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"A New Green Agenda"

New Commonwealth Environmental Laws: A Review of the EDO Network Conference

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Introduction

On 14 October, 1999 the National Environmental Defender's Office Network held a conference entitled "A New Green Agenda" on the new Commonwealth environmental legislation, the *Environment Protection and Biodiversity Conservation Act 1999* (the Act), in Sydney.

The conference was attended by 175 people, including representatives of environment groups, State and Commonwealth Government Departments across Australia, industry associations, law firms, indigenous groups, local community groups, academics, students and individuals. It was opened by the Commonwealth Minister for the Environment and Heritage, Senator Robert Hill, who released a Consultation Paper on a range of proposed regulations at the conference.

There were 4 sessions, looking at:

- the Commonwealth's environment powers
- environmental impact assessment
- biodiversity protection, and
- future directions.

As would be expected from the debate that accompanied the passage of the Act, the views expressed on the Act at the conference, both by speakers and from the floor, were extremely varied.

The Commonwealth's environment powers

The Hon. Justice Catherine Branson, Judge of the Federal Court of Australia, opened the session with an overview of the Commonwealth's constitutional powers in relation to the environment. She noted that it is now accepted that "the Commonwealth possesses extremely wide Constitutional powers over the environment", and summarised the various Commonwealth powers, saying that: "(t)he fact that laws of the Commonwealth may now reach into fields which were previously the preserve of the various State Parliaments is now seen as of limited legal significance".

The debate which flowed from this centred on whether, given the broad extent of the Commonwealth's environmental powers, the Act actually goes far enough to demonstrate Commonwealth leadership in the environmental field. Australia's federal political system is a crucial back-drop to this debate.

Senator Hill, in his opening address, had said

cont...page 2

Inside...

- **Southern Blue Fin Tuna - Provisional measures and precautionary approach** 4
- **Management and Monitoring of Native Vegetation** 5
- **EDO response to 'Regulations and Guidelines under the EPBC Act' consultation paper** 7
- **Public Disclosure and FOI** 11
- **A State's Perspective of the EPBC Act** 12

cont from page 1...

that in his view the Act provided an appropriate balance by: "...provid[ing] for Commonwealth leadership on environmental matters and respect[ing] the primary role of the States in relation to on-ground natural resource management".

However, Peter Garrett, President of the Australian Conservation Foundation (ACF), who was the second speaker for the session, argued strongly that the Act is a major disappointment, and represents a continuation of the bi-partisan withdrawal from Commonwealth leadership in the environmental field which has characterised the 1990's. He was particularly critical of the Act's limited triggers for Commonwealth environmental impact assessment (EIA), and the ability of the Commonwealth to delegate its EIA approval powers to the States under bilateral agreements. He argued that the Commonwealth should take: "a robust approach to federalism – not the legally available and politically enticing route of least conflict", and outlined a list of improvements which the ACF considers would need to be made to the Act if the Commonwealth is to demonstrate unequivocal national environmental leadership.

Putting an equally critical – but completely different – perspective, John Scanlon, Chief Executive of the South Australian Department for Environment, Heritage and Aboriginal Affairs, said that in his view, the Act: "clearly represents an expansion of the Commonwealth's involvement in environmental issues". He made it clear that while his Government had supported the broad framework outlined in the 1997 COAG Heads of Agreement on the Environment, it had not supported the EPBC Bill, as tabled or passed, because of the expanded role for the Commonwealth contemplated in the Bill. (Particular concerns related to the inclusion of a threatened species trigger, the ability of the Commonwealth to unilaterally expand the list of triggers by regulation, and the hurdles to be cleared before bilateral agreements can be entered into.)

He argued that the Commonwealth will find it very difficult to "deliver" on the Act. "It will be extraordinarily difficult to administer, from Canberra, an Act of this type over a land mass (excluding waters) of over 7.5 million square kilometres, and a population of over 18 million. How will the Commonwealth handle queries about the application of the Act and compliance and enforcement issues arising in, say, Perth? Or even more difficult, a small regional centre many miles from Perth?" In his view, the Commonwealth will obviously need access to State infrastructure and experience, particularly since the Explanatory Memorandum to the Bill stated that the Bill would not cost the Commonwealth more than the existing legislative arrangements. However, he emphasised that the Act is *not* a joint exercise of legislative power between the Commonwealth and the States; responsibility for the administration of the Act lies with the Commonwealth, and State involvement by way of accredited processes – particularly accredited approval processes - should not be assumed. Issues such as resourcing and the legal liability of State agencies will need to be resolved first.

Environmental impact assessment

Gerry Morvell, Assistant Secretary of the Environment Assessment Branch of Environment Australia, opened the second session with an overview of the Act's EIA provisions and an examination of issues relating to the implementation of the Act's EIA provisions. He outlined the matters canvassed in the Consultation Paper released by the Minister at the conference, such as the various EIA regulations and guidelines to be developed before the Act comes into force on 16 July 2000, and then went on to talk about a range of other longer-term implementation issues, such as the administrative challenges involved in implementing the Act. He was followed by Karen Grady from the Business Council of Australia, who outlined key positive and negative aspects of the Act's EIA provisions from a business perspective. Unfortunately her paper was not available at the time of writing.

Katherine Wells from the NSW EDO then provided an EDO critique of the EIA provisions. She said that in the EDO's view, on the one hand, the Act introduces a range of very positive EIA features, such as:

- the ability of the Environment Minister to trigger the Commonwealth EIA process, make the final decision about whether or not to approve a project on environmental grounds, and attach environmental conditions to an approval;
- very high civil penalties and criminal liability for failure to comply with the Act, and personal criminal liability for directors and managers of companies; and
- the ability of the Environment Minister to revoke an approval where the Minister believes the impacts were inaccurate because of negligence or deliberate omission.

However, she argued that there are also very significant flaws in the EIA provisions of the Act, such as:

- the Commonwealth's ability to delegate its assessment and approval powers to the States, and to non-environmental Government Departments at the Commonwealth level (effectively reverting to the current "Action Minister" arrangement)
- the fact that not all environmental impacts can be assessed or considered by the Commonwealth (whereas all social and economic impacts *must* be considered), and
- the fact that forestry operations in Regional Forest Agreement areas do not need assessment and approval under the Act – an exemption of enormous significance for Australia's biodiversity.

In her view, the most significant flaw in the Act is the ability of the Commonwealth to accredit State approval processes, which the EDO considers should not be able to occur. She was also concerned about the lack of benchmarks in the Act for the accreditation of State assessment processes, and stressed the need for stringent public interest environmental accreditation benchmarks to be included in regulation. She introduced a chart compiled by the EDO Network comparing current State EIA practices, which are highly variable, and argued that the accreditation process should be used to ratchet State standards up – not to pull them down to the lowest common denominator.

Biodiversity protection

Stephen Hunter, Deputy Secretary and Head of the Biodiversity Group, Commonwealth Department of Environment and Heritage, opened the third session of the conference with an overview of the Act's biodiversity provisions. He began by saying that the biodiversity triggers in the Act provide a strong incentive for States to enter into bilateral agreements with the Commonwealth, and that this in turn creates a powerful force for the establishment of best practice systems, processes and management plans across Australia.

He then talked about a number of broad themes running through the biodiversity provisions of the Act;

- an emphasis on bioregional approaches to biodiversity protection
- an emphasis on identification, planning and monitoring
- attention to the roles and interests of indigenous peoples
- opportunities for public involvement in biodiversity protection, and
- attention to international obligations, such as those under the Ramsar Convention and the JAMBA and CAMBA migratory birds agreements.

