms.
- conflict between residential and agricultural land uses
- conflicts between agricultural land uses .
- the destruction of rural character of an area
- damage to the environment (soil, water, vegetation, wildlife, etc).

Tasmania's Resource Management and Planning System

Tasmania's Resource Management and Planning System ("RMPS") attempts to promote sustainable development of Tasmania's natural resources. Legislation forming part of the RMPS shares common general Objectives which include: (i) promoting the sustainable development of natural and physical resources and the maintenance of ecological processes and genetic diversity; and (ii) providing for the fair, orderly and sustainable use and development of air, land and water.

"Sustainable development" is defined in the Objectives to mean:

> *"managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural well-being and for their health and safety while -*
> *(a) sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; and*
> *(b) safeguarding the life-supporting capacity of air, water, soil and ecosystems; and*
> *(c) avoiding, remedying or mitigating any adverse effects of activities on the environment"*

The *Land Use Planning & Approvals Act* integrates planning schemes, State Policies, guidelines and strategic plans in accordance with these Objectives. The *Environmental Management and Pollution Control Act* aims to prevent, reduce and remedy environmental harm (defined as any adverse effect on the environment and including an environmental nuisance).

The RMPS has been reasonably effective in preventing the loss of agricultural land to residential and industrial use. The next challenge is to deal with the loss of its potential resulting from degradation arising from certain agricultural practices, including the use of agricultural chemicals and fertilizers, pollution and some land clearance.

Loss of Agricultural Land to Subdivision

The subdivision of agricultural land is regulated by Planning Schemes and *the Land Use Planning & Approvals Act.* As *Vincent 2*[1] demonstrates, this system is reasonably effective at preserving the potential for a diversity of choices in agricultural land use. In *Vincent 2* Council granted a planning permit to subdivide a block of land zoned rural surrounded by forestry, a nursery, and grazing land. There were to be two lots, Lot 1 of 2.2ha, Lot 2 (balance) of 36.2ha. The land had been the site of diverse berry and fruit production and is now grazed by cattle. Lot 1 was of relatively higher quality compared to some of the land in Lot 2. The issues before the Resource Management and Planning Appeal Tribunal included whether the land was "good agricultural land" (in the terms of the Huon Valley Planning Scheme).

The Tribunal held that the subdivision proposal did not satisfy the favourable exercise of Council's discretion under the Planning Scheme for two reasons: first, the effect of subdivision on Lot 1 would allow a residence to be built there and the land would be used "for some purpose entirely unconnected with agriculture". This constituted an effective fragmentation of good agricultural land. Second, the subdivision would increase the potential for persons having no connection with rural activities such as forestry and agriculture (grazing and fruit growing) to reside in the area, and there would be a potential for complaint in respect of the use of chemicals, noise and firearms. This conflict would potentially tend to adversely affect the utility of the surrounding agricultural and forestry land.

Earlier cases[2] involved the Planning Schemes of other Municipalities and their provisions for the protection of agricultural land from residential subdivision. In *Campbell Smith, Elude Owen* and *Vincent 1* the Tribunal examined the agricultural use and potential of the land, and upheld the provisions of the Planning Schemes protecting against fragmentation of the agricultural land. In *MacKinnon* and *Vincent 1* the Tribunal also considered the potential for conflicts between residential and established agricultural uses, and decided that the conflicts would affect the long term utility of the agricultural land.

Loss of Agricultural Land Potential to Conflicting Land Use
A number of Planning Schemes also specifically provide for the protection of agricultural activities from conflicting uses which may arise from residential subdivisions adjacent to rural land. The Municipality of Beaconsfield's Planning Scheme, for example, provides protection to "the major rural holdings of the Municipality from excessive encroachment of land uses which impact detrimentally on the management of stock and other farm enterprises.... or present other management difficulties".

These Planning Schemes assume that farmers should not be subjected to complaints from residential neighbours and have to curtail or change their operations due to conflicting uses (eg, dog attacks on sheep, weed infestation from neglected small holdings, and complaints by neighbours concerning spraying chemicals, clearing and harvesting timber and water pollution). The assumption is that farming land is similar to land zoned industrial, allowing for more noise and smells etc than one would find in a residential area. This is reflected in the Primary Industry Activities Act 1995, which purports to protect "lawful and proper" agricultural activities from common law nuisance actions.

Loss of Agricultural Land Potential resulting from some Farming Practices
Some "lawful and proper" agricultural activities can also result in the degradation of agricultural land and loss of the resource. Conflicting land use is not only between residential and established agricultural use. It can be between different forms of agriculture, eg, conventional chemical and fertilizer based practices and organic practices. *Elude Owen* and the situation concerning organic farmers illustrates the potential for land use conflicts between farmers.

In *Elude Owen*, the farming land was friable, with erodible sandy topsoil and sandy clays at depth. A eucalypt woodland on part of the property provided habitat for an endangered bird, and was home to other endemic bird species. The Tribunal noted that due to inappropriate farming practices overgrazing had occurred, and that all watercourses were subject to gully erosion.

