IMPACT

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A critique of the Commonwealth's renewable energy law

Warren Kalinko, Solicitor, EDO (NSW)

The Commonwealth's renewable energy law commenced operation on 18 January 2001[1].

What does the law aim to do?

The law aims to encourage the production of electricity from renewable energy sources. The objective is to reduce Australia's greenhouse gas emissions.

How does the law do this?

The legislation requires a certain percentage of electricity purchased annually in the wholesale electricity market, to be generated from renewable energy sources. This requirement applies every year between 2001 and 2020.

The law is administered by the Office of the Renewable Energy Regulator (the "**Regulator**"). The Regulator's website is at www.orer.gov.au.

Who does the scheme apply to?

The scheme applies to businesses (such as EnergyAustralia) which purchase electricity in the wholesale electricity market or directly from generators (sections 31 and 32 of the Act).

Whilst the law does not place any obligation on individuals or businesses that purchase electricity from energy retailers (e.g. EnergyAustralia), there are ways in which such individuals and businesses can benefit from the scheme (refer next page, "Creation of RECs").

What percentage of electricity purchases needs to be renewable?

The percentage (known as the "renewable power percentage") varies from year to year. The percentage for a year will be specified in regulations to be passed before 1 April of that year.

If no percentage is prescribed by the regulations, the following percentages apply (section 39)[2]:

Year	Renewable power percentage
2001	0.24% (i.e a quarter of one percent)
2002	0.88%
2003	1.44%
2004	2.08%
2005	2.72%
2006	3.6%
2007	4.48%
2008	5.44%
2009	6.48%
2010 – 2020	7.6%

As the table shows, the scheme starts in 2001 with a requirement that a quarter of one percent of purchases be produced from renewable sources of energy. If the regulations do not prescribe a renewable power percentage for any subsequent year, the figure will reach

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7.6% in the year 2010 and remain 7.6% between 2010 and 2020.

How does the scheme work?

The scheme works generally as follows:

Registration

An owner of a power station may apply to the Regulator for registration under the Act . (A list of registered persons can be found at www.rec-registry.com).

Accreditation

Once registered, the owner may apply to have its power station accredited for the purposes of the scheme[3]. (A register of applications, including details of the renewable energy source proposed to be used at the power station, can be found at www.rec-registry.com)[4].

Creation of RECs

Following accreditation, the owner can create one renewable energy certificate ("**REC**") for each megawatt hour of electricity produced from renewable energy sources by the power station[5]. An REC is not valid until registered by the Regulator. (RECs can also be created by individuals or businesses which use solar water heaters, or small generating units run on hydro, solar or wind. The unit must have been installed after 31 March 2001, displace non-renewable energy and meet certain other requirements.)

The Regulator must keep a public register of all RECs registered by it, noting the renewable energy source used to create the certificate (section 140(da)).

Key obligation

The scheme obliges each **purchaser** of electricity in the wholesale market to surrender a certain number of RECs to the Regulator each year. Generators may also be required to surrender RECs in limited circumstances (section 33).

RECs required

The number of RECs to be surrendered by purchasers ("**Participants**") each year, is calculated using the following formula:

[The 'renewable power percentage'] x [the total electricity acquired by the Participant from the wholesale electricity market and from generators during the year][6] (Section 38).

So, if a Participant acquires 500,000 megawatt hours of electricity in the period 1 April 2001[7] to 31 December 2001, it will need to surrender 1200 RECs to the Regulator (0.0024 x 500,000 = 1200). Once surrendered, the RECs can no longer be used.

Penalty

If a Participant fails to surrender at least 90% of the required RECs in a year, it must pay a fine of $40[8] per megawatt hour (**MWh**) for the amount of the shortfall (section 36(2)). If a participant surrenders more than 90% of the required RECs but less than 100%, the shortfall is carried over into the following year. (The Commonwealth Government is exempt from the $40/MWh penalties (section 42(1)).

The Regulator may publish a list of entities which fail to surrender the requisite RECs, although this is not mandatory (section 134).

Debt to the Commonwealth

If a Participant (the "**debtor**") fails to pay the shortfall charge or any other amount under the Act when due, the Regulator may sue to recover these amounts.