Michael Kennedy, Director of the Humane Society International (HIS), then addressed the detail of the Act's provisions relating to threatened species and ecological communities.

Broadly speaking, while he provided a list of legislative improvements which HSI intends to work towards in the future, he was of the view that the Act is a very significant improvement over the Commonwealth's current endangered species legislation. Amongst many other positive developments, it:

- provides new listing categories for species and ecological communities
- improves the key threatening process listing process
- allows the Commonwealth Minister to gazette State lists of ecological communities which must then be automatically considered for listing at the Commonwealth level
- introduces provisions for critical habitat, and
- provides for the mandatory environmental impact assessment of Commonwealth fisheries.

He also commented that, in his view, the provision for listing key threatening processes may be able to be used to protect native vegetation until such time as "vegetation clearance" is made a trigger for Commonwealth EIA.

He was followed by Associate Professor Stephan Schnierer, Director or the College of Australian Indigenous Peoples at Southern Cross University, who gave a paper concentrating largely on the need for the Act to recognise and protect traditional ecological knowledge. He argued that the Act does not go far enough to meet Australia's obligations in this area under the Biodiversity Convention, and called on the Commonwealth Government to ensure that indigenous people play a major role in the proposed inquiry on access to biological resources.

Future directions

The conference closed with two very different views of the Act and where it is leading.

Simon Molesworth AM QC, Chair of the Environment Institute of Australia, was optimistic about the new Act, saying that in his view, given that we operate in a federal system, it contains: "some real benefits to be celebrated". Particular examples of such benefits include, in his view, the inclusion of the principles of ESD and the precautionary principle in the Act; the requirement for Commonwealth Government Departments to report annually to Parliament on their environmental performance; the judicial review and "standing" provisions of the Act; and the enforcement provisions of the Act. He commented, however, that in light of the comments made by the Minister that there will be no budget increase in the area, probably the greatest risk is that the Commonwealth will not actually "follow through" on the potential that exists in the Act.

Associate Professor Rob Fowler, Director of the Australian Centre for Environmental Law at the University of Adelaide, took a very different view of the Act.

He argued that while on a strict "legal" view of the Act it is possible to take a very optimistic view of its potential, a "political" view, based on the actual performance by the Commonwealth of its environmental functions over the past ten years, strongly suggests that the Commonwealth does not wish to have an extensive involvement in environmental assessment and approvals, and would prefer to hand over these functions to the States.

He then looked at implementation issues, and finished by looking at where the Act might be in ten years' time. He said that on the one hand, it was possible to envisage a scenario where the Act continues to operate largely within its current framework, in which case his expectation was that in ten years' time there would be little or no Commonwealth involvement in environmental assessment and approval in relation to activities taken within State boundaries, as a result of bilateral agreements. He could also envisage a "revision and evolution" scenario, where the Act is revised over the next ten years into a "moderately more effective scheme". Amendments which he hoped would eventuate under this scenario included more triggers for Commonwealth EIA, the abandonment of the "RFA exclusion" and approval bilateral agreements, and the establishment of a Parliamentary Commissioner for the Environment.

Thirdly, he canvassed the idea of a substantial rewrite of the Act, implementing key best practice ideas which are currently being explored internationally, such as the use of economic and voluntary instruments in the pollution control area, but which are not dealt with by this Act. He finished by saying that one way of providing national environmental leadership by the Commonwealth would be for the Commonwealth to make judicious use of its financial power to provide conditional financial assistance to the States – but that such an approach would require a substantial reconsideration of the understandings contained in the 1997 COAG Heads of Agreement.

Copies of the conference papers, which represent a wide range of views, are available from the NSW EDO on (02) 9262 6989 or nswedo@edo.org.au.

The Southern Bluefin Tuna Cases, Provisional Measures and the Precautionary Approach

(New Zealand v Japan; Australia v Japan)

Donald K Anton, Solicitor, EDO Victoria

Introduction

On 30 July 1999, Australia and New Zealand instituted proceedings for provisional measures against Japan before the full International Tribunal for the Law of the Sea (**ITLOS**). These proceedings represent only the third and fourth cases that ITLOS has considered since its inauguration in 1996. They are historic in the sense that they represent the first time an international tribunal has ordered provisional measures be taken to prevent serious harm occurring to the marine environment before a specific ITLOS tribunal has been established to determine the merits of the proceedings.

Both Australia and New Zealand maintain that Japan has breached its international legal obligations regarding the conservation and management of Southern Bluefin Tuna (**SBT**) on the high seas. In particular, it is alleged that Japan has breached the 1982 *United National Convention of the Law of the Sea* (**'Law of the Sea Convention'**), the 1993 *Convention for the Conservation of Southern Bluefin Tuna* (**'Tuna Convention'**), and customary international law.

There is no disagreement between the parties that the stock of SBT is severely depleted and is at its historic lowest levels. Likewise, there is no disagreement that this is a cause for biological concern. The dispute, rather, concerns a unilateral "experimental" fishing program (**EFP**) instituted by Japan.

In June 1999, Japan announced its intention to take an experimental catch of 2000 tonnes of SBT in 1999 over and above its total allowable catch (6,065 tonnes) as agreed between the three countries. This announcement came as negotiations between the three nations over an EFP broke down within the Commission for the Tuna Convention, which is the regional fisheries management body responsible for conserving the fish. Japan, which also took an experimental catch in 1998, claims that the increase is justified as scientific research. Australia and New Zealand argue that any experimental fishing programme should be jointly agreed to and question the validity of Japan's research, which they consider to be in breach of its international obligations.

Preliminary jurisdictional issues

In granting the Australian and New Zealand request for provisional measures, ITLOS was required to first grapple with two jurisdictional issues. Japan maintained that the Tribunal lacked jurisdiction because: (i) the matter involved a dispute under the Tuna Convention instead of the Law of the Sea Convention, and that ITLOS only has jurisdiction over the Law of the Sea Convention disputes, and (ii) Australia and New Zealand had failed to attempt to settle the dispute in accordance with the requirements of the Law of the Sea Convention, as opposed to the Tuna Convention.

These claims were summarily dismissed by the majority order for provisional measures made by ITLOS. It was clear to the majority of ITLOS that the obligations of the Tuna Convention between the parties did not preclude recourse to the dispute settlement provisions of the Law of the Sea Convention. Likewise, the majority held that so long as a party to the Law of the Sea Convention has engaged in settlement negotiations (which Australia and New Zealand claimed were conducted under both the Tuna Convention and the Law of the Sea Convention) and concludes in good faith that the possibilities of settlement have been exhausted, it is entitled to invoke the Law of the Sea Convention arbitral procedures.

Accordingly, ITLOS turned its attention to whether the urgency of the situation warranted ordering provisional measures pending the constitution of the specific ITLOS arbitral tribunal to hear the merits of the case. In considering the urgency of the situation ITLOS noted that provisional measures under the Law of the Sea Convention are appropriate to protect the rights of the parties *or to prevent serious harm to the environment.*

The precautionary approach

In ordering provisional measures, ITLOS was confronted by scientific uncertainty surrounding the overfishing threat to the SBT fish stock. Japan maintained that the scientific evidence available fails to show that its unilateral EFP will cause a further threat to the SBT stock and that its EFP is necessary to obtain a reliable assessment of the potential for the stock to recover.