In addition to provisions protecting agricultural land from land use conflicts, the Planning Scheme in *Elude Owen* provided for the recognition of the significance of rural lands for "a source of natural resources, materials and water supply... and a habitat for animal wildlife and plants, and to protect and maintain these ecological and recreational assets for the municipality" (cl2.12.(c)). The Tribunal found that more intense grazing as proposed by the subdivision would exacerbate soil erosion and further affect bird habitats, that the soil itself was "generally unsuitable for more intensive pursuits" and that the proposed subdivision was not in accord with the Planning Scheme.

[An interesting point to arise out of this case is as follows. The Planning Scheme provisions to protect wildlife may have been sufficient in this case to prevent the subdivision, but what is there to encourage the landowner in this case to rehabilitate the land and control erosion? The Environmental Management and Pollution Control Act may be of some use because it provides a remedy against environmental nuisance in s.53, defined as "the emission of a pollutant that unreasonably interferes with....a person's enjoyment of the environment". A pollutant is an agent that causes environmental harm which is "an adverse effect on the environment (of whatever degree or duration) and includes environmental nuisance" (s.5). So a neighbouring landowner whose water supply is contaminated by siltation from the erosion may be able to bring an action in the Tribunal seeking orders under s.48 of that Act. However, there is no legislative provision to allow the Department of Primary Industry and Fisheries to intervene as the Department of Environment and Land Management or a local Council could if an industry was causing an environmental nuisance].

Organic farmers farm without inputs of conventional chemical fertilizers or agricultural chemicals, and cannot get appropriate grower certification or sell products as organic if there is any level of chemical residue in the soil and water on the property. Uncontaminated farming land therefore must initially be selected. If the organic farmer receives spray drift from a neighbouring farmer the statutory remedies may not be available or sufficient. The *Agricultural Chemicals (Control of Use) Act 1995* provides that chemical pollution of a neighbour's water or soil is acceptable below certain prescribed limits. These limits would not be acceptable for organic certification to continue. The *Environmental Management and Pollution Control Act's* nuisance provisions refer to *unlawful* nuisance (section 53) which may provide for a defence if the spraying followed the Act and Regulations. Common law may be the only recourse in the absence of eg, unlawful spraying.

Conclusion
Tasmania's Resource Management and Planning System is effective in providing third party remedies under the *Land Use Planning & Approvals Act* and the *Environmental Management and Pollution Control Act.* Planning schemes and *Land Use Planning & Approvals Act* deal reasonably well with the protection of good agricultural land from fragmentation by subdivision. But, an equally permanent loss of the potential of agricultural land (for a diversity of uses) resulting from farming practices is poorly controlled. The *Environmental Management and Pollution Control Act* can control some agricultural practices (ie, to maintain and enhance water and soil quality and to prevent loss of the agricultural resource and associated ecosystems) with its provisions relating to environmental nuisance and environmental harm. At present this mechanism can be activated by third parties and not by relevant authorities (eg, Department of Agriculture). As well, there is no legislative protection for the degradation of land which can be used for organic farming.

Endnotes
[1].DE Vincent v Huon Valley Council [1997] 235 TASRMPAT (24 November 1997) ("Vincent 2")
[2]. Campbell Smith Phelps Pedley P/L v West Tamar Council [1996] 71 TASRMPAT (22 March 1996)
DC Booth v Break O'Day Council [1996] 111 TASRMPAT (15 May 1996)
Elude Owen Nominees P/L v Kingborough Council 263 TASRMPAT (22 November 1996) ("Elude Owen")
DE Vincent & L Pickering v Huon Valley Council & A&R Littlejohn [1997] 182 TASRMPAT (12 September 1997) ("Vincent 1")
KE Sutton & M Jarvis 239 TASRMPAT (27 November 1997) ("Sutton")

ENVIRONMENTAL ACTION IN THE NSW PARLIAMENT

Katherine Wells, Solicitor, Environmental Defender's Office in NSW

Late last year a tremendous volume of environmental legislation passed through the NSW Parliament. The legislation included major revisions of NSW's pollution and planning acts, and new legislation in the areas of native vegetation protection, contaminated land and protection for endangered marine and freshwater flora and fauna. A brief summary follows.

Protection of the Environment Operations Act 1997
This Act consolidates and updates NSW's major pollution statues - a long-overdue step. The Government has presented the Act as a major advance, but in fact it merely brings NSW (more or less) into line with other States which have overhauled their pollution laws in recent years (Victoria, South Australia, Tasmania and Queensland). The major features of the Act include:

- a works approval and pollution licensing system which integrates formerly separate licensing regimes for air, noise and water pollution and waste;
- "Protection of the Environment Policies" ("PEPs"); technical environmental standards which are much like the EPPs or SEPPs in other States, and which will be used to adopt national environment protection measures agreed to through the National Environment Protection Council;
- the three-tiered system of offences which formerly existed under the Environmental Offences & Penalties Act, with slightly increased penalties;
- environment protection notices requiring clean-up or preventative action, or prohibiting particular actions;
- voluntary and limited mandatory environmental audits; and
- open standing for proceedings to remedy or restrain a breach of the Act, and limited third party standing to bring criminal proceedings under the Act.

The EDO considers that the Act has a number of serious flaws. Unlike legislation in States such as Victoria, the Act does not provide for any public participation in the grant of work approvals or pollution licences. In addition, licences are now permanent, instead of having to be renewed annually (as was previously the case), and while they must be reviewed at three yearly intervals, the public has no right to participate in the reviews.

