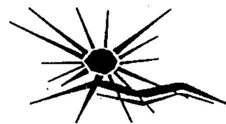
IMPACT

PUBLIC INTEREST ENVIRONMENTAL LAW



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ENVIRONMENTAL LAWS FOR THE 21st CENTURY: What Role for the Commonwealth

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1. Introduction

For the first time since federal environmental law came into being, the Commonwealth is proposing major substantive revisions. The proposed reforms aim to consolidate and update the law — not a bad thing since many of them are out of date and have proved ineffective in halting and reversing environmental degradation. The proposed reforms entail the repeal of a number of existing Acts, to be replaced with an *Environment Protection Act,* a *Biodiversity Conservation Act*, and heritage law reform to follow. Unfortunately, the haste in which this review and revision of law has been conducted (with less than a month for public comment) practically ensures that the opportunity to take Australia into the 21st Century with world-class environmental laws is going to be missed.

Most importantly, the proposed reforms represent a continued retreat by the Commonwealth from its environmental responsibilities. There is little in the paper that evinces the strong leadership role for the Commonwealth that is necessary if the Australian environment is to be effectively protected, and to ensure all Australians are guaranteed the benefit of equivalent environmental protection wherever they live. Under the guise of "efficiency and the reduction of intergovernmental duplication", the paper makes it clear that the Commonwealth is committed to devolving as many environmental matters as possible to the States, through mechanisms such as bilateral agreements and allowing industry and developers to "contract out" of having to observe environmental law through "conservation agreements".

The proposed reforms also severely restrict the nature of environmental matters considered to be appropriate for the Commonwealth to regulate, or play a part in regulating. It limits these to "matters of national environmental significance" which, extraordinarily, fails to include such crucial matters as climate change, vegetation clearance or land degradation. Indeed, the list, in most cases, does not deal with broad-scale environmental issues, but rather one-off places or activities. It could hardly be more restrictive in its view of what the Commonwealth's role in environmental management should be, which is all the more disappointing because the Commonwealth clearly has the legislative competence to do far more.

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2. An appropriate environmental role for the Commonwealth

As we head into the 21st century we find ourselves in a time of growing environmental damage and concern, nationally and internationally. Environmental issues have been at the forefront of the public's concerns for over two decades.

In this context, it is crucial that we have strong leadership on environmental matters from the Commonwealth government. The Commonwealth government should be:

- providing strong leadership at the national level on matters of national environmental significance
- using its best endeavours to ensure that State and local governments meet and maintain best practice national environmental standards
- using its own strong performance to take a leading role on environmental matters in international forums.

3. How does the Government's package measure up?

The package outlined in the Consultation Paper **"(the Paper)"** has a number of key deficiencies. Further, the Paper is silent on many issues which we consider important. In many cases a single sentence would have clarified the position. It is of concern that the Commonwealth, by omission, indicates that these areas are not of concern to it and we await the legislation to see whether our concerns will be realised.

3.1 The package fails to demonstrate strong environmental leadership at the national level

(a) "Matters of national significance" are defined extremely narrowly

The package proposes that the Commonwealth should be responsible for "matters of national significance". However, it proposes an extremely limited version of matters of national significance which would restrict Commonwealth triggers for involvement in environmental matters to very site-specific, or issue-specific, matters.

The package ignores the extremely serious broad-scale issues facing Australia. Extraordinarily, climate change does not rate a mention. Nor do vegetation clearance, land degradation or the allocation of water rights. These are critical issues facing Australia as we head into the 21st century. If the Commonwealth is to be a credible force in environmental protection, it simply *must* accept its responsibility and lead the way in dealing with these issues.

We recognise that dealing with them will not be easy. The degree of difficulty does not justify Commonwealth non-involvement, however. Indeed, it makes Commonwealth involvement even more urgent, because the States, as they have already demonstrated, are unlikely to find the political will, or the capacity, to deal with these national issues effectively. The Commonwealth has the constitutional capacity to demonstrate strong environmental leadership. If the big environmental issues facing Australia today are to be dealt with in a comprehensive and consistent way, it is the Commonwealth which *must* do so.

(b) The package fails to measure itself against *environmental* criteria

The package proposes a set of criteria by which the proposed legislation is to be measured. However, these criteria, such as "certainty", "removal of unnecessary duplication", and "efficiency and timeliness", have very little to do with environmental outcomes.

Worse, the Commonwealth has failed to develop a set of *environmental* criteria by which to judge its package. It says that it is committed to setting high environmental standards - but the rest of the package fails to bear this out. If the Commonwealth is serious about environmental protection, it will revisit its current criteria, and develop outcome-based, best practice environmental criteria aimed at delivering good quality environmental outcomes. Legislation based on these criteria would look very different to the three proposed Acts contained in this package.

(c) Adequate safeguards need to be built into the proposed accreditation process

A major part of the Commonwealth's package rests on matters of national significance being managed on the ground by accredited State processes. This could be acceptable if sufficient safeguards were built into the accreditation process. However, the package provides little, if any, reassurance. There is no serious attempt to address the types of environmental standards which would be required from accredited States. There is also no mention of crucial accreditation requirements such as a requirement for the monitoring and regular review of accredited States, or for community participation in the development of the accreditation process.

Worse, the Commonwealth appears to be placing great reliance on mechanisms such as management plans and conservation agreements which, under the accreditation process, will exempt the parties which have signed them from Commonwealth environmental laws. We are concerned that these will be secret documents, unavailable to, and unenforceable by, the community. This would be completely unacceptable.

3.2 The package fails to address the development of comprehensive national environmental standards

This would have been a marvellous opportunity for the Commonwealth to announce its intention to work cooperatively with the States to develop national environmental policies, strategies, programs and standards in *all* areas of environmental endeavour. The package, however, focuses on just three areas, EIA, biodiversity and heritage. Almost no mention is made of other areas.

3.3 The package will not enable the Commonwealth to address many of its international environmental obligations

Despite the fact that this package purports to take the Commonwealth into the 21st century, it will not enable the Commonwealth to address many of its international environmental obligations. This is simply a function of the very narrow definition of "matters of national significance" discussed above. The Commonwealth is effectively fettering its own powers, and, clearly, hoping that the States will do the job for it. This approach needs to change.

4. THE PROPOSED ENVIRONMENT PROTECTION ACT

There are a number of aspects of the proposed Act which are an improvement on the current system, and are welcomed. These include:

- the broadening of the range of persons able to trigger the assessment process, and
- the transfer of decision-making power under the Act from the "Action Minister" to the Minister for the Environment.

However, these improvements are far outweighed by a range of serious deficiencies in the proposal. The major deficiencies are:

- The Commonwealth proposes far too limited a role for itself in the environmental matters which it will regulate under the proposed Act. As mentioned above, it will only regulate "matters of national environmental significance" defined in an extremely restrictive way. It is crucial that the list include the extremely serious broad-scale issues facing Australia, such as climate change, vegetation clearance, land degradation and the allocation of water rights.
- The Commonwealth proposes to maximise reliance on accredited State environmental impact assessment procedures which meet "appropriate standards" when dealing with matters of national significance. However, the Paper is almost completely silent as to what these standards might be, and the safeguards, if any, which will apply. Accreditation should only be granted where States' EIA procedures meet defined best practice environmental and public participation criteria. In addition, accredited States should be subject to monitoring and regular review, and accreditation should be subject to satisfactory State performance.
- The Paper also lacks detail about the actual accreditation process. There appears to be no provision for community participation in the development of the process, or in the monitoring and review of accredited States.
- It appears that the Commonwealth will be relying to a considerable extent on environmental management mechanisms such as management plans and conservation agreements which deliberately exclude the operation of the proposed laws, and the community. This is unacceptable.
- Any member of the community should be able to refer a proposal to the Environment Minister for assessment. Under the proposed Act this will not be possible.
- A very limited form of 'standing' is proposed. Any person should be able to seek review of decisions made under the proposed Act, and apply for civil enforcement of it.