Interestingly, the Regulator can require any third party which owes money to (or holds money for) the debtor to pay that money directly to the Regulator, in satisfaction of the debt due to the Commonwealth (section 73)[9].

Appeal rights

Participants are entitled to appeal certain decisions under the Act to the Administrative Appeal Tribunal (such as a refusal by the Regulator to accredit a power station).

Audit/enforcement

The Regulator has power to conduct audits to ensure the Act is complied with and to ensure RECs are not fraudulently created. It can also take legal action to enforce breaches of the legislation.

In summary, the scheme works by requiring purchasers of electricity in the wholesale market to surrender a specified number of RECs each year. Theoretically, 'demand for RECs' equates to 'demand for renewable energy', because each REC is evidence that a megawatt hour of renewable energy has been produced.

The assumption is that Participants will surrender RECs to meet their obligations rather than pay the $40/MWh penalty which accrues for non-compliance. It will be interesting to see whether this penalty is a sufficient incentive to ensure compliance. No other sanctions (apart from negative publicity) apply for non-performance (i.e. it is not an offence if a Participant fails to surrender the requisite RECs).

What energy sources are "renewable"?

The legislation contains a finite list of energy sources which are considered to be renewable under the Act (section 17).

These sources are: hydro, wind, solar, bagasse co-generation, black liquor, **wood waste**, energy crops, crop waste, food and agricultural wet waste, landfill gas, municipal solid waste combustion, sewage gas, geothermal-acquifer, tidal, photovoltaic and photovoltaic Renewable Stand Alone Power Supply systems, wind and wind hybrid Renewable Stand Alone Power Supply

systems, micro hydro Renewable Stand Alone Power Supply systems, solar hot water, co-firing, wave, ocean, fuel cells and hot dry rocks[10].

For a use to qualify as a renewable energy source under the Act, the use must:

(a) comply with the requirements of all relevant Commonwealth, State, Territory and local government planning and approval laws; and

(b) be ecologically sustainable (clause 7 of the Regulation).

Does the Act allow a person to create RECs by burning wood waste from native forests?

Yes (refer clause 8 of the Regulations).

Allowing native forest wood waste to qualify as a renewable energy source is highly controversial.

The main argument for its inclusion appears to be that a certain quantity of wood waste is produced by the process of sawmilling, and this waste should be burnt for electricity rather than transferred to landfill or burnt in the open.

There are a number of arguments against its inclusion.

First, the percentage of energy which needs to be renewable in Australia is very low (a quarter of one percent in 2001; similar low levels for other years). This modest objective should be focussed entirely on developing clean technologies for the production of energy. It should not be allowed to be satisfied by the low tech, 'backward-looking' option of burning wood.

Secondly, by placing an economic value on wood waste, the scheme serves to encourage the production of wood waste. Whilst the law should require sawmillers to reduce the proportion of waste produced by their operations (and a significant proportion of each tree processed through a sawmill becomes "wood waste"), the scheme provides economic incentive for wood waste to be increased.

The third concern is that the system will be abused – that trees will be logged for burning, and that this will lead to the increased logging of our native forests.

The legislation attempts to limit the risk of abuse with the following requirements:

(a) **Ecologically sustainable -** the use must be ecologically sustainable;

(b) **Primary purpose -** obtaining the wood to produce electricity must not have been the primary purpose of the harvesting operation;

(c) **Ecologically sustainable forest management principles -** the wood waste must either be from an area where a regional forest agreement is in force and produced in accordance with ecologically sustainable forestry management principles required by the agreement; **or** from an area where no regional forest agreement is in force and produced from harvesting that is undertaken in accordance with ecologically sustainable forest management principles that the Minister is satisfied are consistent with those required by a regional forest agreement;

(d) **Planning laws -** use of the source must meet the requirements of all relevant planning and approval processes; and

(e) **By-product of operations -** the wood waste must either be a by-product of a harvesting operation that is undertaken in accordance with ecologically sustainable forest management principles; **or** a by-product or waste product of a harvesting operation approved under relevant laws for which a high-value process is the primary purpose of the harvesting (Clause 8 of the Regulations).