PEPs are not enforceable - unlike, for example, EPPs in South Australia, which can contain enforceable provisions.

The Act places very little emphasis on pollution prevention; nothing in the Act makes pollution reduction or prevention mandatory. Nor does the Act tackle the more controversial area of emissions reporting or community right to know. NSW contains a major portion of Australia's industry, and this major review of the State's pollution laws would have been an ideal opportunity for the Government to approach the whole problem of pollution in more innovative ways.

Environmental Planning & Assessment Amendment Act 1997
This Act represents the biggest change made to NSW's planning legislation for almost twenty years. It amends Part 4 of the Environmental Planning & Assessment Amendment Act 1997 ("EP&A Act"), which is the Part dealing with development applications. Amongst other things, it:

- introduces a single new assessment system for development, building and subdivision control;
- links the grant of development consents under the EP&A Act to other approvals such as pollution control, water and heritage approvals - creating, in effect, a "one-stop-shop" approvals process;
- establishes a private certification scheme in which private accredited certifiers can grant consent to development categorised as "complying development";
- gives the Minister increased powers of intervention in the development approvals process by creating new types of "State significant development";
- creates a new category of minor development, "exempt development", which will be exempt from the need to gain development consent; and
- reduces the matters which a Council must consider when deciding whether to grant development consent from a specific, detailed list to five very broad criteria.

The Exposure Draft Bill attempted to delete all the Part 4's important public participation and appeal rights, and all the provisions protecting threatened species, on the basis that they were merely "procedural" matters and would be put in Regulation at a later date. Following representations, however, this position was reversed, and the relevant provisions were reinstated in the Act largely unamended.

Nevertheless, the EDO has significant concerns with the Act.

The "one-stop-shop" which it creates is complex, and allows insufficient time for well-considered decisions by the other regulatory bodies involved in the approvals process (such as the Environment Protection Authority or "EPA"). Nor does it allow time for proper community participation in the process.

The expansion of the Minister's powers is unnecessary; the Minister already has adequate call-in powers under the EP&A

Act. Exempt and complying development are also problematic. There appear to be inadequate environmental controls attached to these new categories of development, and complying development, in particular, is likely to be fraught with difficulty - not least in the important area of threatened species protection.

The reduction of the criteria to be taken into account when considering whether to grant development consent is also of concern. The broad replacement criteria are vague and therefore likely to be less enforceable than the existing criteria - thus making it harder for the community to appeal a council's decision by way of judicial review.

Lastly, it is not clear that the private certification scheme will work. The Government has said that it is intended to apply to non-discretionary, technical matters only - and yet the provisions of the Act appear to leave room for accredited certifiers to make discretionary decisions about matters of considerable environmental importance. The scheme will be regulated by professional associations, rather than a governmental or statutory body, and it seems unlikely that professional associations will have either the expertise or resources to administer and enforce the scheme adequately. (Even reasonably-resourced statutory bodies have difficulty, as the Victorian experience with accredited builders has shown.) The Act also fails to provide a direct right of appeal to a court or tribunal for the "victims" of accredited certifiers.

The Act is clearly aimed at facilitating development in NSW at the expense of the community and the environment. Given the magnitude of the changes, it is very disappointing that the Act does not take a more balanced approach to the development approvals process.

Native Vegetation Conservation Act 1997

This Act replaces NSW's previous attempt to regulate the clearance of native vegetation, State Environmental Planning Policy No. 46.

The main tool introduced by the Act to assist in the management of native vegetation is the concept of regional vegetation management plans. These plans will identify areas of land on which native vegetation should be protected and improved, or on which revegetation should be encouraged. Clearing of native vegetation will generally be permitted on all the remaining land.

The plans are to be prepared by regional vegetation committees, in consultation with the National Parks and Wildlife Service and other bodies, then exhibited for 40 days, and finally approved by the Minister for Land and Water Conservation, who must consult with the Minister for the Environment and the Native Vegetation Advisory Council before making a decision. The membership of the regional vegetation committees is limited to 15, and must include four representatives of rural interests, two conservation representatives, two representatives of the NSW Aboriginal Land Council, and representatives from a land care group, a catchment management committee, local government, three government agencies and either the National Herbarium or the Ecological Society.

Regional vegetation management plans are taken to be environmental planning instruments, and they override all other environmental planning instruments (except SEPP No. 14, on coastal wetlands, and SEPP No. 26, on littoral rainforests). However, the EDO has a number of significant concerns about them.

It will not be necessary to prepare an environmental study before preparing a plan. Without comprehensive vegetation information, the concept of regional planning becomes meaningless. Another problem is that the Act provides that plans can specify whether or not development consent is required in order to clear vegetation - but it does not allow plans to place outright prohibitions on vegetation clearance, even where the vegetation is of high conservation value. In addition, there are a number of exemptions from the plan process which weaken it considerably.

Other features of the Act include:

- provisions allowing land owners to enter into property agreements which provide them with financial assistance for vegetation management;
- provisions allowing the Director-General of Land and Water to issue stop work orders and directions requiring remedial work; and
- provisions allowing any person to bring proceedings to remedy or restrain a breach of the Act (including a breach of a plan, or a development consent issued in connection with the Act).