5. THE PROPOSED *BIODIVERSITY CONSERVATION ACT*

The proposed *Biodiversity Conservation Act* contains a number of progressive proposals, including provision for:

- the development of bioregional planning
- expanded categories for the listing of species
- the potential for species impact statements
- the broadening of the definition of key threatening process.

However, these changes are outweighed by the deficiencies in the proposal. Disappointingly, the proposed reforms will do little more than amalgamate five existing Acts and incorporate a variety of disparate "add-ons" to the current law. Worse, the proposal fails to implement crucial provisions, principles, objectives, and priority actions contained in the Biodiversity Convention, the National Strategy for the Conservation of Australia's Biological Diversity, and the National Strategy for Ecologically Sustainable Development.

Other deficiencies in the proposed reforms include:

- a failure to include benchmarks based on priority actions
- a failure to include adequate provisions to detect biodiversity in decline, including an early warning monitoring approach that will trigger strategic conservation interventions
- a failure to regulate access to biodiversity on a national basis
- a failure to address issues of biosafety, biotechnology, and exotic species
- a failure to consider a full range of economic incentives for the protection of biodiversity
- a failure to regulate Australian "processes and activities" beyond national jurisdiction
- a failure to fully address bioregional planning
- a clear commitment to multiple-use principles, without specifying their nature
- the preservation of all existing interests in marine parks and reserves, which will allow commercial fishery extraction to continue as before
- a failure to provide sufficiently for the protection of the non-biodiversity values of protected places
- a failure to provide sufficient safeguards in connection with the accreditation of State biodiversity regimes
- a failure to provide for public participation in and the enforcement of conservation agreements
- a failure to give the Endangered Species Scientific Subcommittee the power to make the listing decisions.

6. THE PROPOSED HERITAGE REFORMS

These reforms need to be understood within the context of the National Heritage Strategy which is to be developed over the next 12 months. It is clearly time that a division of powers and responsibilities between the three levels of government for heritage matters is properly delineated. With this in mind, the direction which it appears the National Heritage Strategy will take - setting out the roles and responsibilities of the Commonwealth and the States, and identifying criteria, standards and guidelines for the protection of heritage by each level of government - is welcomed.

It is also clear that the most logical delineation of the Commonwealth's role in this area is to make it responsible for heritage of national significance. The Commonwealth's support for this proposition is also welcomed.

However, the general thrust of the Commonwealth's proposals is alarming.

- It appears that the Commonwealth's proposed list of "places of national heritage significance" will be highly reductionist

in nature. This has not been justified, and no explanation has been offered of what will happen to the rest of the heritage currently listed on the Register of the National Estate.

- Additionally, the Commonwealth appears to be intent on transferring the powers and responsibilities currently residing with the Australian Heritage Commission to the Environment Minister. This would be a retrograde step, with the potential to unnecessarily politicise the heritage protection processes which will be available under the proposed legislation. An independent statutory authority should administer and enforce the proposed legislation.

- The Paper is silent about the principles of ESD in the context of heritage reform. The legislation should ensure that ESD principles are required to be taken into account in all decisions made under the legislation.

- A place or item on the national list is worth protecting properly. The independent heritage authority should have strong listing, monitoring, protection and enforcement powers.

- Listing on the national list should lead to mandatory management plans containing performance indicators for the maintenance and enhancement of heritage values. Listing should trigger the provisions of the proposed Environment Protection Act, as proposed. In addition, however, the legislation should ensure that "strategic EIA" applies to places and items on the list. The assessment of new government policies, strategies and legislation for their potential impact on the national list will enable at least some integration of heritage considerations into broader government decision-making. Lastly, the independent heritage authority should be a "concurrence authority" under the proposed Environment Protection Act, able to refuse or modify a project being assessed under that Act on grounds of significant adverse impact on heritage of national significance.

- There should be a range of financial incentives available for heritage conservation under the proposed legislation.

- The community should be given the ability to participate in the protection of heritage of national significance, including the nomination process and the monitoring and enforcement of management plans drawn up under the proposed legislation. There should be open standing to bring appeals and take action to remedy or restrain a breach of the legislation.

- Lastly, the Paper makes it clear that the Commonwealth proposes to maximise reliance on accredited State heritage protection procedures when dealing with matters of national significance. However, as with the other parts of the package, the Paper is almost completely silent as to what standards and safeguards, if any, will apply. These need to be developed before accreditation could be supported.

7. Conclusion

In view of the complexity of the issues and the truncated time-frame allotted by the Government to obtain and consider public comment, and draft the Environment Protection Bill and the Biodiversity Protection Bill, it essential that these Bills are considered in Senate Committee.

This is an unparalleled opportunity to ensure that Australia enters the 21st century with world class environmental laws. It is critical that sufficient time is allotted to the process to enable this to happen.

How will the new Native Vegetation Laws work?

Critique from Environmental Lobby

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World Wide Fund for Nature Australia

This is an edited version of a paper presented at the Caring for the Land conference held in Sydney on 1 May 1998 which assessed the efficicacy of the Native Vegetation Conservation Act 1997. The full set of conference papers is available from the EDO.

1. ABSTRACT

Conservation of native vegetation by preventing clearing is Australia's greatest nature conservation challenge. Despite some apparently well intentioned reforms, NSW has failed to learn from and is lagging behind at least Victoria, South Australia and Western Australia in conserving its native vegetation.

The NSW Native Vegetation Conservation Act 1997 relies on a series of regional committees to produce regional management plans. This risky strategy is expensive, is missing essential information, and is open to parochial and political decisions. The danger to vegetation conservation posed by this system is compounded by the legislation's weak and ambiguous environmental goals.

The Government and Department of Land & Water Conservation (DLWC) can best implement a workable vegetation conservation system by:

- Obtaining more funding to implement the Act properly;

- Coordinating and providing mapping of statewide data on vegetation, habitats of threatened and migratory species,

and land and water degradation from which to develop sound plans;

- Establishing a limited number of Regional Vegetation Management Committees based on bioregions and with sufficient resources to identify how to achieve conservation objectives;

- Coordinating and rationalising the plague of natural resource management committees and processes with overlapping roles under DLWC's auspices;

- Developing statewide guidelines which clearly identify areas of native vegetation to be conserved;

- Providing a package of information and financial incentives to complement the regulations;

- Establishing of a satellite-based, remote-sensing, monitoring and enforcement system.

2. BACKGROUND

2.1 The Issue

The State of the Environment Australia report (SEAC 1996:ES-14) describes land clearance and related activities as: "the single largest threat to biodiversity. The situation is deteriorating as threatening activities continue."

As at 1995 Australia was destroying around 425,000 ha per year (NGGIC 1997, AGO 1997), a level of environmental destruction exceeded only by a dozen developing nations (WWF 1995:6).

The destruction of native vegetation damages the environment in three key ways:

- it directly threatens the survival of flora, fauna and ecosystems;
- land degradation caused by over clearing reduces agricultural productivity as well as destroying natural ecosystems;
- destruction of native vegetation is responsible for around 17% of Australia's greenhouse gas emissions (as at 1995) (NGGIC 1997, AGO 1997).