Australia and New Zealand, on the other hand, presented contrary scientific evidence. They argued further that in light of the competing scientific claims and absence of a complete scientific picture of the threats to the SBT stock, Japan's obligations under customary international law, in particular its obligations in relation to the 'precautionary principle,' must be applied. Where the environment is at serious risk, this principle is generally accepted as providing that scientific uncertainty, or the absence of complete proof (about environmental harm likely to be caused by those risks), cannot be used to justify failure to minimise risks or take preventative, conservatory or remedial measures. However, it remains controversial whether the precautionary principle has become part of the corpus of customary international law, even though it is firmly entrenched as an obligation in a number of important multilateral environmental treaties, including the *Convention on Biological Diversity* and the *United Nations Framework Convention on Climate Change.*

Australia and New Zealand argued that in general the precautionary principle:

> Must be applied by States in taking decisions about actions which entail threats of serious or

> irreversible damage to the environment while there is scientific uncertainty about the effect of such actions. The principle requires caution and vigilance in decision-making in the face of such uncertainty.

ITLOS declined to find that the precautionary principle is a binding norm of custom. Instead, it adopted what Judge Laing termed "a precautionary approach" in a separate opinion to the ITLOS order. The order, issued by the majority, states that: "although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency to . . . avert further deterioration of the [SBT] stock". The order goes on to require that "the parties should in the circumstances *act with prudence and caution* to ensure that effective conservation measures are taken to prevent serious harm to the stock of [SBT]".

Judge Treves in another separate opinion to the order makes the important point that the precautionary approach adopted by ITLOS is necessary not because the SBT stock will collapse in the months that elapse between the time the provisional measures are ordered and the time the specific ITLOS arbitral tribunal is convened to consider the merits (and order its own provisional measures). Instead, Judge Treves highlights that the measures prescribed by Tribunal are aimed at stopping the deterioration of SBT; and each step in the deterioration, including Japan's EFP, can be seen as serious harm because of its cumulative effect towards the collapse of the stock. For Judge Treves, the precautionary approach utilised by ITLOS satisfied the requirement of urgency warranting provisional measures.

Finally, Judge *ad hoc* Shearer referred to Article 6 of the *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, which obliges parties to the Agreement to apply the "precautionary approach". While the Agreement is not yet in force, all three parties involved in the dispute have signed it. According to Judge Shearer the parties should view the Agreement "as a set of standards and approaches commending broad international acceptance".

Conclusion

As early as 1974, the International Court of Justice (**ICJ**) highlighted the need in the Fisheries Jurisdiction Case for States to consider the need for fisheries conservation measures in light of available scientific evidence. The ICJ held that maritime international law recognised a duty to have due regard to the rights of other States and the needs of conservation of fish stocks for the benefit of all.

Still, it remains controversial as to whether this duty has blossomed into a norm of customary law that entails a fully formed "precautionary principle". Accordingly, it is understandable that ITLOS makes no direct reference to it.

Nevertheless, these cases are important for a number of reasons. First, it is the first time that an international tribunal has ordered provisional measures to protect the environment.

Second, the order and separate opinions will contribute to the development of international jurisprudence on environmental precaution as a basis for determining the urgency of the need for provisional measures where other environmental values are threatened. While ITLOS does not adopt the precautionary principle as a mandate for action, the approach it takes does recognise the need to err on the side of caution while allowing for a certain degree of flexibility.

Finally, the cases place Australia firmly on the record contending that the precautionary principle is indeed a settled norm of general customary international law and therefore binding on a global basis. It will be difficult for Australia in the future to retreat from this position. Indeed, given that s 391 of the new *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) requires consideration of the precautionary principle in environmental decisions across a wide spectrum of important issues of ecologically sustainable development, it behoves Australia to ensure that the precautionary principle is firmly crystallised as a rule of customary international law.

The Draft National Framework for the Management and Monitoring of Australia's Native Vegetation

Donald K Anton, Solicitor EDO Victoria

Introduction

In April this year, the Senate Environment, Communications, Information Technology and the Arts Legislation Committee argued that the anticipated Draft *National Framework for the Management and Monitoring of Australia's Native Vegetation* (**'the National Framework'**) justified the exclusion of the clearance of native vegetation as a matter of national environmental significance that would 'trigger' a requirement for Commonwealth environmental assessments and approvals under the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**).

The final version of the EPBC Act failed to include vegetation clearance as a trigger. Consequently, the National Framework will of necessity serve as the Commonwealth's primary response in the protection, conservation and reestablishment of native vegetation across Australia. It is vitally important that the National Framework is effective from the outset given that, at the government's own estimate, native vegetation "is still being cleared at a rate of over 600 000 hectares per year – about half the rate of clearing in the Brazilian Amazon in '90-91".

Unfortunately, under the Draft National Framework, the protection, conservation and rehabilitation of native vegetation is relegated to a mere "coordination issue" for the Commonwealth. For States and Territories, it is a matter of picking and choosing (according to their "circumstances and priorities") from a range of already existing measures for "managing and monitoring" native vegetation (now labelled "best practice") without the need to strengthen or improve any regulatory regime.

The following is a précis of some of the key suggestions to improve and strengthen the Draft National Framework made by EDO Victoria in a submission to the Australia, New Zealand Environment and Conservation Council (ANZECC). (The full submission is available on the EDO webpage at: edo.org.au/edovic/policy/policy.htm.)

National minimum standards

The Draft National Framework does not include a set of basic minimum national standards for protection, conservation and rehabilitation of native vegetation. This is despite the fact that the Draft National Framework is intended to ensure that management and monitoring takes place "*in a unified and consistent manner*". Instead, the Draft National Framework employs "soft" unenforceable language such as "*desired outcomes*", and "*principles and benchmarks*", and "*national goal*". While these matters are important to an integrated, holistic regime for the protection and conservation of native vegetation, they are clearly insufficient in themselves.

As a minimum, the Draft National Framework ought to provide standards relating to conditions which would necessitate the preparation of an environmental impact statement and which would require approval before clearance can take place. Appendix A to the Draft National Framework includes a number of worthwhile additional "best practice" measures that should be made into binding national standards (or at least standards that must be reflected in State and Territory legislation before bi-lateral agreements under the EPBC Act may be entered into). At present, however, Appendix A is merely descriptive of measures which may or may not be adopted depending on the predilection of a State or Territory. These standards should be reflected in the National Framework, but should also be formally established by regulation under section 25 of the EPBC Act.

Scope of the Framework

The Framework seeks to "complement" the Regional Forest Agreement process (**RFA**). Unfortunately, the way in which it "builds" on this incomplete and contentious process is by *excluding* the application of the National Framework to the management of Australia's native forests on public land. Instead of a providing comprehensive coverage of Australia's native vegetation, the National Framework is essentially limited to "native vegetation on private land within agricultural and pastoral regions of Australia". The National Framework should address and apply to all public land forests subject to timber extraction and other uses that impinge on the protection, conservation or rehabilitation of native vegetation.

Lack of explicit and clear objectives

It is curious that the Draft National Framework does not provide clear objectives to be achieved by its implementation. It does list core objectives of the National Strategy for Ecologically Sustainable Development (**ESD**), but it fails to outline its own objectives. In order to gauge the effectiveness of the National Framework, clear and explicit objectives need to be included which focus on the conservation of native vegetation, reduction in the loss of biological diversity; prevention of land degradation; maintenance of greenhouse gas sinks, and protection of water catchments and water quality.