The overall problem with the Act is its emphasis on the *management*, as opposed to *conservation*, of native vegetation; the fact that it nowhere contains a clear mechanism for the prohibition of vegetation clearance is a good example of this emphasis. The Act appears, on the whole, to be an improvement over SEPP 46 - but it is disappointing that the Government did not take the opportunity to introduce some of the stronger conservation approaches contained in legislation elsewhere (such as in South Australia).

Contaminated Land Management Act 1997

This is NSW's first real attempt to regulate contaminated sites. The Act is primarily concerned with giving the EPA the power to regulate "significant risk" sites - that is, sites where contamination presents a significant risk of harm. If the EPA decides that a site is *not* a significant risk site, it is not specifically required to take any action regarding the site.

Broadly, the Act:

- creates a publicly-available contaminated sites register;
- gives the EPA various duties and powers relating to contaminated land, including the power to issue "investigation" and "remediation" declarations and orders;
- allows the EPA to serve declarations and orders on the polluter, owner or "notional owner" of a site (in that order), or alternatively, the local Council;

• requires polluters and owners of land who are aware of "contamination which presents a significant risk of harm" to notify the EPA about it;

• makes it an offence to fail to comply with a declaration or order, or to fail to notify the EPA of contamination; and

• creates a scheme of accredited site auditors which is based on provisions transferred from the *Environmentally Hazardous Chemicals Act 1995*.

The Act contains a number of useful public participation provisions, of which the most important is probably a clause which allows anyone concerned about actual or possible site contamination to give information about it to the EPA, and then request a response from the EPA. The EPA must:

- examine the information,
- address any significant risk of harm presented by the contamination, and
- tell the person who provided the information, within a reasonable time, what it has done and why.

Additionally, the Act:

- allows any person to ask the EPA for reasons for a decision by it that a site is *not* a significant risk site;

- requires the EPA to give public notice whenever it issues an investigation or remediation declaration, and invite public comment about the site in question; and

- allows any person to bring proceedings to remedy or restrain a breach of the Act, and (in limited circumstances) to bring criminal proceedings under the Act.

The Act is part of a contaminated land package which includes Draft SEPP No. 55, entitled "Remediation of Land", and Draft Planning Guidelines entitled "Managing Land Contamination". Both of these other documents have been out for public comment and are currently in the process of being finalised by the Department of Urban Affairs and Planning.

The Government's package is a considerable improvement over what currently exists in NSW. It also compares well with what is on offer in other States of Australia, particularly in terms of legislative provisions providing transparency and the opportunity for public participation in the regulation of contaminated sites.

The main disappointment with the Act is that it was not possible to persuade the EPA to include an offence of contaminating land in the Act. It is ridiculous that no offence of contaminating land has been included in a Bill *whose only purpose* is to regulate contaminated land - and such an offence is hardly a radical idea. In both Queensland and Victoria it is an offence to contaminate or pollute land. The EPA should have available to it a full "regulatory pyramid" of measures to give it flexibility in responding to the problem of contamination.

Other legislation

Other important legislation passed late last year included:

- the *Fisheries Management (Amendment) Act 1997*, which applies a protection regime to marine and freshwater flora and fauna that is very similar to the regime set up under NSW's *Threatened Species Conservation Act 1995* for land-based flora and fauna; and

- the *Local Government Amendment (Ecologically Sustainable Development) Act 1997*, which requires local councils to have regard to the principles of ecologically sustainable development in the exercise of their functions.

Heritage Legislation in NSW - Past, Present & Future

Stephen Gow, Director Planning & Environmental Services, Armidale City Council

Below is an extract from the essay "Heritage Legislation in NSW: Past, Present and Future" by Stephen Gow that was awarded the Peter Hunt Memorial Prize. In memory of Dr Peter Hunt, an extraordinary environmental broadcaster and journalist, the EDO in NSW offers an annual prize of $300 for the most outstanding essay or thesis on environmental law by a postgraduate student at Macquarie University. The full essay is available from the EDO: 02 9262 6989.
The essay was first published in the Local Government Law Journal [(1997) 2 LGLJ 148] published by LBC Information Services and is reprinted with permission.

Introduction

The *Heritage Act* 1977 (NSW) was one of the first pieces of legislation in Australia to address cultural heritage conservation. Developed in the wake of a Victorian *Historic Buildings Act* 1974 and the landmark *Australian Heritage Commission Act* 1975, legislation in New South Wales was initially enacted in response to "Green Bans" and community concerns about the proposed destruction of bushland and historic buildings in Sydney in the late 1960's and early 1970's[1]. At that time the protection of items in imminent danger of destruction provided the focus for the early operation of the Act.

Almost twenty years on, increasing societal awareness of the cultural value of heritage has seen shifts in community expectations and growing acceptance of government involvement in heritage matters. Davison suggests that the community's attachment to its "heritage" has also been strengthened by the increasing pace of change in society, and a sense of fear or rejection of what the future may bring[2].

Meanwhile the advent of multiculturalism in Australia has also led to a broadening of the concept from an initial preoccupation in the 1970's with places with white anglo-

saxon associations[3]. Equally the notion of heritage as physical "things" which we value and wish to retain has also been expanded to embrace ideals and value systems, language and folklore as part of cultural heritage[4]. Another significant factor has been the increasing role of local government in heritage management throughout the State.