Three examples highlight the environmental damage wrought by ongoing clearing. Of 432 vegetation groups identified in NSW, 6% are considered endangered and 19% vulnerable (NSW EPA 1997:169). Of 95 bird species regarded as nationally threatened, 78 have declined or are still declining due to habitat clearance and fragmentation (Garnett 1992:1,215). In NSW west of the Divide, due to ongoing bushland destruction, there are already about 200-300,000 hectares of former farmlands discharging salt, and it is predicted to rise to five million hectares within 30-50 years (Blackmore 1998:3).

In NSW, the State of the Environment report (NSW EPA 1997:169) notes that "clearing continues at the conservative estimate of 150,000 ha per year." This estimate is based on rigorous, independently reviewed regional studies of at least four major regions of the State (eg. Biodiversity Unit 1995:20-24). It demonstrates that clearing continues at a great rate to the present day.

Conservation groups believe that sustainable management of native vegetation requires a variety of measures, including information and education, financial incentives, and regulation. It is our view that it is preferable for vegetation to be conserved by voluntary means with the enthusiastic management by the landholder. However, despite any number of voluntary measures and incentives, nowhere has the rate of vegetation destruction in Australia been substantially reduced without a complementary, regulatory safety net to control the minority of landholders who persist with clearing. Regulation is essential.

Further, Commonwealth Government Natural Heritage Trust funding to state agencies is now linked to implementation of clearing controls to protect threatened ecosystems and ensure no net loss of native vegetation.

In 1998, there is little excuse for broadacre clearing of more and more marginal land for agriculture. There is no doubt that many farmers are suffering from difficult economic times. However, permitting more clearing is no solution to low commodity prices and will not make producers more viable in the long term. Conservationists believe that agriculture can and should develop through more intensive but sustainable development of already cleared lands.

3. THE ACT & ITS PROBLEMS

The Native Vegetation Conservation Act 1997 was a compromise that was reluctantly supported by conservation groups. We are committed to making the Act work as well as it can. However, there are four substantial problems which need to be addressed, particularly by the Minister and the Department in their administration of the Act.

3.1 Data and information

Good bushland management plans require good vegetation maps and related data. It is a mark of the failure of NSW governments that there is still no adequate set of maps of the state's bushland or monitoring of actual change in vegetation cover. Victoria completed such a system in 1988. Even Queensland, the most environmentally rapacious state in the nation, has more complete and systematic data on where its bushland remains and which ecosystems are threatened.

There are minimum data sets which each committee requires. These must include maps of:

- Vegetation communities now, and as estimated before agricultural developments;
- Threatened vegetation communities and habitat of threatened and migratory species;
- Land systems incapable of agricultural production;
- Areas which should not be cleared to prevent land degradation, especially dry land salinity.

DLWC has established two pilot regional vegetation planning processes in the Western Division. The provision of good environmental data was essential for the Southern Mallee Regional Planning Committee to develop greater understanding between the stakeholders and reach agreement in principle on a

regional plan. The Northern Floodplain Regional Planning Committee has made much less progress due to the lack of this data.

3.2 Regionalisation and ownership
I believe the major weakness of the legislation is its reliance on regional committees to develop vegetation plans and oversee local clearing controls.

South Australia, Western Australia and Victoria have successfully implemented clearing controls based on a single, statewide approach using common criteria. Following the introduction of controls, clearing has been reduced by more than 80% in these states. This has enabled the majority of state government resources to be focussed on the real issues of identifying remaining bushland and threatened ecosystems, monitoring assessing development proposals, and providing incentives for landholders to conserve their remaining bushland.

It is disturbing that NSW failed to learn from these States in developing its legislation. The fact remains that a single administrative structure has proved cheap and efficient, and resulted in good environmental outcomes that are substantially accepted by the communities affected. Further, a statewide approached has proved to be perfectly capable of dealing with any unique regional circumstances.

Conservation groups reluctantly agreed to include a regional approach in the realpolitik of the debate for the legislation. This regional approach was implemented as a political fix in an attempt to buy support from regional communities. I believe it could fail for the following reasons:

a) It leaves controls open to a tyranny of small decisions. It leaves the way clear for every shire and every local entrepreneur to lobby the Minister of the day to establish a Regional Vegetation Management Committee of dubious competence. It is patently obvious that membership of these committees will be biased in favour of local agricultural interests who are likely to promote continued clearing. Already the Minister has fallen victim to this sort of pressure by agreeing to establish a committee for Walgett Shire, ignoring the work already done and the $400,000 investment in the Northern Floodplains pilot vegetation committee for half of the Shire and large adjacent areas.

b) It is very expensive to implement properly and I see no evidence that DLWC will be provided with the resources to do a competent job. The fact remains that the two inadvertent 'trial' regional plans being prepared under DLWC auspices in the Western Division, have cost over $800,000 over four years since 1994 to run, with more work required. There are potentially substantial efficiency gains compared with these first efforts. However, given that DLWC has proposed somewhere between 20 and 50 regions statewide, necessary allocation of resources appears most unlikely.

c) The regional approach continues the process of DLWC and the NSW Government substantially avoiding key decisions on natural resource management in favour of poorly resourced local committees of questionable competence. The plethora of community based processes with parallel or overlapping responsibilities under DLWC auspices is a recipe for waste and inaction. The Regional Vegetation Management Committees will compete for members, resources and a role with: Catchment Management Committees; other Natural Heritage Trust bodies; River Management Committees; and committees associated with the forest reforms, among others. The mess in NSW is in stark contrast to Victoria, where all these natural resource planning and management functions are now undertaken by just ten Catchment Management Authorities. While there are many reprehensible aspects of the Victorian system, the environmental outcomes are no worse but the administrative processes are demonstrably more efficient.

The goal of local ownership of vegetation plans and clearing controls will not be advanced by poorly resourced processes which fail to achieve their objectives.

3.3 When does 'no' mean 'no'?
This Act in my view is a spineless piece of legislation in that at no point does it ever actually identify a class of land based on biodiversity values that will be protected under any circumstances. The legislation is disappointing in that the Regional Vegetation Management Plans should really be targeting lands for restoration of native vegetation. Instead it establishes a myriad of processes for progressively leaping each environmental hurdle to approve clearing.

Firstly, there are 'as of right' exemptions in the Act that allow clearing. Secondly, the best protection the Regional Vegetation Management Plans will provide is to identify areas which may not be cleared without a development consent. In other words, the areas identified for protection in a regional plan can be cleared if a development consent is obtained. Thirdly, if consent is refused, the proponent may appeal. Further, the Act provides for industries to establish 'native vegetation codes of practice' to permit as of right clearing and amend any conflicting regional plans. There is a danger that powerful industry groups will use these provisions to circumvent other checks and balances in the Act and entrench dubious environmental practices.

One of the major concerns is that the Act and subsequent regional plans will specify a series of exemptions where clearing will be permitted 'as of right'. While a few exemptions may be justified they have the potential to be exploited. Environmental values that are difficult to identify may be lost, such as populations of threatened species.

One means of preventing deliberate and inadvertent environmental damage, and of protecting a proponent from prosecution, is to require all clearing to be notified to DLWC. This would enable DLWC officers to provide expert advice to landholders and ensure any mistakes could be prevented. Regrettably a requirement for notification for all activities is not required in the legislation. This is extraordinary and marks agriculture as a privileged industry with development rights afforded to few businesses in similar circumstances. Indeed one has to question the professionalism of an industry that demands the right to undertake environmentally detrimental activities at whim rather than in a planned manner.

3.4 Defining the limits

Many of the problems discussed here may be avoided if the Minister and DLWC set firm guidelines. These guidelines should cover not only the thresholds and targets for retaining vegetation, but also the processes used to deal with areas for which there is inadequate information. The Act's reference to ecologically sustainable development, and the precautionary principle in particular, must be given explicit expression in these guidelines.