However, these controls are of limited use.

a) the definition of "ecologically sustainable" is so broad as to have no practical use: *"ecologically sustainable means that an action is consistent with the following principles of ecologically sustainable development:*

(i) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;

(ii) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;

(iii) the principle of inter-generational equity, which is that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;

(iv) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;

(v) improved valuation, pricing and incentive mechanisms should be promoted" (section 5).

b) the "primary intention" of a harvesting operation is not a substantial control. Operators could simply structure their operations so that 'wood for burning' is a secondary intention of their harvesting operation. Significant quantities of material would still be able to be extracted;

c) the term 'ecologically sustainable forest management principles' suffers from similar problems of imprecision to that of "ecologically sustainable" referred to above; and

d) the planning and approval requirements applicable to

forestry vary from State to State. Certainly in NSW, the regional forest agreements and integrated forestry operations approvals do not place tight controls on the quantity of timber which can be extracted from forests.

The only control of legal substance is (e) above: that the wood waste be a by-product of harvesting operations. Arguably, this prohibits logging for the purpose of bioenergy. However, the control is: (a) amenable to exploitation; and (b) very difficult to police.

Whole trees can be a 'by-product' of harvesting operations (for example, where 'thinning' occurs; i.e. where whole trees are removed to make room for larger trees (refer Regulation 8(3)(e)(ii)). The concern is that operators will structure their operations to increase their level of thinning or to find other opportunities for 'by-products' to be maximised.

It will also be very difficult to ensure that the control is complied with. How will the Regulator be able to tell, looking at piles of trees or sawmill residue being fed into generators, that this "wood waste" was sourced in accordance with Act? Will inspectors be sent into forests around the country to inspect how wood is extracted? Even if it was possible, considerable resources will be needed to properly police the scheme.

The preferred approach would be for native forest wood waste to be removed as a renewable energy source. This would eliminate the risk of our native forests being logged for bioenergy; free resources from having to police this marginal source of renewable energy, and encourage the development of genuine renewable energy technologies (such as solar).

Are there any proposals under the Act to generate electricity from wood waste?

According to the register, three power stations are currently proposing to burn wood waste to create RECs. All are in NSW and all are owned by the NSW State Government. Register details, as at 23 August 2001, are as follows (www.rec-registry.com; although the register is silent on whether or not wood waste from native forests is to be used):

Registered name	Station	Fuel source	State	Status
Delta Electricity	Wallerawang Power Station	Wood Waste	NSW	Pending accreditation
Macquarie Generation	Bayswater Power Station	Wood Waste, Co-firing	NSW	Pending acrreditation
Macquarie Generation	Liddell Power Station	Wood Waste, Co-firing	NSW	Pending accreditation

The NSW Government has power under the *State Owned Corporations Act 1989* to stop these corporations from proceeding with their applications[11].

Finally, is the scheme likely to encourage investment in renewable energy technology?

The scheme seeks to provide industry with an incentive to invest in the production of renewable energy. It aims to do this by providing certainty that demand for renewable energy will exist.

Unfortunately, the Act allows the regulations to **reduce** the 'renewable power percentage' for any year (refer sections 39(1) and (3)).

This reduces certainty for investors that any minimum level of renewable energy will be mandatory. It essentially leaves investors to wait until 1 April of each year to determine what level needs to be renewable for a year. It is difficult to see how this can assist the decision making process for investments.

Summary

In summary, the scheme has the potential to make a valuable contribution to the production of renewable energy in Australia. However:

(a) the low renewable power percentages;
(b) allowing native forest wood waste to qualify as a renewable energy source (both in terms of the potential this creates for logging, and the disincentive this provides to the development of new technology (given the relative low cost of wood), and
(c) the ability of regulations to lower the renewable power percentage (introducing a level of uncertainty for investors);

mean, that the scheme's contribution to the development of renewable energy production is significantly curtailed.

ENDNOTES

[1] The legislation comprises the *Renewable Energy (Electricity) Act 2000* (Cth) ("**Act**") and the *Renewable Energy (Electricity) Regulations 2001* (Cth) ("**Regulations**").

[2] The table is calculated based on a formula provided in the Act (section 39(2)). If the renewable power percentage for a year is different from that shown in the table, (because the regulations for that year provide a different percentage) then the percentages for the remaining years will need to be recalculated.