The *Heritage Act* 1977 - Background

The *Heritage Act* 1977 (NSW) came into force from April 1978. Although originally conceived as part of a review of environmental planning system in the 1970's, the heritage component was brought forward and separated from planning legislation for reasons of political expediency - a response to community concerns about demolitions of historic buildings in Sydney[5]. From its inception, the legislation was used in a reactive, rather than prospective fashion. Ironically, it was only with the subsequent emphasis on conservation in the planning regime for New South Wales established under the *Environmental Planning and Assessment Act* 1979 ("EPAA"), that this position noticeably altered. Under ss. 5 and 26 of that Act, local government was given a mandate to conserve natural and man-made resources and to produce local environmental plans to make provision for, inter alia, "protecting the environment"[6].

Greater impetus was provided by the State Government in 1985, with a Direction to all Councils to provide for conservation of places of heritage and ecological significance in Local Environmental Plans[7]. This marked a watershed in heritage conservation in NSW, with increasing involvement by local government since that time in the identification and management of cultural heritage through heritage studies and development control activities[8]. This has allowed the State Government in recent years to refocus on "big picture" heritage issues.

Components of the Act

The *Heritage Act* 1977 contains no specific objectives, which may explain a degree of soul-searching by those affected by its operation, including Commissioners of Inquiry empowered to advise the Minister on its Implementation[9]. The purpose of the Act must therefore be adduced by reference to its main components.

The meaning of Environmental heritage

Much has been written about the definition of "environmental heritage" in s. 4 of the Act. The term appears very broad, encompassing:

> *"buildings, works, relics or places of historic, scientific, cultural, social, archaeological, architectural, natural or aesthetic significance for the State".*

The Act therefore seeks to identify and protect various kinds of heritage items and the types of significance that result in their value to the community. The phrase "significance for the State" also attracted a good deal of attention in commentaries on the Act.

Public administration of heritage conservation

Part II of the *Heritage Act* establishes the Heritage Council of NSW, comprising 12 members drawn from the Government Architect, the Director of the National Parks and Wildlife Service or their nominees, together with nominees of the Director of the Department of Planning, the Minister for Local Government, the Labor Council of New South Wales, the National Trust of Australia, and the Royal Australian Historical Society. Only three 'specialists', with qualifications in heritage conservation, citizens' property rights and knowledge of the building and development industries are specifically identified in s.8(2) of the Act[10].

The Heritage Council is empowered under s.21 of the Act to investigate and make recommendations to the Minister for Urban Affairs and Planning in relation to the administration of the Act, conservation and access to items of the environmental heritage, and provision of information.

The Heritage Council is assisted in its work by a professional bureaucracy, traditionally within the State Department of Planning. The Carr Government has recently established an independent Heritage Office[11] with approximately 20 staff. The Office still reports to the same Minister, but is to have independent Directorship.

Identifying and protecting environmental heritage

Parts III and IV of the Act provide a system of Interim and Permanent Conservation Instruments or Orders ("ICO's" and "PCO's") which, as their name implies, provide protection of varying duration for items or precincts of the environmental heritage.

ICO's and complementary provisions under Divisions 8 and 9 of Part VI of the Act[12] are primarily intended as emergency measures to maintain the status quo pending more detailed investigation and research. They remain valid for up to one year or until action is taken following the completion of an Inquiry in response to any subsequent objection by an owner, mortgagee or lessee of the affected land[13].

PCO's can be made following a Commission of Inquiry, or on the request of the Minister, the Heritage Council, a local Council or the owner of an item of the environmental heritage. The Act also provides for an Inquiry if an owner, mortgagee or lessee objects[14].

Part IV of the Act in turn outlines mechanisms for approval by the Heritage Council of proposals to undertake work on, demolish or alter items subject to Conservation Instruments under the Act.

Division 4 of Part IV empowers the Minister to determine appeals arising from Part IV applications, including appeals on prescribed applications, if the Minister considers that the appeal issue relates to heritage significance[15]. In determining an appeal, the Minister may request a Commission of Inquiry[16].

Part V of the Act provides the Heritage Council with the power to prepare or direct the preparation of an environmental planning instrument under the EPAA "in relation to land within a heritage precinct"[17]. A mandatory requirement for consultation with the Heritage Council is also established for other authorities preparing environmental planning instruments affect-

ing land to which a Conservation Instrument applies[18].

Finally, where an ICO or PCO is current for an item, powers exist under Divisions 4 and 5 of Part VI of the Act in relation to the offence of wilful neglect for the purpose of facilitating demolition or redevelopment. In such circumstances, the Heritage Council may issue an Order to an owner to effect stabilisation works[19]. If the Order is not complied with, the Council may resume land or prevent further development for up to 10 years[20].

Enforcement
Part VII of the Act deals with its implementation and enforcement through command and penalty provisions. Offences under the Act are punishable by fines up to $20,000 or 6 months' imprisonment, or both[21]. The Minister also has power under s.161 of the Act to 'freeze' development on a site for up to ten years where illegal demolition, damage or despoilation of a heritage item has occurred.

Finally, judicial review provisions in relation to breaches of the Act are exercisable by any person on appeal to the Land and Environment Court[22]. Orders may also be sought in the Supreme Court under s.154 following or in anticipation of a breach of the Act.