Governmental responsibilities

The Draft National Framework claims "State and Territory Governments have primary responsibility for native vegetation management". This is factually inaccurate. The Commonwealth, as signatory to a number of multilateral environmental agreements, (especially the *Convention on Biological Diversity and the Convention on Climate Change*), has direct international responsibility for the protection and conservation of Australia's native vegetation. By virtue of these treaties, it has explicit Constitutional power to legislate in respect of these matters under the external affairs power.

Moreover, the Draft National Framework states that the responsibilities of States and Territories for native vegetation are to be tempered by "the particular circumstances and priorities" of each individual State and Territory. Such a proviso undermines the protection and conservation of Australia's native vegetation. It makes the implementation of the National Framework in a "unified and consistent manner" extremely difficult, if not impossible. It also allows States to decide that their developmental priorities should take priority over ending broad-scale land clearing.

Linkages with other activities

The Draft National Frameworks seeks to complement a host of existing strategy and policy documents, including, amongst others, the *National Strategy for ESD* and the *National Strategy for the Conservation of Australia's Biological Diversity* (**'National Biodiversity Strategy'**).

In order to be consistent with these important policy statements, the Framework should recognise that the continuing large-scale destruction of Australia's native vegetation adversely threatens the long-term economic and social welfare of regional areas and the nation as a whole through the continued loss of biological diversity, further land degradation, the continued harm to water catchments and water quality and the loss of greenhouse gas sinks.

It should provide controls for the conservation of native vegetation on private *and* public lands, including requirements for land clearing applications; provide binding criteria for assessing these applications, and provide environmental impact procedures to be followed before clearing can take place. These controls must include broad community involvement as of right in every phase of their operation.

EDO Network Response to the Consultation Paper issued by Environment Australia: "Regulations and Guidelines under the EPBC Act 1999"

Katherine Wells, Director of Policy, NSW EDO

On 14 October 1999, at the EDO Network Conference on the *Environment Protection and Biodiversity Conservation Act 1999 (C'th)* (**the Act**), the Commonwealth Minister for the Environment, Senator Hill, released a Consultation Paper on the Act. Entitled "Regulations and Guidelines under the EPBC Act 1999", it canvassed the following topics:

- the referral and screening stages of the environmental impact assessment (EIA) process under the Act
- the assessment process to be applied to projects assessed by the Commonwealth under Part 8 of the Act
- the form and contents of assessment bilateral agreements
- the EIA benchmarks which the Commonwealth proposes to apply to projects assessed by the States and Territories under assessment bilateral agreements, and
- management principles for World Heritage properties and Ramsar wetlands.

The EDO Network has made a submission on the Consultation Paper, a full copy of which can be viewed on our website at edo.org.au/alerts.htm. Some of the key concerns to emerge from that submission are set out below.

Overview

Broadly speaking, the Consultation Paper contains a range of useful proposals, and we have indicated in the submission where we think they should be retained. Particularly noteworthy are some of the Consultation Paper's proposals for environmental impact assessment at the Commonwealth level, which at times impose more stringent standards for assessment than those currently found in most States and Territories. We support these proposals.

However, we have a range of significant concerns about other parts of the Consultation Paper. One concern which crops up time and again is the fact that the Consultation Paper often proposes standards which are either not drafted clearly enough (such as the criteria for choice of assessment approach), or are to be placed in unenforceable documents (such as the criteria for significance). A very important example of this latter problem is that the Consultation Paper appears to leave the way open for the accreditation of State EIA processes which are not in legislation or regulations, but merely in administrative guidelines. From an environmental point of view, this is not adequate.

In addition, we are concerned about the *content* of a number of crucial proposals in the Consultation Paper, such as the inadequate protection offered to World Heritage, and the content of the benchmarks to be applied when State accreditation is being considered. A further broad problem is the lack of adequate public consultation at various key stages of the assessment process.

Some of our concerns arise from proposals contained in the Consultation Paper. Others are inherent in the limitations of the Act. Our submission makes recommendations for change to various aspects of the Consultation Paper. It also, on occasion, recommends changes to the Act itself. These latter changes are not intended to address all the amendments which we consider should be made to the Act, but to address the parts of the Act closely related to matters canvassed in the Consultation Paper.

1. The referral and screening stages of the EIA process

Referrals

The Act currently provides for public notification of referrals under the Act by way of the Internet, and a period of 10 business days for public comment. Many people do not have access to the Internet, and 10 business days is far too short for members of the community to find out about a referral, scrutinise the information and provide comments to Environment Australia. The Act should be amended to provide for notification of referrals in national and regional newspapers as well as on the Internet, and a comment period of at least 20 business days. An additional problem is that the public does not have the ability to refer an action to the Minister for consideration under the Act. The Act should be amended to allow this to occur.

The screening stage: criteria for "significance"

The Consultation Paper proposes criteria for "significance" (that is, criteria for the decision about whether the project is likely to have a 'significant' impact on a matter of national environmental significance.)

A major problem with the criteria is that the Consultation Paper proposes that they be included in Administrative Guidelines, rather than in regulation - despite the fact that the Act contains a provision which specifically allows the Commonwealth to make regulations for this purpose. These Administrative Guidelines will not be enforceable, and will be unlikely to provide any real brake on the Minister's discretion. This sort of uncertainty is not desirable. The criteria should be placed within regulations, rather than unenforceable administrative guidelines.

We also have concerns about the *content* of a number of the criteria (in particular, the content of the criteria for World Heritage sites, and the failure of the criteria to address cumulative impacts), which are discussed in detail in our submission.

2. The assessment process for projects assessed by the Commonwealth under Part 8 of the Act

Public participation

One key problem with the consultation paper is the lack of adequate public participation at various key stages of the assessment process. For example, at present there is no provision in the Act ot the regulations for the public to be involved in the choice of assessment approach - a key part of the scoping process for Commonwealth EIA. The public should be given an opportunity to comment on the choice of assessment approach, and the Minister should be required to take public comments into account. The public comment period could, for example, take place at the same time as the public is invited to comment on whether an action is likely to have a significant impact on a matter of national environment significance.

Nor is there a requirement that the Minister actually take public comments into account when making his or her decision. This could be remedied by way of regulations spelling out the content of assessment reports, and requiring copies of all public comments to be included in assessment reports. (The Minster *is* required to take assessment reports into account). A range of other problems with the proposed public participation provisions is addressed in detail in our submission.

Choice of level of assessment

Another problem is the Consultation Paper's proposed criteria for the decision about which level of assessment is appropriate. Firstly, the Consultation Paper proposes that they should merely be contained in guidelines. As with the criteria for "significance", they should be in clearly enforceable regulations.

Secondly, while the criteria, by and large, are not objectionable, they are simply a list of factors to be taken into account. They do not actually give any real direction to the Minister about which level of assessment he or she should choose after considering the criteria. This leads to problems of certainty for both proponents and the community.

The criteria should be redrafted so as to give a greater level of direction and certainty. One way to do this, for example, would be to indicate a range of criteria which need to be met before the Minister can choose the "lower level" assessments, such as assessment on the preliminary documentation, and then require the more comprehensive forms of assessment to be used in all other cases. Another way to provide more certainty would be to indicate certain types of projects which will always require the more comprehensive forms of assessment. It would be reasonable, for example, to require a public inquiry whenever a nuclear action is proposed. It would be possible to develop lists of actions which will always trigger a public inquiry, or an EIS. There are precedents for this in a range of other jurisdictions. These lists should also be in regulation, and not unenforceable guidelines.