[3] A power station is eligible for accreditation if it has adequate metering capability and is operated in accordance with all relevant planning and approval laws.

[4] A power station's accreditation can be revoked: sch2 of the Regulations

[5] If the power station produced renewable energy before 1 January 1997, then not all of the renewable electricity produced by it can be used to create RECs. It is necessary for such generators to work out their average annual production over the three years preceding 1997. That average is then considered to be its "baseline", and it is only renewable electricity generation above three-quarters of that baseline, which can be used to create RECs. Special rules for determining baselines etc are set out in schedule 3 to the Regulations.

[6] Certain acquisitions of electricity are excluded from this calculation. In broad terms, these are acquisitions where the electricity is delivered on a grid of less than 100MWs of capacity, and situations where the electricity acquired by a person was also generated by that person. Refer section 31(2).

[7] Note: the Act only applies to acquisitions of electricity from 1 April 2001 (section 162).

[8] *Renewable Energy (Electricity) Charge Act 2000* (Cth)

[9] The Act also contains special rules in relation to recovering the shortfall and other debts, where the liable entity has become insolvent (ss 77 – 90).

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Environmental Protection and Biodiversity Conservation Act Wildlife Amendments

Aviva Gulley, Volunteer, EDO NSW

An improved wildlife trade regime is due to commence in January 2002, after the *Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Act 2001* ("Wildlife Protection Act") received assent on July 11 2001. The new Commonwealth Act repeals the *Wildlife Protection (Regulation of Imports and Exports) Act 1982*, and brings the wildlife trade regime into the framework of the *Environment Protection and Biodiversity Conservation Act 1999* ("the EPBC Act").

The Wildlife Protection Act is the legislative basis for meeting Australia's obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"). The purpose of the Act is to ensure that trade in wildlife, and wildlife products, is not detrimental to the survival of any species, especially endangered species, or their natural habitat. It is also designed to prevent the introduction of plants and wildlife that could adversely affect the Australian environment.

One of the changes wrought by the Act is in extending the objects of the regime, to include ensuring both the ethical conduct of wildlife research and the humane treatment of wildlife specimens being transported, as well as compliance with the Biodiversity Convention.

The Act implements these objects by regulating the import and export of most live animals and plants, and most animal and plant products. It establishes a number of offences, including importing or exporting a CITES specimen, exporting a regulated native specimen or importing a regulated live specimen, without holding a permit or being subject to an exemption.

The regime goes a step further than CITES in requiring import permits for CITES Appendix II species in most circumstances, and strict export bans for many live native species. The new legislation also strengthens the existing enforcement provisions, by requiring a person caught in possession of a CITES specimen to produce evidence that it was legally imported. Incorporating the wildlife trade regime into the EPBC Act allows for the prosecution mechanisms in that Act to be used.

Further changes introduced by the Act are designed to:

- ensure that when the impact of harvesting a species is being assessed, consideration is given to the impact on the ecosystem as a whole;
- restrict exemptions for registered exchanges of scientific specimens between scientific organisations to registered *non-commercial* exchanges; and
- require the precautionary principle to be taken into account in more decisions under the regime.

The Wildlife Protection Act also made other 'non-wildlife' amendments to the EPBC Act, and these came into force on July 11.

The first of these amendments changes the provisions relating to how the Federal Environment Minister determines whether an action will have a 'significant impact' on matters of national environmental significance. Previously, Section 524B provided for regulations to be made setting out the matters to be taken into account by the Minister when determining whether the action would have a 'significant impact'. This section was effectively redundant, as no regulations were ever made. It has been replaced by s25A, which allows for regulations to be made identifying an action, or class of action, that will be deemed to have a 'significant impact'.

Secondly, where a person is breaching or will breach civil offence provisions in the Act, the Minister now has the power to issue evidentiary certificates, which can be used as evidence in court proceedings. This is designed to prevent actions being taken before an approval decision is made, and if the Act is breached and the Minister decides to commence legal proceedings, it will increase the chances of success.

Thirdly, in cases where a person fails to refer an action for approval, the Minister will now have stronger 'call-in' powers. This means that where a proponent has failed to respond to a referral request, the Minister can deem that the action requires approval, and thus trigger the Act.