Facilitation
The remaining provisions of the Act relate to the advisory, educational and financial functions of the Heritage Council.

Evaluation and Discussion
Pearson and Sullivan provide useful criteria for the assessment of what they describe as "effective" heritage legislation[23]. Interestingly, in view of the foregoing discussion, their foremost concern is that legislation should be complemented by continuing financial support and enabling provisions such as education and tax relief. Other important elements identified include:

- Legislative systems should be inclusive and consultative;
- Legislation should be capable of protecting classes of places or objects without the need for special listing;
- It should restrict deterrents to major issues that are enforceable, and make them real deterrents, such as the loss of development rights;
- It should balance individual and societal rights in cultural property;
- It should be closely linked to environmental planning.

On the face of it, the *Heritage Act* appears responsive to these issues and similar criteria developed by Australia ICOMOS[24] for legislation to protect the National Estate[25]. Aspects of the Act which are less satisfactory include:

- The absence of provision for effective field management[26];
- The relatively complex administrative regime for the operation of the Act and its inter-relationship with the EPAA;
- The staff involved in the Act's administration have not been responsible to the Heritage Council or its Chairman.

These and many other issues have been raised in two major reviews of the *Heritage Act* by the State Government in 1992 and 1996[27].

Conclusion
Within NSW there appears ample scope to rationalise the current operations of the *Heritage Act*, the EPAA and the *National Parks and Wildlife Act 1974 (NSW)* in relation to heritage conservation. Indeed this option was canvassed as "logical" in the 1992 Review of the NSW Heritage System[28], but ultimately dismissed because of the scale of legislative change required.

Four years later, political expediency appears to be driving a move to further divorce the operations of the *Heritage Act* from mainstream environmental planning in NSW, while paradoxically suggesting that certain regulatory provisions in the Act could be appropriately "borrowed" by local government for use under the EPAA[29].

The current situation mirrors a wider problem with law reform in Australia which demonstrates a preference for piecemeal amendment and augmentation of existing statutes rather than wholesale review[30]. This reflects the short-term horizon of democratically-elected governments worldwide and bedevils many attempts to introduce effective environmental management.

[The full paper also examines the following key issues:
- *How inclusive and relevant is the current approach to heritage in NSW, for example in relation to aboriginal heritage?;*
- *The existence of separate legislative approaches to heritage conservation at State and Local Government level;*
- *The effectiveness of the Heritage Act as a regulatory and enforcement tool in practice.]*

Endnotes

1. Freestone, R. (ed) An Introduction to Heritage Planning. Proceedings of a Short Course at the University of New South Wales, October 1994, at p.5.
2. Davison, G and McConville, C, eds, A Heritage Handbook. Allen & Unwin, Sydney, 1991, at p.4.
3. See Armstrong, H. (1) 'Social Issues and Multiculturalism' in Freestone, R. op. cit, pp.68-73. and (2) The Myths of Heritage - Inconsistencies in a Multicultural New World. Polemic, 5(2), 1994, pp 83-100.
4. Fourmile, H. Aboriginal Heritage Legislation and Self-Determination. Australian-Canadian Studies, 7(1-2) 1989, at pp.52-53.
5. Hoppe, S. The NSW Heritage Council and the NSW Heritage Act in Freestone, ed, op. cit, at p.21
6. This is to be interpreted in a broad sense, and the EPAA includes provisions for protection of buildings or works through control over demolition, as well as protecting flora and more recently fauna. Note, for example, the 1996 amendments to the EPAA to achieve integration with the operation of the *Threatened Species Conservation Act* 1995 (NSW).
7. Direction G21 pursuant to sections 26(1)(h) and 117 of the EPAA.
8. Boer, B in Lipman, Z., ed. Environmental Law and Local Government in NSW. The Federation Press, Sydney, 1991 at p.2.
9. O'Connell, C. in Wintergarden Inquiry (ibid), at pp.27-32 and 58-62, and op. cit. in "Camden" Inquiry above at pp.21-22.
10. Although it may appear reasonable to assume that the representatives of the organisations listed above would be selected because of competencies in heritage matters, the fact that the recent review of the Act foreshadows an amendment "to ensure a skills-oriented composition" suggests a level of concern with the current constitution (Knowles. C, op. cit, at p. 2). The Minister also proposes a reduction in the term of members to two years, which appears unlikely to foster a long-term strategic approach.
11. NSW Government Gazette No 77, 28 June 1996.
12. See especially Section 130 Orders, preventing harm to items not subject to Conservation Instruments ("harm" is widely defined in s.129A and s.4(5)). The Act also provides for Stop Work Orders under s.136, which give 40 days' protection from destruction. Finally, Division 9 of Part VI of the Act also provides that an individual must obtain a permit from the Heritage Council to

excavate land with the intent to expose, discover or move a relic, being any deposit object or material evidence relating to the settlement of NSW that is more than 50 years old, but not including Aboriginal settlement. The definition therefore applies to historic Shipwrecks in State Waters.

13 Sections 29A-31 *Heritage Act* 1977.

14 Section 41, Heritage Act 1977. See also Divn.3 of Part III of the Act. In the case of proposed ICO's and PCO's, the relevant grounds for objection which will require the Minister to call an Inquiry are set out in Section 41, as follows:

15 Section 77, *Heritage Act* 1977

16 Section 71, *Heritage Act* 1977.

17 Section 82(1), *Heritage Act* 1977.

18 Section 83, *Heritage Act* 1977.

19 Sections 117-120, *Heritage Act* 1977. Interestingly, the appeal path here is to the District Court rather than the Minister.