Standards for EIA consultants

A further problem is that the Consultation paper does not propose anu standards for EIA consultants. There is widespread community cynicism with the EIA process. One of the main reasons for this is a belief that insufficient standards are applied to the consultants who perform environmental impact assessment work, particularly EISs.

In order to counter this, the Government should introduce a government-run, statutorily-based accreditation scheme for EIA consultants. (There are a number of examples of such schemes, such as the accredited contaminated site auditor schemes in Victoria and NSW.) It could either be mandatory, or discretionary, to use accredited consultants for Commonwealth EIA work. Provided that it was run according to stringent standards, even a discretionary scheme would be useful, because it would build the credibility of those consultants who gain accreditation under it, and slowly build a new norm in EIA consulting standards across the industry.

3. The form and contents of assessment bilateral agreements

We have a number of significant concerns in this area. Firstly, bilateral agreements are not enforceable documents (except in an indirect sense). It will therefore be necessary to ensure that all provisions which need to be enforceable in order to provide reasonable environmental standards (for example, provisions requiring monitoring of bilateral agreements) are contained in the Act or regulations, rather than just the agreements themselves.

Secondly, both the Act and the Consultation Paper are silent as to whether, and if so, how bilateral agreements may be amended. However, a Draft Discussion Paper on assessment bilateral agreements which we understand was provided by the Commonwealth to the State and Territory Governments early this year proposed that assessment bilateral agreements will provide that changes to an agreement will be able to be made "by exchange of letters between Ministers".

If, in the absence of provisions in the Act permitting it, it is possible for bilateral agreements to be amended, they should only be amended in circumstances where the same environmental standards and requirements for public participation which apply to the *making* of bilateral agreements apply to their *amendment*. This should be spelt out in the Act.

Thirdly, we reiterate the view expressed in our earlier submissions on the Act, that the Act should be amended to provide for the establishment of an independent Commissioner for the Environment charged with the task of:

- reviewing bilateral agreements to assess their consistency with the accreditation criteria to be spelt out in the regulations, and
- monitoring and reviewing both State and Commonwealth compliance with bilateral agreements.

4. The benchmarks for Commonwealth accreditation of State processes

The Commonwealth's ability under the Act to delegate its EIA assessment and approval powers to the States has been extremely controversial. We consider that the delegation of approval powers is not appropriate in any circumstance – but since the

Consultation Paper does not discuss this issue directly, we do not canvass it any further here. The delegation of assessment powers, on the other hand, may be appropriate if it is subjected to sufficiently stringent standards, given that such delegation occurs already, in practice, for the vast majority of projects caught by the *Environmental Protection (Impact of Proposals) Act 1974 (C'th)*. The question is therefore whether the standards proposed in the Consultation Paper are sufficiently stringent. In our view, they are not. Firstly, the Consultation Paper does not ensure that the State processes to be accredited under assessment bilateral agreements will be contained in legislation or regulations. Indeed, it appears to leave the way open for these accredited processes to be purely administrative ones (albeit within a statutory framework) and we understand that this is, in effect, what a number of States are lobbying for. If this occurs, it means that a crucial opportunity to lift State legislative standards for EIA will have been missed. If the States do not amend their legislation or (as a minimum) their regulations, it is highly unlikely that the benefits of the Commonwealth standards will flow onto other State EIA processes in any permanent fashion. Administrative processes are far too easy to change. Consequently, only State EIA processes that are contained in legislation or regulations should be accredited by the Commonwealth.

Secondly, the content of the proposed benchmarks is not stringent enough. Some of the proposed benchmarks appear useful, and should be retained. However, they do not go far enough. As noted above, this is a key opportunity for State EIA standards to be lifted. The Commonwealth should use the opportunity to insist on a broad range of best practice public interest environmental benchmarks which will deliver real improvements to State EIA systems (and there can be no doubt that most State EIA systems are in serious need of improvement). While initially these improvements would only apply to the assessment of matters of national environmental significance, their application, in effect, as national standards, would undoubtedly have a flow-on effect, particularly if the new standards were enshrined in legislation or regulations (as opposed to administrative guidelines).

Our submission proposes a comprehensive list of the sorts of benchmarks which the Commonwealth should be aiming for if it is genuinely interested in lifting State EIA standards to meet best practice public interest environmental criteria. The list takes a much more comprehensive approach than the benchmarks proposed in the Consultation Paper, considering triggering, assessment, approval, monitoring and enforcement aspects of the EIA process, and public participation in the EIA process.

As a minimum, the Commonwealth should ensure that State EIA systems meet various key benchmarks currently proposed in the Consultation Paper, and the standards which the Commonwealth has imposed on itself in the Act, and which it proposes, in the Consultation Paper, to impose on itself by way of regulation. At present, it appears that the Commonwealth is not proposing to do this in all circumstances. For example, the Consultation Paper contains no requirements for the content of assessment on the preliminary documentation where this is carried out under a *State* process – even though the Consultation Paper devotes some 2 pages to what should be contained in the preliminary documentation where this level of assessment is carried out under the *Commonwealth* process.

We have compiled a chart comparing current State EIA legislative systems with the standards to be applied to the Commonwealth EIA process. A copy of the chart is attached to our submission as Appendix A. As is immediately apparent from the chart, most of the State systems fall well short of the EPBC standards proposed for Commonwealth EIA.

5. Management principles for World Heritage properties and Ramsar wetlands

The submission makes a range of detailed recommendations for improvements to the management principles proposed in the Consultation Paper. Space does not permit a discussion of those recommendations here, except to draw out the following concerns:

- the Act only affords protection for World Heritage *values*; there is nothing in the Act that prevents a person from taking an action that is likely to result in a significant impact on World Heritage *property* itself. The Act should therefore be amended to protect both property *and* values, and the management principles amended accordingly

- the management principles for Ramsar wetlands do not place sufficient emphasis on the protection of the waterfowl within the relevant wetlands, and should be amended accordingly

- neither the World Heritage nor the Ramsar principles discuss buffer zones, a crucial requirement for the protection of these sites, and should be amended to address this.

6. Conclusion

The Commonwealth has indicated that it will be providing draft assessment bilateral agreements for public comment in the first half of 2000. Regulations, on the matters dealt with above, should also be released before the Act comes into force on 16 July 2000. The EDO network will continue to provide public comments on these developments as they occur.

A full copy of the *EDO Network Response to the Consultation Paper issued by Environment Australia: "Regulations and Guidelines under the EPBC Act 1999"* is available on our webpage at: edo.org.au/alerts.htm

The $1.8 Million Dollar Potatoes

Puntoriero v Water Administration Ministerial Corporation [1999] HCA 45

Chris Norton, Senior Solicitor, EDO(NSW)

In this case, the High Court found that a statutory immunity under the *Water Administration Act 1986 (NSW)* ("the **WA Act**") did not prevent a statutory authority which supplied water to farmers under a contract from being liable when the farmers' crop failed due to chemical pollution in the water.

Facts

Mr and Mrs Puntoriero drew water from irrigation supplies to water their potato crop. The water was supplied by the Water Administration Ministerial Corporation ("**the Corporation**"), a statutory body set up to regulate water usage in NSW.