The guidelines need to spell out which areas of vegetation should be identified for full protection. These should include:

- Threatened vegetation communities;
- Habitat of threatened and migratory species;
- Land systems incapable of agricultural production;
- Areas required to maintain water quality;
- Areas which should not be cleared to prevent land degradation, especially dry land salinity.

Further, the guidelines should emphasise and help committees preparing plans to identify lands for restoration of vegetation.

3.5 NSW Farmers' alternative

My criticisms of the Act do not support the complaints of the NSW Farmers' Association of excessive bureaucracy and delay. The processes for developing the vegetation plans can be relatively efficient if only the Government and Association will accept: the need for good, statewide data; some environmental bottom lines; and an affordable, limited number of committees.

The NSW Farmers' Association propose an alternative: a plethora of parochial, farmer-dominated committees drawing up plans. Compliance would be largely voluntary under the Farmers' Association proposal. This is a recipe for deliberate or inadvertent environmental pillage.

4. WHAT WILL WORK?

For the existing legislation to work in the most effective manner for the benefit of the environment, the following measures are required:

Funding

The government needs to allocate sufficient funding to implement its Act. Hundreds of millions of dollars have been allocated to forestry reforms in NSW. The rest of the state's vegetation requires similar resources. Pillaging DLWC's existing programs to implement the vegetation reforms is not good enough.

Mapping

A single, whole-of-government program is needed to complete mapping the State's remaining vegetation and to identify: environmentally significant ecosystems and habitats; areas that may contribute to land degradation; and areas incapable of agriculture. This work can then inform the Act's processes and form the basis of good vegetation plans.

Regions

DLWC and the Minister need to identify regions which genuinely reflect bioregions, as the Act and draft State Biodiversity Strategy require. The minimum number of regions possible should be formed so that the government can properly resource their work. Some hard work is required to integrate the work of the regional vegetation committees with the plethora of other DLWC bodies that plague NSW's countryside.

Identify where 'no' means 'no'

The government needs to identify up front vegetation which is too precious to clear. Habitat of threatened and migratory species, threatened ecosystems, and land prone to, or contributing to, land degradation are obvious areas to conserve at all costs. Vegetation needed to maintain water quality and areas incapable of agriculture should also be proscribed. Clear guidelines are also needed to conserve all vegetation communities. Minimising the Act's exemptions is vital.

Regional committees

The government needs to clearly define the role of the Regional Vegetation Management Committees. Statewide guidelines should establish the conservation policy objectives. The role of the committees should be one of identifying the best means of achieving conservation and vegetation restoration, not one of reducing environmental standards to suit parochial interests.

Voluntary incentives

A whole-of-government approach is required to adopt a suite of incentive programs that will provide the maximum encouragement for landowners to conserve bushland. While NPWS has some good programs, more options are required. DLWC needs to ensure its mooted program does not undercut those of NPWS or the clearing controls. The recent report, "Motivating People" (Binning & Young 1997), provides a rigorous framework for the NSW Government to develop new measures. The 1996 fencing incentive, program proposal developed by the NSW Farmers' Association, WWF and others is one such measure.

Monitoring and enforcement

A satellite based monitoring program is required to assess the impact of the Act in regulating clearing, to facilitate both improvements to the regulations. and to identify miscreants for prosecution. DLWC needs to enhance resources available to pursue prosecutions.

5. SUMMARY

It is hard to escape the conclusion that NSW, the state which should be the leader, is the "Basil Fawlty" of Australian vegetation management, in that the government action needed to reach the goal becomes increasingly contorted following each blunder despite erstwhile good intentions.

Regulation is an essential element along with information and financial incentives for conserving native vegetation. The Native Vegetation Conservation Act 1997 is a compromise which could conserve our bushland but only if these key problems are addressed.

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COMMUNITY ENFORCEMENT COSTS ORDERS, THE HIGH COURT AND THE NEED FOR REFORM

Oshlack v Richmond River Council

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The Story So Far

The Land and Environment Court (LEC) in NSW has taken a leading role[1] in a number of cases in recognising the public interest aspect of community enforcement[2] of environmental and planning law. In the case of *Oshlack v Richmond River Council and Iron Gates Developments Pty Ltd* Stein J of the LEC held that the LEC, in exercising its unfettered discretion to award costs[3] in unsuccessful community enforcement proceedings, should consider the public interest as a relevant and significant factor to be taken into consideration. However it is not a factor sufficient in itself to warrant refusing an award of costs against an unsuccessful community enforcement applicant.[4]

However, in June 1996, when deciding on an appeal against this judgement, the NSW Court of Appeal,[5] unanimously overturned this line of reasoning. It held that the public interest aspect should not be taken into account when considering the exercise of the discretion to award costs. The Court of Appeal based its ruling on a decision of the majority of the High Court in *Latoudis v Casey.*[6]

Mr Oshlack appealed to the High Court against the Court of Appeal's decision. The High Court, in a 3:2 decision,[7] overturned the decision of the Court of Appeal.

The majority of the High Court (Gaudron, Gummow JJ and Kirby) decided that:

- *Latoudis* dealt with summary criminal proceedings and does not apply to the issue of the exercise of the costs discretion in the LEC.[8] *Latoudis* did not create "a general rule governing the exercise of all unqualified statutory cost discretions".[9]

- There is no absolute proposition that the sole purpose of a costs order is compensatory.[10] Such a proposition would shackle or confine the discretion.[11]

- Costs discretion granted in the LEC under section 69 of the *Land and Environment Court Act 1979* (NSW) should not be construed narrowly.[12] It should be exercised to allow for the varied interests at stake in the litigation,[13] including the public interest which Stein J identified.[14]

- The question that the Court of Appeal had to ask was not whether this was "public interest litigation" but whether the reasons given by Stein J for refusing to award costs to the successful respondent were definitely beyond the intended scope and purpose of section 69.[15] Gaudron and Gummow JJ, having examined the specialist nature of the jurisdiction of the LEC[16] and the operation of section 69 of the LEC Act[17], decided that the reasons given by Stein J were not beyond the intended purpose and scope of Section 69.

The minority (Brennan CJ and McHugh J)determined that:

- "The costs discretion must be exercised judicially in accordance with established principle and factors directly connected with the litigation."[18]

- On the authority of *Latoudis* and on existing principles regarding the exercise of the costs discretion, the fact that the proceedings (whether civil or criminal) "can be characterised as public interest litigation is irrelevant to the question whether the court should depart from the usual order that costs follow the event."[19] In addition, all the additional factors upon which Stein J relied to find the "special circumstances" were irrelevant to the question of costs.[20]

- "(T)he result of the litigation"[21] is the most important guiding principle. "It is the conduct of the successful party, and not the conduct or motives of the unsuccessful party, which is relevant to the exercise of the costs discretion."[22] The principle that "costs follow the event" is "grounded in reasons of fairness and policy".[23]

The Court[24] did flirt with the dilemma that it would be faced with if the successful respondent were a private developer, who acted in good faith on the strength of a planning approval, rather than a planning authority. How would the court balance the public interest against the developer's interest when deciding the costs issue? However, the Court had no need to decide the issue.

Commentary

The minority judgements cling to the traditional views of fairness and equity which were considered only in terms of the personal interests of the parties, not in terms of the overall community interest.[25]

The *Oshlack/Latoudis* saga is an illustration of the uncertainty that surrounds the costs issue for community enforcement applicants so long they remain at the mercy of judicial discretion and therefore subject to the appeal process.

The outcome has left a number of questions unanswered.