20 Section 121, *Heritage Act* 1977.

21 Section 157, *Heritage Act* 1977.

22 Sections 153-4, *Heritage Act* 1977. s.153 matters are heard in Class 4 of the Land and Environment Court jurisdiction. A major case heard pursuant to this Section was *Nettheim on behalf of Actors' Equity v. Minister for Planning and Local Government* (Nos 1 & 2 -40139 and 40086 of 1988) in which the applicant sought to have the revocation of a PCO in respect of the Regent Theatre overturned, on the grounds that the Minister had not adequately considered the recommendation of a Commission of Inquiry. The Supreme Court of NSW Court of Appeal eventually dismissed the appeal for want of evidence of inadequate or irrelevant consideration.

23 Pearson M & Sullivan, S. Looking After Heritage Places. Melbourne University Press, Melbourne, 1995, p.35

24 The Australian Committee of the International Council on Monuments and Sites. ICOMOS is a UNESCO-affiliated association of professional conservation practitioners.

25 Yelland., S. in Davison, G and McConville, C, eds. op. cit, at p.46-52 from work by Yenken, D. The National Estate in 1981: A Report of the Australian Heritage Commission, Canberra, 1982.

26 A separate *Historic Houses Act* 1980 does provide for protective custody and maintenance of certain buildings under State ownership by a Historic Houses Trust.

27 See reference 7 above.

28 NSW Department of Planning and Heritage Council, op. cit, at pp.5 and 9.

29 Knowles, C. op. cit, at p. 5.

30 An example in NSW was the failure to effectively integrate Environmental Planning legislation with the new *Local Government Act* 1993. Ironically, as a result of two Green papers on Regulatory Reform released in May 1996, the Government is now contemplating removing the approvals provisions of the LGA and bringing them within the EPAA - again missing the opportunity for effective integration of the statutes.

COURT OF APPEAL CONFIRMS REMEDIATION ORDER

CASE NOTE UPDATE: Iron Gates Pty Ltd v Oshlack and Anor - Court of Appeal

Lisa Ogle, Solicitor, Environmental Defender's Office in NSW

The NSW Court of Appeal[1] has unanimously upheld the earlier decisions of Stein and Pearlman JJ in the Land and Environment Court[2] requiring a developer demolish the infrastructure for an illegal subdivision and return the site to its pre-development condition by replanting native vegetation[3].

In March 1997, Stein J found that work carried out on the Iron Gates site at Evans Head, NSW, had been carried out in contravention of s 76(2) of the *Environmental Planning and Assessment Act 1979* ("EPA Act"), in that Iron Gates Pty Ltd had clear-felled vegetation, excavated drains and built roads in breach of the conditions of its development consent which required a "green subdivision". Justice Stein granted an injunction restraining all further work on the site, and 4 months later, Pearlman J made consequential orders under s 124 of the EPA Act that Iron Gates Pty Ltd return the site to its pre-development condition.

The appellant challenged the extent and severity of Stein J's findings that the consent had been breached. It argued that the differences in the development *as constructed* to the development *as approved* were permitted under Condition 1 of the consent which provided that "Development of the site shall be carried out *generally* in accordance with the documentation lodged...".

Chief Justice Gleeson, with whom Priestley and Beazley AJJ agreed, declined to interfere with the findings of the trial judge in the absence of evidence that the trial judge had palpably abused his discretion[4]. His Honour upheld Stein J's findings of fact that the drains constituted a gross departure from the consent, that the wildlife corridor had been obliterated and that the roads were wider than those proposed in the consent.

The Court of Appeal also upheld a declaration that the appellant had breached s 118 D of the *National Parks and Wildlife Act 1974*, by destroying habitat which it knew to be habitat of threatened species.

As a consequence of the Court of Appeal's decision not to interfere with any of the findings of fact, or any aspect of the discretionary judgment of Stein J, the challenge to the remediation orders made by Pearlman J also failed. The appeal was dismissed with costs.

Endnotes

1. *Iron Gates Pty Ltd v Oshlack and Anor*, CA 40485/97, Gleeson CJ, Priestley and Beazley JJ, unreported.
2. See Oshlack v Iron Gates Pty Ltd and Anor, unreported, Pearlman CJ (on remediation), 4 July 1997. Also see the earlier unreported judgment of Stein J, (on breach of consent) LEC, 6 March 1997, 40152 of 1996, and
3. For two earlier Impact articles on these Land and Environment Court decisions see Ogle L, "Why developers should read their consents", (1997) 45 Impact 11, and "Remediation: The Land and Environment Court flexes its muscles", L Ogle, (1997) 47 Impact 10.
4. See High Court decision of *Abalos v Australian Postal Commission* (1990) 171 CLR 167.

Book Review:

Environmental Incentives. Australian Experience with Economic Instruments for Environmental Management. Environmental Economics Research Paper No. 5.

Dr David James, Ecoservices Pty Ltd, published by Environment Australia 1997.