When the Puntorieros took possession of their property in July 1992, the dam on their property was full of water, and they sprayed their crops with dam water that was topped up from the irrigation supply. In November 1992, their crops began to turn yellow, apparently due to atrazine contamination. The Puntorieros sued the Corporation in the Supreme Court, claiming that the Corporation knew about the contamination because of similar damage suffered by two nearby properties which had been drawing water from the same general source 12 months previously. In spite of this, the Corporation did not warn them, did not test the water and did not clear and drain the irrigation channel to remove any contaminants from it. A jury heard the case, made findings of fact which made the Corporation liable, and awarded damages of around $1.8 million to the Puntorieros. That award was then set aside by the NSW Court of Appeal on the basis that the Corporation was legally immune from liability under s 19(1) of the WA Act. Section 19(1) provided that it was not possible to bring an action against the Corporation for "loss or damage suffered as a consequence of the exercise of a function of the Corporation, including the exercise of a power to use works to impound or control water, or to release water from any such works". The Punterieros appealed to the High Court, which overturned the findings of the Court of Appeal and reinstated the damages award.

Findings

The High Court held by a majority of 4-1 that the immunity did not apply and that the Corporation was liable.

The majority interpreted s 19(1) strictly, finding that it only excluded liability for loss or damage suffered when the Corporation actually exercised a function. It did not exclude loss or damage suffered when the Corporation *failed* to exercise a function.

The majority also held that since the Corporation is a body which undertakes commercial operations, and can enter into contracts, partnerships and other commercial relationships imposing obligations on the Corporation, it would be contrary to the objects of the WA Act if the Corporation could escape liability for not performing in accordance with its obligations under such relationships. The operation of s 19(1) should be confined to liability arising from functions "which of their nature will involve interferences with persons or property". In this case, the functions complained of did not fit this description; also, the Puntorieros were complaining about the Corporation's failure to do certain things, rather than the way that the Corporation did do things.

Comments

This case illustrates one of the side effects of the growing corporatisation of essential services, such as the supply of water, electricity and gas. The High Court pointed out that there was an inherent contradiction in supposedly requiring an operator, such as the Corporation, to act in a corporate manner, incurring liabilities to other people and corporations, but then protecting it from liability for any damage it may cause when not fulfilling the expectations upon it. The result of the High Court's decision is that statutory corporations will only have limited protection for their actions – if the Government confers corporate status upon these regulators, they must accept the responsibilities that come with such status.

Public disclosure of letters of objection

Gilling v. Hawkesbury City Council [1999] NSWADT 23
(22 June 1999, Administrative Decisions Tribunal, A. Hannessy, Deputy President)

Marc Allas, Solicitor, EDO NSW

This case concerns the application of the "personal affairs" exemption to disclosure of documents under the *Freedom of Information Act* 1989 (NSW) (**"FOI Act"**). It also deals with public access to letters of objections to development applications.

The FOI applicant, an owner of a caravan park, had appealed to the Land and Environment Court against a local council's rejection of a development application for her caravan park. After the appeal was filed, the applicant lodged a freedom of information **("FOI")** request with the local council seeking access to the letters of objection to her development application.

Access was granted. However, the local council had deleted the names and addresses of the objectors from the letters. The Council argued that the names and addresses were 'personal affairs' and were exempt from disclosure under s. 6, sch 1 of the FOI Act. The applicant took the case to the Administrative Decisions Tribunal **("ADT")**.

The ADT held that the names and addresses were 'personal affairs' and affirmed the Council's decision not to disclose them.

Personal affairs

The ADT held that it is a question of fact in every case as to whether the names and addresses of a person amount to 'personal affairs' under the FOI Act. The ADT adopted the meaning of personal affairs used by Kirby P in *Perrin's case* (1993) 31 NSWLR 606:

> *" 'personal affairs' means the composite collection of activities personal to the individual concerned" (at 625).*

In *Gilling*, the letters of objection were written in the objector's private capacity, expressing concerns over the proposed caravan park (p. 7):

> *"...the information was not provided in the course of the performance of any public duty or responsibility".*

Therefore, the names and addresses were found to be 'personal affairs', although the actual content of the letters of objections were clearly not.

What is unreasonable disclosure?

Under the FOI Act, information about "personal affairs" is exempt from disclosure only if it would be unreasonable for disclosure to occur. The test for unreasonableness is determined by weighing the public interest in disclosure against the private interest of withholding the information.

The ADT looked at three aspects of the public interest:

1. Transparency:
The ADT held that the applicant's development application 'vitally affects her life' and information taken into account by a local Council in determining a development application should be known by the applicant so that the decision is transparent and the Council could be accountable for it. In particular (p. 7):

> *"Councils should take all available opportunities to inform residents [making objections] that confidentiality will generally not be available..."*

2. Harassment:
There was evidence that the applicant harassed or intimidated persons who had lodged objections to the previous development proposals. However, in this case, the Tribunal accepted the applicant's evidence that she would not attempt to contact the objectors because she anticipated her development application would be approved by the Land and Environment Court. Despite evidence of previous harassment and intimidation, the Tribunal held there was no evidence that objectors would suffer any prejudice or disadvantage if their names and addresses were disclosed.

3. Motive:
The ADT's view was that the applicant's motivation in seeking the information is relevant to the question of reasonableness. The ADT approved comments made by Mahoney JA in *Perrin's* case that if disclosure is sought merely to harass the parties in question, a court would have to 'exercise care' in deciding whether access should be granted.

The original purpose of the applicant's FOI application was to permit her to discuss the objectors' views and put submissions to the council that addressed those objections. The Court held that these were both legitimate reasons for seeking the information, which would have furthered the public policy purposes of the FOI Act.

However, the information could only be used for this purpose *before* the development application had been determined. In this case, the development application had been refused by the Council. The applicant's interest in obtaining access to the names and addresses at this time was therefore merely curiosity.

Conclusion

Gilling was decided on its particular facts by the ADT, and is not a precedent. Nonetheless, it contains an interesting discussion on the nature of personal affairs and the public interest test used to determine whether personal affairs should be disclosed or not.

An overview of the Environment Protection and Biodiversity Conservation Act 1999: " A State's Perspective"

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This paper is an edited version of the paper given at the EDO Network Conference, "A New Green Agenda" in October 1999. Full conference papers are available from the EDO NSW. Call 02 9262 6989

This is Federal legislation.

Legislated for independently of the States[1]

The *Environment Protection and Biodiversity Conservation Act 1999* ("the EPBC Act") is a Federal Act. In passing the Act, the Commonwealth has relied upon its full suite of Constitutional powers and the Act represents a significant assertion of the Commonwealth's power to legislate for the environment.

Unlike some other legislation (for example the *National Environment Protection Council Act 1995*), the EPBC Act does not represent a joint exercise of legislative powers. It was introduced by the Federal Government and enacted by the Federal Parliament, independently from State Governments and Parliaments, and without their agreement on it.

The Heads of Agreement that preceded the Act (and which now essentially bears little, if any, relevance to the administration of the Act) was an agreement between Commonwealth and State Governments on a broad framework for environmental law reform. It did not canvass the detail of any new system, and the States were always of the view that the devil was going to be in the detail.