- What will be the fate of unsuccessful public interest litigants when they argue costs against private respondents rather than planning authorities?
- Given the slim majority decision, will a differently composed High Court consider the matter differently?[26]

In any event, at best, the High Court has merely allowed the courts to consider the public interest aspect as one factor to be taken into account, which, by itself, may not overturn the traditional "costs follow the event" rule.

The experience in NSW and SA regarding community enforcement, open standing and an approach to the costs issue that recognises the importance of community enforcement has been that the mythical litigation floodgates have not opened.

While McHugh J appears to have sympathy for unsuccessful public interest litigants[27], he considers it is the role of the legislature to address their plight[28]. His Honour considers that judges cannot and should not apply their "social preferences",[29] in determining how and when to consider the "public interest". However, His Honour is prepared to allow the judiciary to make value judgements (based on social preferences) as to what amounts to "lax conduct"[30] of litigation and as to how local councils should best use their funds.[31]

Even though the High Court has endorsed the LEC approach to the costs discretion, the uncertainty inherent in the exercise of a judicial discretion remains. How can this uncertainty be complementary to purpose of community enforcement proceedings? If reform is not forthcoming community enforcement will continue to be hampered by the costs disincentive.

Recommendation for Reform

The options for improvement range from:

(a) retaining the status quo and allowing "costs to follow the event" except in special circumstances that may justify departure from that rule; to

(b) ensuring that unsuccessful community enforcement litigants can obtain payment of their costs and are immune from adverse costs orders (except in vexatious/frivolous applications) and that community enforcement litigants can obtain full reimbursement of their costs in successful litigation.

The second option recognises community enforcement proceedings for what they are - actions brought in good faith on reasonable grounds to protect community assets for present and future generations. This approach throws off the shackles of costs regimes which are focused on private litigation. It clearly indicates to the community and potential respondents that community enforcement is a much valued community service that deserves substantial and special financial assistance.

If the costs deterrent to community enforcement is to be removed for unsuccessful applicants, then an acceptable trade off may be the amending of open standing provisions[32] to impose standing qualifications such as those in section 104(7) and (8) of the *Environment Protection Act* 1993 (SA) and section 141(6) and (7) of the *Water Resources Act 1997* (SA).[33]

To fund the costs, all developments could be subject to a small levy to create an indemnity fund to cover community enforcement costs. Such a levy would spread the financial burden equitably across the community. The fund could also finance expert reports for community enforcement applicants.[34] The funding should extend to Supreme Court and High Court appeal costs.

The identification of community enforcement applicants before the application is heard is essential to the successful operation of the reforms. Pre hearing conferences in enforcement proceedings could be used to determine whether the application is a community or private enforcement application for the purpose of costs. Such a determination could be more easily made in the inquisitorial atmosphere of the conference rather than the adversarial atmosphere of the application hearing. Comino has identified a number of criteria that could be used by the court to assist in the costs certification process at the

conference.[35] Pre hearing conferences may become costly, time consuming and open to abuse. The costs of such conferences should be borne by applicants who frivolously claim to be a community enforcement applicants but not by bona fide (even if unsuccessful) claimants.

[36] To paraphrase Toohey J, "The door to the Court is open but the "Enter at Your Own Risk" sign remains firmly in place".

The uncertainty in relation to the exercise of the costs discretion in public interest cases represents an enormous disincentive to community enforcement proceedings. There is a need for statutory reform.[37]

This article has been extracted from the writer's Masters thesis. Should you wish to obtain a copy of that paper, please contact the writer.

ENDNOTES

1 In SA, the Environment Resources and Development Court (the ERDC) has not had the opportunity to consider argument on costs orders against unsuccessful community enforcement applicants. It has heard argument in relation to security for costs in such proceedings. See *Vandenberg v Hannaford & Artesia Pty Ltd* 1996 EDLR 732. See also *District Council of Kingscote v Kangaroo Island Eco Action Inc* (1996) 67 SASR 422, SA Supreme Court decision on costs against an unsuccessful public interest litigant in criminal proceedings.

2 Community enforcement is the enforcement of the law by persons who have no direct stake in the outcome and who are taking enforcement action to protect the public interest. Australian Law Reform Commission Reports Nos 69(2) and 75.

3 Under section 69(2)(a) of the *Land and Environment Court Act 1979 (NSW).*

4 *Oshlack v Richmond River Council and Iron Gates Developments Pty Ltd* (1994) 82 LGERA 236 at 240-244.

5 *Richmond River Council v Oshlack* (1996) 91 LGERA 99. The Court of Appeal upheld an appeal against a judgement of Stein J in the LEC in which His Honour refused to award costs to the successful respondent in community enforcement proceedings (*Oshlack v Richmond River Council* (1994) 82 LGERA 236).

6 (1990) 170 CLR 534.

7 *Oshlack v Richmond River Council* [1998] HCA 11 (25 February 1998).

8 At 7 & 8, per Gaudron and Gummow JJ. Kirby J at 29.
9 At 31, per Kirby J.
10 At 11, per Gaudron and Gummow JJ. Kirby J at 32.
11 At 32, per Kirby J.
12 At 11, per Gaudron and Gummow JJ. Kirby J at 26.
13 At 12, per Gaudron and Gummow JJ.
14 At 12, per Gaudron and Gummow JJ.
15 At 8, per Gaudron and Gummow JJ.
16 At 8, per Gaudron and Gummow JJ. Kirby J at 32.
17 At 10, per Gaudron and Gummow JJ.
18 At 16, per McHugh J.
19 At 13, per McHugh J.
20 At 25, per McHugh J.
21 At 16, per McHugh J.
22 At 20, per McHugh J.
23 At 16, per McHugh J.

24 At 6 and 12, per Gaudron and Gummow JJ. Kirby J does not address the position of the private developer at all. At 23-24, per McHugh J.

25 At 24, per McHugh J.

26 It is interesting to note that the membership of the High Court has undergone substantial changes since the 3 (Mason CJ, McHugh, Toohey JJ) : 2 (Brennan and Dawson JJ) split decision in *Latoudis*. The High Court is currently composed of Brennan CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ. Brennan CJ will be replaced by the Chief Justice of the Supreme Court of NSW, Gleeson CJ in May 1998.

27 At 23, per McHugh J.
28 At 23, per McHugh J.
29 At 19, per McHugh J.

30 At 17, per McHugh J. In such circumstances the courts may depart from the traditional costs orders.

31 At 23, per McHugh J. McHugh J considers that such funds are better spent on services for the politically weak rather than on funding unsuccessful public interest litigation through an adverse costs rule exception for such litigants.

32 In NSW, section 123(1) of the *EP & A Act*. In SA, section 85(1) of the *Development Act.*

33 Those provisions require that civil enforcement applicants (that are not agents of the Government) either must be persons whose interests are affected by the subject-matter of the application or must obtain the leave of the court to commence proceedings. Before the court may grant leave it must be satisfied that the application is not an abuse of process; that is not unlikely or that there is a real or significant likelihood that the requirements for making the order will be satisfied; and that it is in the public interest that the proceedings be brought.

34 As supported by the Australian Law Reform Commission *"Costs Shifting - Who pays for Litigation?"* (ALRC Report No. 75) Australian Government Publishing Service 1995 pp146 & 182-183 and discussed by McHugh J in *Oshlack v Richmond River Council* [1998] HCA 11 (25 February 1998) at 23.

35 "Submission on Costs Rules" *(1995) 38 Impact 6 at 8.*

36 *Oshlack v Richmond River Council* (1994) 82 LGERA 236 at 245, per Stein J - In relation to the floodgates argument, His Honour commented that in 14 years there had been "little more than a modest flow barely wetting the wellies." In SA, in the last 4 years, out of a total of 1928 matters filed in the ERDC, 46 were civil enforcement proceedings.