Finally, actions with prior authorisation and a continuation of use which were previously exempted from the entire Act will now only be exempted from the assessment and approvals process. The definition of 'prior authorisation' has also been explicitly defined as meaning 'prior *environmental* authorisation'.

Now that the legislation implementing the new regime has been passed, only one question remains - whether Environment Australia will be given sufficient funding to ensure that the improvements introduced by the regime are, in fact, implemented.

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[10] Specifically excluded sources include: fossil fuels and their waste products and products derived from coal or natural gas.
[11] Refer sections 20N, 20O and 20P of the *State Owned Corporations Act 1989* (NSW)

Corporate Code of Conduct

Chris Norton, Senior Solicitor, EDO NSW

A proposal to regulate the conduct of Australian corporations operating overseas has come under strong criticism from a Senate Committee and seems destined for failure. But should we give up on the concept of imposing mandatory standards of conduct on Australian corporations?

There is a growing rise in public concern that corporations may seek to gain a competitive advantage in their home territory by employing practices that, whilst legal overseas, are below the standard of what is considered acceptable practice domestically.

The Australian Democrats introduced the *Corporate Code of Conduct Bill* 2000 into the Commonwealth parliament. The Bill's stated objects include imposing environmental, employment, health and safety, and human rights standards on the conduct of Australian corporations employing more than 100 persons in a foreign country. The Bill was referred to the Parliamentary Joint Statutory Committee on Corporations and Securities for report.

The Committee report

As is commonly the case, the Committee could not reach an agreed position on the Bill. The majority report by coalition members made a number of severe criticisms of the Bill and recommended that it not be passed "because it is unnecessary and unworkable". A minority report by Labor members concluded that although the intent of the Bill was "right and proper" it was not appropriate to establish a series of prescriptive regulations to achieve this intent. Rather, this report recommended legislation requiring Australian corporations operating overseas to develop codes of conduct, requiring reporting on compliance, and requiring governmental auditing of the codes and compliance reports.

Are the criticisms of the Bill justified?

Extraterritoriality

A prime criticism levelled at the Bill is that its attempts to regulate activities in foreign jurisdictions are "paternalistic"[1] and may be viewed overseas as "arrogant, patronising and racist."[2] These are strong criticisms indeed. However, it is very difficult to reconcile these criticisms with Australia's enactment of several pieces of legislation with extraterritorial operation in its recent past.

It is now reasonably accepted that, all Australian parliaments have the power to enact laws with extraterritorial operation.[3] The Commonwealth has passed a number of pieces of legislation with extraterritorial effect, including:

- *Crimes (Child Sex Tourism) Amendment Act 1994:* amends the *Crimes Act 1914* to create a number of offences relating to sex with persons under 16 outside Australia; and
- *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*: creates a number of offences for Australian ships that discharge polluting substances into the sea.

The majority report seeks to contrast these statutes with the Bill by stating that they provide "specific and quite detailed responses to particular perceived problems" whereas the Bill is "generic".[4]

The Bill is, in truth, a response to "particular perceived problems", such as the problem of Australian corporations being able to conduct their operations under standards which the Australian legislature may consider inappropriate, including breaches of established international standards such as the Universal Declaration of Human Rights.

The concept of Australian corporations operating overseas being required to comply with certain minimum standards, despite those standards being above the legal requirements of the country in which the corporation is operating, is not new (for example the *Crimes (Child Sex Tourism) Amendment Act*). Therefore, criticisms in the majority report that the Bill is needlessly 'paternalistic' since it would allow Australian courts to disregard the laws of foreign jurisdictions that would otherwise have provided a defence to such charges, are criticisms that apply equally to current legislation. The real question that the Committee should be directing its mind to is, surely, whether the standards that the Bill seeks to uphold are sufficiently important that the Commonwealth should impose these standards on Australian corporations overseas.

In this regard, comments made by the Committee majority in relation to consumer health and safety standards are puzzling. The majority report considers it inappropriate to legislate to require corporations operating overseas to comply with Australian occupational health and safety standards, as this "could be equivalent to encouraging Australian corporations to flout the laws of foreign jurisdictions"[5]. This is clearly absurd as there is no suggestion in such a requirement that corporations are not encouraged to comply with foreign laws as well. Rather, it is clearly an attempt to require Australian corporations to maintain a certain minimum standard, rather than lowering their standards to a 'lowest common denominator'.