States objected to the Bill that was tabled in the Senate. The South Australian Government made written submissions both to Senator Hill and to the Senate Environment, Recreation, Communications and the Arts Legislation Committee, outlining its opposition to the Bill (as opposed to the broad framework of the Bill as reflected in the Heads of Agreement). These submissions were reiterated in its oral presentation to the Senate Inquiry.[2]

No intrinsic relationship with State legislation

The EPBC Act establishes a system that is quite separate and distinct from State systems. State Acts and systems are neither replaced nor altered by the EPBC Act, nor do any State Acts or systems replace Commonwealth responsibilities. The EPBC Act runs as a parallel system for environmental assessment and approval.

Responsibility for the administration of the Act clearly rests with the Federal Government through the Federal Minister committed with the administration of the Act, which is presently the Minister of Environment and Heritage. While the Commonwealth will seek to discharge its responsibilities in close partnership with the States, this does not alter the fact that we are dealing with a Federal Act of Parliament which the Federal Government is responsible for administering.

The States' willingness to engage the Commonwealth in exploring opportunities to make this new Act work in practice, is reflected in the fact that South Australia (on behalf of all States) hosted a one and a half day workshop at Adelaide Oval on 21 and 22 September 1999. This workshop was held to introduce Commonwealth officials to State systems and to the practical ramifications of the application of the EPBC Act in each of the eight jurisdictions with which it will interact.

EPBC Act 'speaks' directly to proponents

The EPBC Act speaks directly to proponents, not to State Governments[3]. The onus is on the proponent to seek a determination whether the proposed action is a "controlled action" (see section 67), and to subsequently seek the approval of the Commonwealth Minister. Neither accreditation of State systems for assessment, nor lack of accreditation, changes this fact.

No 'special deals'

There have been assertions from various individuals and conservation groups that the EPBC Act is the result of secret deals behind closed doors with State Governments[4]. This is not the case, and it is time to debunk this myth once and for all. The Heads of Agreement was a consequence of two spheres of Government seeking to review their respective roles and responsibilities for the environment. Such intergovernmental discussions are entirely appropriate and common place. They recognise that one sphere of Government in our Federal system, of necessity, relies on the cooperation of the other for the efficient and effective exercise of respective roles and responsibilities.

Discussions were originally held in the context of a thorough review of the *Intergovernmental Agreement on the Environment of 1992* (IGAE), but evolved to a much simpler, broader agreement. This agreement took the form of a Heads of Agreement document, through which the parties agreed the Commonwealth would focus its interest on identified matters of NES.

The Heads of Agreement, a political accord which has no legal status, is arguably completely superseded in any significance by the legislation itself. In any case, it differs in the detail (as opposed to the broad framework) in several significant ways from the terms of the Heads of Agreement. By way of example:

- the way in which threatened species would operate as a

trigger for Commonwealth involvement in assessment and approval had *not* been agreed in the Heads of Agreement;
- the detail, or put another way, the hurdles which need to be cleared in the development of bilateral agreements (in particular, 'approval' bilaterals), had not been agreed in the Heads of Agreement;
- there was *no* suggestion that the Commonwealth would become involved in the assessment of matters which are not of National Environmental Significance (NES), (in fact it could be stated that its inclusion runs counter to the basis of the Heads of Agreement); and
- States remained opposed to the Commonwealth's wish to retain a power to expand the matters of NES unilaterally and by regulation.

Following the signature of some (but not all) States and Territories to the Heads of Agreement, States saw themselves as being treated as just another stakeholder, with no special interests or rights above other stakeholders. It is true that State Governments (among other key groups, it is understood), received a copy of the draft Bill two weeks before it was tabled. Governments were given four days in which to comment. The Bill as tabled remained unchanged (apart from matters of legal drafting) from the draft Bill.

The lack of special consultation of States continued throughout debate on the Bill. In particular, States were not consulted at all on the 500 or so amendments passed by the Senate. Consultation during that period, and on those amendments, appears to have been restricted to the Australian Democrats and a select few conservation groups. It is a number of those amendments, particularly in relation to bilateral agreements and the assessment of non-NES impacts of actions, that have caused the States the greatest concern.

The need for State Governments to be closely involved in all aspects of development of the legislation stemmed from the fact that it was clear the Commonwealth would need to rely upon them and their systems in many instances in order to give effect to the new regime. It is the States alone that have the infrastructure in place which is needed to deliver on such regulatory schemes. Consequently, the lack of recognition of the special and quite different role of State Governments to other stakeholders became a focus of strong comment from those Governments.

No 'handing back' or 'delegation' of powers to States

The EPBC Act does not represent a hand back or delegation of Commonwealth powers to State Governments[5]. As already noted, the Act is a Federal Act, running separately from, and parallel to, State Acts, which remain unaffected by it. The accreditation allowed by sections 46 and 47 of the Act is not, in any sense, a 'delegation' of Commonwealth powers. (In fact, the Minister has a limited power to delegate under the Act, and may only delegate to officers or employees of his Department (see section 515)).

It is likely that the 'handing back' reference is a reference to bilateral agreements, and approvals bilaterals in particular. However, as far as 'approvals' bilaterals are concerned, it needs to be said that they will be the exception rather than the rule. The numerous hurdles set out in the Act before they can be entered into both severely limit their scope and make them largely unattractive from a State perspective.

Perhaps the most significant hurdle is that approvals bilaterals operate via 'accredited management plans'. An accredited management plan must be in force under a law of the State, both the plan and the relevant State law must meet criteria set out in regulations under the EPBC Act, and the plan must be laid before both Houses of the Federal Parliament, where they may be disallowed by either House. While disallowance does not affect the operation of the plan for any State purpose, it will prevent the use of the plan for an approvals bilateral.

Disallowance by a House of the Federal Parliament of a management plan in operation under State law is a singularly unattractive prospect. Neither House is a Court of law, or comprised of objective specialists in matters of environment protection. There is no requirement (or expectation) that management plans would be assessed from a neutral, or even 'environmental' point of view. Parliaments are political forums, and operate as such.

'Assessment' bilaterals (which are a more realistic prospect) still do not amount to a handing back of power; rather they represent the Commonwealth Minister choosing, in some circumstances, to 'piggy back' on an existing State assessment, using the resultant information for his or her own purposes (provided it will be sufficient to discharge his responsibilities under the EPBC Act). It is notable that in spite of any accreditation of State assessment, the Minister retains the power to call for more information, even once the accredited assessment is complete (see section 132).

There are further provisions relating to bilateral agreements which, from a State's perspective, tend to mitigate against their potential. Amongst these are the requirement that the bilaterals include an undertaking by the State that the environmental impacts of an action on matters other than the matters of NES will be assessed "to the greatest extent practicable". A number of issues are raised by this provision, including the legal status of the undertaking given, and the ambiguity of the phrase "to the greatest extent practicable".

All bilateral agreements must undergo a period of public consultation, even after agreement has been reached between the State and Commonwealth Governments. Given the nature of bilaterals, as government-to-government agreements concerning accreditation of State legislation and systems, this requirement is not seen as appropriate. The proper forum for public consultation on State legislation is by State Governments in the development of that legislation.

Expansion of the Commonwealth's role

This Act clearly represents an expansion of Commonwealth involvement in environmental issues. The expansion is both in the *area* of interest, for example in relation to:

- threatened species – from applying to just 2-3% of Australia's land mass plus Commonwealth waters, to the whole of Australia, including coastal and marine waters;
- migratory species;
- Ramsar wetlands[6]; and
- any aspect of the environment on Commonwealth land or

water, affected by any action on or outside of that land/ water;

and in the *role* of the Federal Minister, namely he or she:

- is the approving Minister, not the advisory Minister;
- can set conditions on approvals and can enforce approvals through criminal and civil means;
- can unilaterally "declare" sites to be World Heritage or Ramsar sites for the purpose of controlling actions, in spite of the absence of a formal listing as such (see sections 14 and 17A); and
- can expand matters of NES by regulation.