37 The latest High Court ruling, since this article was written, refusing to overrule a discretionary award of costs against unsuccessful public interest litigants, illustrates the urgent need for reform. See *South-West Forest Defence Foundation Inc v Dept of Conservation and Land Management* and *Bridgetown Greenbushes Friends of the Forest Inc v Dept of Conservation and Land Management* [1998 HCA 35].

International Investment and the Environment: A Look at the Draft Multilateral Agreement on Investment

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I. Introduction

In an age dominated by market claims of the necessity to maintain "international competitiveness" at the expense of all else, the adverse impacts of economic globalisation on the prospects for environmental protection are a matter of increasing concern. The relationship between the promotion of international trade and the imperatives of environmental protection, shows convincingly that the rise of global economic governance has exerted a downward pull on the efforts to address environmental challenges through legal mechanisms.

This apparent international economic juggernaut on the environment reveals fundamentally inconsistent policy objectives and the need to achieve a regulatory compromise between competing economic and environmental values. This was explicitly recognised by the international community when it made the commitment to work toward "sustainable development" at Rio de Janeiro in 1992. World leaders declared that "*environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it*".

The development process is largely driven by today's greatly increased investment flows and the potential ecological and social impacts are significant threats. To meet the 1992 Rio commitment, environmental protection must be included in any attempt to regulate international investment. Indeed, there is a clear need for a comprehensive treaty to regulate investor behaviour in order to ensure that international investment supports, rather than threatens, long-term environmental sustainability.

The members of the Organisation for Economic Cooperation and Development (OECD) have been quietly -- most would say secretly -- negotiating a multilateral treaty on investment since 1995. Known as the Multilateral Agreement on Investment (MAI), it is primarily intended to establish "investor rights" and provide a framework for the liberalisation of investment regimes. The problem, however, is that instead of focusing on the need to integrate environmental protection into the investment process, the MAI will foster a liberalised investment climate in which the ecological order of the day will undoubtedly be over-exploitation of natural resources and short-sighted environmental destruction for short-term economic gain.

This brief article looks solely at the deficient MAI environmental provisions. It should be recognised, however, that there are a number of other problem areas, including reservations, expropriation and dispute settlement.[1]

II. The Deficient MAI Environment Provisions

A. The Preamble

The Preamble to the MAI contains a tentative reference to the need to implement the Agreement in accordance with general international environmental law, the Rio Declaration on Environment and Development, and Agenda 21. However, a number of delegations are resisting the inclusion of such language. Clearly, this language must be retained, but even more importantly, it must be included in the body of the Agreement where it imposes binding legal obligations. Moreover, the language should be strengthened with a clear commitment to the entire Rio Declaration, including the precautionary principle, and not only to the principles of sustainable development.

In order to make certain that environmental protection is accounted for under the MAI, an explicit provision should be included that makes clear that environmental obligations assumed by states will all ordinarily prevail over the terms of the MAI. These environmental obligations should include: (i) multilateral environmental agreements -- both existing now, as well as negotiated in the future, (ii) general international environmental law, (iii) the Rio Declaration (especially its terms dealing with the precautionary principle, public participation, access to information, and the avoidance of relocation and transfer of activities causing environmental damage), and (iv) Agenda 21.

Giving preference to environmental treaties is exceptionally important in order to ensure their effectiveness. For example, the trade measure provisions of the Montreal Protocol, and the preferential transfer of technology provisions of the Climate Change and Biological Diversity Conventions would be of doubtful validity under the MAI in its present form.

B. The MAI lacks a necessary general Environmental Exception

The MAI does not contain any provision that would clearly entitle governments to take environmental measures that might otherwise offend the vast number of other wide-ranging obligations imposed by the MAI. By omitting such a broad and generally available exception to the MAI's rigorous investment disciplines, the Agreement's comprehensive investment rules may result in new limits on the ability of governments to freely and innovatively meet environmental challenges.

For example, there are a number of commonly used environmental regulatory measures that could be challenged under the MAI. Some of these measures might include:

- Remediation orders to prevent toxic seepage;
- Changes to existing license fees to protect fisheries, flora and fauna;
- Changes to planning laws for environmental purposes that would reduce the value of property for a foreign investor;
- Requirements that would increase the costs of resource extraction by limiting extraction techniques to those that

are environmentally acceptable;

- Preventative measures taken to protect the environment and public safety that caused loss or harm to foreign investors.

C. The Narrow MAI Environmental Exceptions

Except for two extremely narrow and still bracketed, (ie contentious and not yet agreed), exceptions from the fourteen current performance requirement obligations, the MAI does not contain any environmental exceptions. Indeed, the majority of delegations negotiating the Agreement see no need even for these exceptions and in the final text of the Convention they could be eliminated. The two environmental exceptions permit a government to require domestic content in a product and provide a preference to local goods or services if, *and only if,* the measure:

- is not arbitrary or unjustifiable;
- is not a disguised restriction on investment; and
- *is necessary* to protect human, animal or plant life, or is necessary for the conservation of living or non-living exhaustible natural resources.

The experience with a similar exception under the General Agreement on Trade and Tariffs (GATT) clearly demonstrates the ineffectiveness of the exception and that environmental protection has suffered roundly by the interpretation it has received from GATT panels. All environmental measures challenged to date have been disallowed as either an arbitrary means of discriminating against non-nationals, or because they have not met the "necessary" requirement of the exception. GATT panels have ruled regularly that a measure taken by a state that is inconsistent with GATT cannot be considered "necessary" if an alternative measure is reasonably available that is consistent with the GATT. If such an alternative is not available, then the state must adopt a measure that entails the least degree of inconsistency with GATT provisions. In other words, if this interpretation were applied under the MAI, as is likely, a measure will be judged "necessary" only if it entails either (i) no inconsistency or (ii) the least possible inconsistency with other MAI provisions. No measure scrutinised under GATT adjudication has ever survived this test. Indeed, no GATT panel has ever attempted to justify so restrictive an approach involving such a high burden on the party adopting a environmental trade-restricting measure.

III. Conclusion

Australia should be working to ensure that the MAI is transformed from an instrument hostile to the environment to one that ensures that international investment promotes ecologically sustainable development. In this there is much to be done.

Endnote

[1]. A copy of the full EDO Submission to the Commonwealth Parliamentary Joint Standing Committee on Treaties on the MAI, complete with citation to sources, is available on the EDO NSW webpage at -- http://www.edo.org.au/

Case note: Hawkesbury City Council v Foster and Anor
NSW Court of Appeal, unreported, CA 40307 of 1996, 18 December 1997

WHO GETS TO KEEP THE FINE?

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The NSW Court of Appeal has recently held that a party who successfully prosecutes for contempt of court is entitled to keep up to half of the fine.

Contempt proceedings had been successfully brought in the Land and Environment Court by two applicants: Peter Foster on behalf of local residents, and a local council, Hawkesbury City Council **("Council")**, against a mushroom composting company. The company had wilfully and deliberately flouted orders of the Land and Environment Court of NSW that it cease emitting offensive odours which affected the small township of Ebenezer. The company pleaded guilty to contempt and was fined $80,000.

The Council then brought proceedings seeking an order directing that the whole of the fine be paid to it under s 694(1) of the *Local Government Act 1993* (NSW). Section 694(1) provides that, where a council brings proceedings *under any Act*, that council is entitled to be paid that penalty, fine or forfeiture.