Review by Andrew Sorensen, Solicitor, Environmental Defender's Office in NSW

This report is an updated and expanded version of *Using Economic Instruments for Meeting Environmental Objectives: Australia's Experience*, a research paper prepared by the same author for the Department of the Environment, Sport and Territories in 1993.

The publication of this report reflects an increasing interest in the use of economic instruments as an alternative to, or more commonly in conjunction with, traditional "command and control" or regulatory mechanisms as a means of achieving environmental objectives. Economic instruments are in essence financial incentives to undertake appropriate behaviour in a market-based system, and are said to potentially result in efficiency gains and greater flexibility.

The report starts from the premise that the use of economic instruments for environmental management may be one way of "achieving more efficient government, and of encouraging environmental good practice while improving economic performance and international competitiveness" (p.1). The report takes the view that the main advantage of the use of economic instruments is their economic efficiency, enabling the achievement of environmental objectives at "least cost" to the community.

The report also makes the (not unexpected) underlying assumption that environmental management objectives are to be determined in the context of sustainable development, which it apparently considers means the need to achieve environmental protection as a way of supporting economic development. The use of economic instruments is in turn seen as means of implementing the principles of sustainable development.

A very brief overview is provided in the report of developments at both international and national levels, regarding the recognition of economic instruments as a possible means of achieving environmental outcomes.

The report also provides a short overview of the use in Australia of different types of regulatory systems and economic instruments in the context of pollution management, natural resource management, and management of natural areas and biodiversity. The main body of the report then follows the classification system recommended by the Organisation for Economic Co-operation and Development (OECD), looking in turn at:

- emission and effluent charges
- user charges for the treatment and/or disposal of waste
- environmental taxes and levies
- proportional non-compliance fees
- product charges
- deposit refunds
- tradeable discharge permits
- tradeable resource use rights
- user charges for natural resources and environmental amenity
- performance bonds
- other economic instruments.

The report utilises Australian case studies, where possible, to demonstrate the practical application of these instruments, and includes individual evaluations of the performance of each major system studied. The studies are diverse and are drawn from Commonwealth, State, Territory, and local government experiences.

The report then concludes with an overall evaluation of economic instruments in relation to specified criteria, including:

- effectiveness in achieving environmental objectives (protecting the resource/environment)
- efficiency gains over other regulatory systems
- incentives for ongoing improvements in efficiency and environmental performance
- social equity aspects
- community and industry acceptance
- administrative feasibility and administrative costs.

The report has as its focus practical application rather than theory, and as such is inherently limited in terms of providing a sound and detailed theoretical/philosophical justification for the use of economic instruments. Accordingly, readers who are interested in such theory should look elsewhere for a more substantial treatment.

The report acknowledges that economic instruments suffer from practical limitations, for example the inherent difficulty involved in identifying and valuing environmental resources. The report also notes that, if poorly designed, economic instruments can cost as much as command and control systems, and can simply be ineffective in achieving the desired results (examples include where the price incentive is not sufficient, or in the case of tradeable rights, where the "zone" or area within which rights can be traded is inadequately/incorrectly defined). However, the treatment of these issues is brief and superficial. Other important issues, such as the effectiveness of the use of economic instruments for controlling behaviour in a market with oligopoly or monopoly characteristics, are not specifically addressed (apart from brief references in certain case studies). The most useful element of the report is its overview of the systems in place across Australia in respect of each of the OECD categories mentioned above, its detailing in the case

continued overleaf...

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studies of particular regulatory approaches of interest adopted in different Australian jurisdictions, and the evaluation of those approaches. This approach assists in identifying the recent history of usage of such instruments in Australia, the current state of play, and some of the comparative advantages and limitations of the use of particular economic instruments in practice.

However, the report's main failing in respect of the overviews and case studies is its superficiality and brevity. The treatment of individual case studies is simply not detailed enough to enable the reader to glean a great deal of useful information, and the individual evaluations are unsatisfactory. Certain evaluations contain statements of opinion which are not necessarily supported by the facts presented in the case studies. In respect of the majority of the case studies, there is a lack of serious critical analysis. One gets the impression that the author based many of the studies solely on information and opinions provided by the implementing agencies themselves. A good example of this is the determinedly positive treatment in the report of the Victorian Environment Protection Authority's accredited licensee scheme.

The final evaluation section also only covers 4 pages, with its general conclusions suffering due to reliance on the evaluations in individual case studies, and the lack of critical analysis.

In conclusion, the report provides a basic introduction to the subject of economic instruments, and a good overview and summary of the application of such instruments in the Australian context, but is lacking in depth, detail and serious critical analysis for anyone who wishes to pursue the subject beyond an initial level.

A free copy of the publication is available from the web page of the Environmental Economics Unit of the Commonwealth Department of the Environment: http://www.erin.gov.au/portfolio/dest/eeu/publications/enviro.html

Errata

With the index supplied in the September edition of Impact the incorrect author was credited for two articles. Maria Comino not James Johnson was the author of "Rivers in Crisis" Impact 28, January 1993. Maria Comino and David Mossop were the authors of "Inland Rivers: Regulatory Strategies for Sustainable Management" Impact 28, January 1993.

Commonwealth Environmental Laws

A discussion paper on the reform of Commonwealth environmental law is now out. Available at http://www.environment.gov.au/net/legrev.html. A summary of the discussion paper will soon be available from the EDO.

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