The real question - Can the Commonwealth deliver?

The issue for all parties must be whether the Commonwealth is up to delivering on this Act which covers the whole nation. By way of example, there are close to 40,000 applications for licences, permits, consents or other authorisations dealt with per annum by various South Australian State Government agencies and authorities and by local government.

To cope with the extent of activity, South Australian Government Departments have regionalised and been active in the 'conscious' devolution of authority to local government and various boards and authorities. The Department for Environment, Heritage and Aboriginal Affairs, for example, has four major regional offices, as well as many outlying offices attached to those regional centres and share-accommodation arrangements with other Departments in other areas to act as bases for field officers and inspectors.

The State Government has also approached the issue of 'coverage' by devolving administration to the local level where appropriate; for example to local government and regional statutory bodies such as Catchment Boards, Animal and Plant Control Boards, Soil Boards and the like. The EPBC Act takes quite a different approach, centralising administration rather devolving it.

While obviously only a small percentage of applications at a State level are expected to be assessed for the purposes of the EPBC Act, a much greater number are likely to be referred to the Federal Minister under the Act for determination, particularly in early years. A high number of referrals is likely to be caused by the manner in which the EPBC Act approaches the question of whether an action needs a Commonwealth assessment and approval. This particular approach of the EPBC Act (addressing impacts of actions, rather than classes of activities), coupled with the severe civil and criminal penalties and the scope for third party access to both enforcement and judicial review, makes it very hard to estimate the numbers of referrals. However, if these were five percent of all applications, or even just one per cent, this would be a very significant new workload for the Commonwealth which, based on advice from Environment Australia, currently receives less than 300 referrals per annum.

It will be extraordinarily difficult to administer, from Canberra, an Act of this type over a land mass (excluding waters) of over 7.5 million square kilometres, and a population of over 18 million. How will the Commonwealth handle queries about the application of the Act and compliance and enforcement issues arising in, say, Perth? Or even more difficult, a small regional centre many miles from Perth?

The Federal Minister has stated in the Financial Impact Statement of the Explanatory Memorandum to the EPBC Bill that "*The Environment Protection and Biodiversity Conservation Bill 1998 will not cost the Commonwealth more than the existing legislative arrangements which it will replace*" (page 5) and "*There will be minor one-off costs to the Commonwealth, States, and industry associated with revising procedures for environmental assessments and approvals. .... While it is not possible to quantify one-off costs, they should be small compared to the ongoing benefits of more streamlines (sic) and efficient processes. While total costs will be reduced, the savings for specific jurisdictions cannot be predicted until such accreditation arrangements and agreements are in place*" (page 16).

The Commonwealth will obviously need access to State infrastructure and experience. It is only through the States' cooperation that the Commonwealth will be able to "get on the ground" with the EPBC Act. To date, State Governments have indicated that they are prepared to work in partnership with the Commonwealth to assist in making its new system work on terms to be agreed. Clearly issues such as the resources required to do this, and the potential for legal liability will need to be addressed in these discussions. However, it remains to be seen how the provisions set out in the EPBC Act for entering into bilateral agreements will be able to facilitate this process in practice.

Only time will tell - as this new and quite revolutionary piece of legislation unfolds - whether the Commonwealth will be able to deliver.

End Notes

[1] In this paper, 'States' includes both States and Territories.

[2] On 12 March 1999.

[3] There are areas in which consultation with States is required by the Federal Minister: for instance, listing of properties for Ramsar and World Heritage and expanding the matters of NES. There is also provision in the Act preventing the Federal Minister from approving an action until he or she has received a certificate from the relevant State stating that the 'non-NES' impacts of the action have been assessed (see section 130(1B)). However, no obligation is imposed upon States to provide such certification.

[4] For example: "*Following a number of closed meetings and secret agreements between Commonwealth and State governments ... the Bill was tabled in July 1998*" (John Connor, 'Habitat'); and "*[the legislation] reflects political accommodations reached largely behind closed doors by the Commonwealth and the States*" (Rob Fowler, The Australian, 25 June 1999)

[5] There have been many claims that this is the case. See for example: "*The new requirement for bilaterally accredited management plans for the purposes of a bilateral agreement simply add another procedural hoop to an already complex process, but leave open the prospect of a wide range of approval powers being delegated to the States*" (Assoc. Prof. Rob Fowler, open letter to Democrats, 23 June 1999).

[6] Previous Federal powers in relation to Ramsar extended only to a regulation making power in the *National Parks and Wildlife Conservation Act* (section 69). However, the potential scope of that section was not clear. The provisions of the EPBC Act as to listing and subsequent protection are very much stronger.

The NSW EDO's new patron: Mr Hal Wootten AC QC

At the NSW EDO's Annual General Meeting on 30 November 1999, the Chair of the NSW EDO, Bruce Donald, announced that Mr Hal Wootten AC QC has agreed to be the NSW EDO's Patron.

Hal Wootten is a distinguished senior member of the Australian legal profession. He was a leading Sydney Barrister for nearly 20 years before becoming the foundation Dean of the University of NSW Law School in 1969, where he quickly established a reputation for his innovative approach to legal institutions. He was then appointed to the Supreme Court of NSW, where he served with distinction from 1973-83, including chairing the NSW Law Reform Commission for 4 years.

Hal has always been an avid bushwalker and birdwatcher. He was a Council member of the National Trust and his dedication to the environment resulted in his appointment as President of the Australian Conservation Foundation from 1984-88. During his Presidency he guided the Foundation through the Roxby Downs uranium mine confrontation, the anti woodchipping campaign, excluding mining in Kakadu, the Wet Tropics and Bloomfield Road campaigns, Shelburne Bay and laying the path to the Antarctica declaration.

Having helped found the Aboriginal Legal Service, he was its President between 1970-73. From 1988-91 he performed a vital role as a Royal Commissioner into Aboriginal Deaths in Custody and from 1994-7 was Deputy President of the Native Title Tribunal.

Hal Wootten has a reputation as a fair minded person who argues a case with passion but reason. He will make an important contribution to the policy and strategic direction of the NSW EDO, as well as being a sounding board on major day to day issues. We are honoured to have him as the first Patron of the EDO.

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"I bequeath the sum of $_____ (you can also include part or all of any property that you own), to the Environmental Defender's Office Ltd for its general purposes, and declare that the receipt of the Treasurer of the time being of the Environmental Defender's Office Ltd shall be a complete discharge to my executors in respect of any sum paid to the Environmental Defender's Office Ltd".

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PAYMENT DETAILS

I enclose a cheque/money order ☐ or please debit my credit card as detailed below

Bankcard_____ Visa_____ Mastercard_____ Expiry Date _____

Number ☐☐☐☐ ☐☐☐☐ ☐☐☐☐ ☐☐☐☐ Amount enclosed or debited_____

Card Holder's Name_____ Signature_____

Please send this form with payment to: Environmental Defender's Office, Level 9, 89 York Street, Sydney 2000 DX 722 Tel: 02 9262 6989 Fax: 02 9262 6998 ACN 002 880 864