Alternatively, the Council sought half of the fine be paid to it under s 5(3) of the *Fines and Penalties Act 1901* (NSW) which provides that where an Act imposing or authorising a fine makes no direction as to its application (for example, to consolidated revenue), the court may, where the informer or other person prosecuting or suing is not a member of the police force, direct that up to half be paid to the informer.

Both applications were dismissed by her Honour Justice Pearlman, from which the Council appealed.

The Court of Appeal held[1] that a fine imposed for contempt was not one "under" an Act for the purposes of s 694(1) of the *Local Government Act*, and that therefore the Council was not entitled to recover it. Rather, the fine was imposed by a Court for violation of that Court's orders.

In relation to the claim under the *Fines and Penalties Act*, the Court of Appeal held that it was open to the Land and Environment Court to direct that up to half of the fine be paid to the Council. However, the Court of Appeal found that the trial judge had properly exercised her discretion in not awarding a half of the fine, as in bringing the contempt proceedings the Council was simply performing its statutory duty to enforce the planning law.

[1] Meagher JA and Sheller JA (majority), Mason P (dissenting).

Public Participation under the ACT's New Environment Protection Law

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Introduction

In December 1997, the ACT Legislative Assembly passed the *Environment Protection Act 1997* ("the Act"), the *Environment Protection (Consequential Provisions) Act 1997* and the *Environment Protection Regulations* ("the Regulations"). These Acts and Regulations will come into force by 1 June 1998. They repeal the ACT's existing air, noise and water pollution laws, as well as those dealing with ozone protection and pesticide control. They replace these laws with an integrated and comprehensive framework for the protection of the environment from harmful activities. This framework provides significant opportunities for public participation in setting policies for environmental protection and in decision-making under the Act. However, it fails to provide any real opportunities for public participation in the enforcement of the legislation.

The History of the Legislation

The advent of self-government in 1989 provided the ACT with the opportunity to update pollution laws in line with reform proposals in other jurisdictions, such as Queensland, South Australia and Tasmania. These proposals involved:

- integration of air, noise and water pollution controls
- the inclusion in the legislation of principles of Ecologically Sustainable Development
- the application of the polluter pays principle
- the encouragement of progressive environmental improvement by industry
- the establishment of environmental protection policies
- the incorporation in the legislation of a general environmental duty
- the provision of a range of regulatory tools and incentives.

A public discussion paper was released in 1993 by the then Labor government, and a Reference Group of business, community, legal and public health representatives was established to assist in developing the legislation. A second discussion paper was released in late 1994, so that the reform process was well advanced by the time of a change of government in 1995. The new Liberal government decided to continue the reform process and drafting began. In May 1997 the Bills and Draft Regulations were tabled in the Assembly and were referred to its Planning and Environment Committee in August 1997. The EDO had prepared and circulated a detailed submission prior to the tabling and was invited to give evidence before the Committee. One of the main thrusts of the submission was the need to improve the provisions for public participation in the processes provided by the Bill. The Committee accepted many of the EDO's suggestions and they were subsequently adopted by the Assembly.[1]

Avenues for Public Participation

The Act provides avenues for direct public participation in the processes of establishing environment protection policies ("EPPs"), decision-making about the grant of environmental authorisations and accrediting codes of practice for industry. It also contains rights for "persons whose interests are affected" by certain decisions under the Act to have them reviewed by the ACT Administrative Appeals Tribunal ("the AAT"). The Act also enables citizens to take civil and criminal proceedings to enforce the Act, although there are some fairly significant disincentives to such action. There are also more indirect avenues for public participation arising from rights for the public to be notified of certain decisions and to inspect a range of documents relevant to decision-making by the Environment Management Authority ("the Authority"), the main regulatory authority under the Act which is constituted by a public servant within the Department of Urban Services.[2] As a result of such information being accessible, public debate can occur on environmental standards and may influence decisions by the Authority or the Minister where he or she exercises a "call-in" power provided by the Act.

Each of these avenues is discussed in more detail below.

Environment Protection Policies

The Authority prepares EPPs which set out guidelines for industry and the community, assist the Authority in administering the Act generally, and specifically, contain matters to which it may refer in making decisions under the Act.[3]

Public Participation occurs by way of the Authority inviting comments on a draft EPP notified in the Government Gazette and a local newspaper and given to the local Conservation Council.[4] The Environmental Protection Order is obliged to consider the public comments in finalising the EPP.[5] The same process occurs when an EPP is varied. Notice must also be given if an EPP is revoked.[6] EPPs are available for public inspection.[7]

Draft EPPs on air, noise, water and general matters have recently been released for public comment.[8]

Environmental Authorisations

Public comments are also invited on applications for environmental authorisations. Environmental authorisations are required for activities considered most harmful to the environment, which are listed in Class A of Schedule 1 to the Act. Some examples are:

- the commercial incineration of wastes including chemical wastes
- the sewage treatment involving the discharge of effluent
- the commercial use of chemicals registered under the Agricultural and Veterinary Chemicals Code.

Applications for environmental authorisations have to be notified in the Gazette and a local newspaper and comments

invited. At least 15 days are allowed for the submissions.[9] The Authority then has to make a decision within 20 days to:

- grant the environmental authorisation
- refuse the environmental authorisation
- require further information, or
- request the Minister to direct environmental impact assessment[10].

If an environmental authorisation is granted, the applicant is notified immediately and the public is required to be notified within 10 days through Gazette and newspaper notices.[11]

AAT Review
A decision to grant an environmental authorisation may be reviewed by the AAT.[12] Any person "whose interests are affected by the decision" may apply for review.[13] The AAT has taken a broad view of a similar provision in the ACT's planning legislation to allow residents' and environmental groups to apply for review or be joined in review proceedings.[14] Other reviewable decisions relevant to such groups are: to vary an environmental authorisation, not to take action after review of an environmental authorisation, to exclude a document from public inspection, to accredit an environmental improvement plan and a Ministerial decision to "call in" any decision under the Act.[15]

Codes of Practice
The Act establishes a general environmental duty, so that persons are obliged to take "such steps as are practicable and reasonable to prevent or minimise environmental harm or environmental nuisance caused, or likely to be caused, by an activity conducted by that person."[16] Codes of Practice are documents which set out ways for industry to comply with the general environmental duty. The Minister can accredit Codes of Practice if he or she is satisfied that they have been prepared in consultation with industry and the public. There is no specific requirement for notification of a draft Code and invitation of public comment, however some form of consultation will have to occur before accreditation.[17] Accreditation is by means of a disallowable instrument and the *Subordinate Laws Act 1989 (ACT)* provides that the Assembly may disallow such an instrument within 15 days of notification, so that, if there is significant community concern as a result of public consultation, there is a real possibility of disallowance if enough Assembly members support that concern, given that the government is a minority one (and the ACT has a history of minority governments).[18]

Third Party Enforcement
Third parties may seek to participate directly in the enforcement of the Act by instituting criminal or civil proceedings. There is nothing to prevent private prosecutions for offences provided by the Act. However, the *Director of Public Prosecutions Act, 1990 (ACT)* allows the DPP to take over and terminate any such prosecution, which acts as a considerable disincentive to anyone contemplating such action.[19] The Act specifically allows third parties to apply for injunctive orders from the Supreme Court if the Authority fails to respond to a request to take such action and the Court considers that the action is in the public interest.[20] However, there are also specific provisions allowing the Court to order security for costs in such actions and compensation in the event of a loss, so that such action attracts risks over and above those associated with the ordinary course of litigation, resulting in considerable disincentive for third parties to pursue this course.[21]

Public Inspection of Documents
As discussed above, certain documents may be inspected relating to a range of decisions where the public does not have any direct involvement. These documents are:

- Reviews of environmental authorisations
- Environmental Protection Agreements ("EPAs")
- Environmental Improvement Plans required by the Authority ("EIPs")
- Emergency Plans
- Environmental Audits
- Environmental Protection Orders ("EPOs")
- Results of monitoring or testing required by an environmental authorisations, EPA or Environmental Protection Order

These are discussed briefly below.

Reviews of Environmental Authorisations
Environmental authorisations may be granted for specified periods up to 3 years or for unlimited periods.[22] There is provision for annual review and for the Environmental Protection Order to take action under the Act as a result of such a review.[23]

Environment Protection Agreements
Environmental Protection Agreements (EPAs) are an alternative to environmental authorisations for activities listed as Class B activities in Schedule 1 to the Act, being activities which have less harmful effects than Class A activities. Examples of such activities are major land development or construction on sites greater than 0.3 hectare, large scale concrete production and the management of services such as maintenance of the stormwater system. The Explanatory Memorandum to the Act states that EPAs are a mechanism for industry to manage its environmental performance in partnership with the the Authority rather than the the Authority acting solely as an enforcer. They can be used to encourage industry to improve its environmental performance through compliance with certain standards and commitment to higher standards. There is a financial incentive for industry in that EPAs do not attract fees whereas environmental authorisations do. EPAs are anticipated to be one of the most commonly used tools in the Act.

Environmental Improvement Plans (EIPs)
EIPs may be required by the Authority where it believes that there may be a breach of an environmental authorisation, EPA or Environmental Protection Order resulting in serious or material environmental harm and it also believes that changes in the method of conducting the relevant activity would reduce the risk of harm. An EIP may specify alternatives for conduct of the activity and an implementation timetable.[24]

Emergency Plans
Emergency plans may be required by the The Authority where it believes that an environmental emergency may occur during an activity. An environmental emergency involves the

discharge of an excess of a pollutant resulting in serious or material environmental harm. The plan may specify a course of action in the event of the emergency and preparatory requirements.[25]

Environmental Audits
Audits may be undertaken voluntarily or may be required by the The Authority as a condition of an environmental authorisation or when it believes that an activity may breach an environmental authorisation, EPA or Environmental Protection Order and serious or material environmental harm may result.[26] The audit may deal with the source of the harm and the need for alternative management practices to reduce the harm.[27]

Environment Protection Orders
Environmental Protection Orders are one of the enforcement tools under the Act. They may be served on a person by the Authority where it believes that an environmental authorisation or the Act has been contravened. They may direct specific actions or restrain an activity.[28]

Exceptions to Public Inspection
The general right to inspect such documents is qualified by the right of persons providing the documents to apply to the Authority to exclude parts which would reveal trade secrets or adversely affect their business affairs. If the Authority decides to exclude part of a document from inspection, that will be noted on the document.[29] Persons may apply for review of that decision in the AAT.[30]

Conclusion
The new legislative framework provides significant opportunities for public participation in establishing policies for environmental protection and in decision-making in relation to environmentally harmful activities. It also provides significant access to information relevant to public debate about such activities. The lack of realistic opportunities for the public to participate in the enforcement of the Act is disappointing and may need to be addressed further if there is dissatisfaction with enforcement by the Authority. The Act provides for a review of its operation after two years and such matters should at least be addressed then if they are not raised earlier in public debate about the operation of the legislation.

ENDNOTES

1 Legislative Assembly for the ACT Standing Committee on Planning and Environment, Report on the Inquiry into the Environment Protection Bill 1997 and the Environment Protection (Consequential Provisions) Bill 1997, Report No 35, October 1997, at 64-66 and 69-72. See also ss19, 31, 32, 41, 48, 50, 59 of the Act.
2 Section 11
3 Section 24
4 Subsections 25(1) and (3)
5 Subsection 25 (2)
6 Section 28
7 Section 29
8 Notification in *The Canberra Times*, 9 May 1998.
9 Section 48
10 Section 49
11 Subsections 50 (1) and (3)
12 Section 135
13 Subsections 135 (1) and (5)
14 Canberra Tradesmen's Union Club v Commissioner for Land and Planning AT 97/124, 97/125
15 Subsection 135, paragraphs (a), (d), (f), (h), (k) and (u). See s136 in relation to the Ministerial call-in power review and note that the decision is made by way of a disallowable instrument and can thus be overturned by the Assembly. See the discussion in relation to Codes of Practice above.
16 Subsection 22 (1)
17 Sections 31 and 32
18 Sections 6 and 10
19 Section 8
20 Section 127
21 Sections 131 and 132
22 Section 52
23 Section 57
24 Sections 68 and 69
25 Sections 80-82
26 Section 76. See also s 4 for the definitions of serious and material environmental harm
27 Section 74
28 Section 125
29 Section 21
30 Subsection 135 paragraph (a)

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Local Government Amendment Bill 1998
Pecuniary Interest refined

Andrew Burke,
EDO College of Law Placement

Allegations of conflict of interest in local government frequently create considerable antagonism and controversy, yet the law in this area is often poorly understood. To be fair, the statutory provisions relating to pecuniary interest in local government are occasionally quite unclear and perhaps councillors and the general public can be excused a little confusion. The Local Government Amendment Bill 1998 (the Bill) is an attempt to rectify some of that confusion.

The Local Government Amendment Bill 1998, due to come into effect on the 22nd June, contains a number of miscellaneous provisions which amend Chapter 14 - Honesty and Disclosure of Interests of the *Local Government Act 1993* (the Act). There are effectively four amendments, which are dealt with below:

- Prior to this amendment a person could have been liable for a pecuniary interest of their partner or employer when the interest arose without the person's knowledge, despite the fact that there would have been no liability had the interest been held by their spouse or relative. This anomaly which exists at present in s. 443 of the Act is removed with the insertion of ", partner, employer" after "relative"in section 443 (3) (a), thereby achieving consistency with s. 443 (2) (a).[1]

- At present s. 459 of the Act requires council employees who are designated persons under s. 441 (senior staff and employees working in an area that could give rise to a conflict) to disclose any pecuniary interest the person has in any council matter with which the person is dealing. The Bill removes this requirement where the pecuniary interest relates only to the person's salary or conditions of employment. This addresses the situation where Council staff could not discuss wages or conditions without first declaring their interest - a situation which was never intended under the Act.[2]

- The Local Government Pecuniary Interest Tribunal, established on recommendation from the Independent Commission Against Corruption, can suspend or disqualify from office a councillor, a member of a council committee or an adviser to a council against whom it finds a complaint proved.[3] Under the Act, an offender may be suspended for not more than 2 months or disqualified for not more than 5 years. The Bill extends the maximum period of suspension to not more than 6 months in order to provide a wider range of discretionary penalties short of disqualification.[4]

- A case has been brought before the Land and Environment Court seeking and obtaining an interim injunction to stop the further participation of a councillor in a specific matter due to an alleged conflict of interest. The Local Government and Shires Associations and the State Government were concerned that this may have established a precedent whereby injunctions could be sought in order to change the vote on a particular Development Application.[5] The Bill clarifies jurisdiction to determine breaches of Part 2 of the Act. S. 489 (1) is deleted, and replaced with a section which makes it very clear that the Local Government Pecuniary Interest Tribunal has exclusive jurisdiction at first instance to decide alleged contraventions of the duties of disclosure provisions concerning councillors, council delegates and council staff. However, under s. 486 the Tribunal may still refer a matter before it to the Ombudsman, ICAC, the Commissioner of Police or the DPP if it considers that it is more appropriate to do so, and if the authority agrees.

[1] Sch 1 [15] Local Government Amendment Bill 1998
[2] Ibid. [3] Ibid. [4] Ibid. [5] Ibid.

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