Which corporations should be regulated?

The Bill seeks to apply to Australian corporations or "related corporations" which employ more than 100 persons in a foreign country. This raises a number of difficulties.

One is with the concept of 'related corporations', which includes subsidiaries and holding corporations of the Australian corporation. Although extending the operation of the Bill to "related corporations" is intended to prevent corporations from escaping the impact of the bill through establishing wholly-owned foreign subsidiary companies, one problem is that the bill would also apply to established foreign holding corporations, such as, for instance, General Motors. This is a problem and the bill should probably extend only to holding companies that are also Australian companies.

Perhaps a greater problem, however, is the '100 employee' threshold. As the majority report points out, subcontractors would not be included in the employee count, hence, the obligations of the Bill could be avoided by subcontracting the company's operations.

Imprecision of obligations

Perhaps the most problematic aspect of the Bill, in the EDO's view, is the fact that many of the 'obligations' which it seeks to impose are phrased in general terms. For example:

- an obligation to "provide satisfactory sanitary conditions at a workplace";[6] and
- an obligation to respect the freedom of workers to associate[7]

In practice, it would be difficult to bring legal proceedings against a relevant corporation to demonstrate that it had breached one of these standards.

The majority report makes this criticism, but some of its comments on the standards set by the Bill are puzzling. Of particular concern is a comment on cl 13(1) of the Bill, which requires that an overseas corporation not engage in conduct that is misleading or deceptive or likely to mislead or deceive. This provision is a virtual word-for-word restatement of a provision that applies to most corporate entities within Australia, by reason of the *Trade Practices Act* 1975 (Cth) and State fair trading legislation. However, the majority stated that they could not recommend the introduction of such a provision due to the large amount of litigation it may generate. This is a truly extraordinary statement – that a proposed requirement, on all fours with a requirement already existing in domestic legislation, should be rejected not on the basis that it sets an inappropriate standard, but that the standard might be enforced.

Reporting

The Bill contains a requirement for relevant corporations to lodge with the Australian Securities and Investments Commission a Code of Conduct Compliance Report, detailing compliance with specific standards in the Bill. The majority found that the reporting requirements would be unduly onerous and expensive.

The report contains no actual estimate of compliance costs to support this conclusion. Rather, the majority seems to have accepted at face value the submissions of various representatives of corporate interests to this effect.

General impact on business

Conflicting views were put to the Committee on the likely effect on Australian business. Corporate interests argued that the effect would be negative, causing Australian corporations to either incorporate outside Australia, or withdraw from foreign operations. On the other hand, supporters of the Bill argued that there would be an overall beneficial impact in the form of increased goodwill towards Australian companies. This might give Australian industry in general an advantage.[8]

The majority rejected the suggestion that the Bill would enhance Australia's reputation. However this ignores the likely effects that someone who purchased from an Australian company would be able to be satisfied that, regardless of whether the good or service was sourced from Australia or overseas, it had been produced by a corporation subscribing to certain minimum standards. This is not to say that the standards of all foreign countries in which Australian corporations operate are inferior; rather, it provides a standard, and lets the marketplace judge whether it sees compliance with that particular standard as being a thing of value.

The way forward on corporate conduct

In the light of the extreme criticism of the Bill from the majority, coupled with the stated views of the Labor members that a bill in this form is not the best way to achieve its objectives, it is hard to conceive of this Bill, or indeed any legislation in a substantially similar form, passing through Parliament in the foreseeable future, regardless of which of the major parties is in government.

Although this is disappointing for the proponents of the objects of the Bill, there is an alternative way forward which overcomes many of the concerns raised about the current Bill. The Labor members suggested that the best way of dealing with corporate conduct overseas would be to enact legislation:

- requiring Australian companies operating overseas to develop codes of conduct incorporating the relevant OECD guidelines;
- requiring those companies to report regularly on compliance with the codes; and
- providing for a government department to audit the

codes and compliance reports.[9]

Some benefits of this approach are as follows:

- It recognises the appropriateness of the general aims of the Bill, as well as the benefits that could accrue to Australian business from the application of publicly known standards of operation;
- It permits business to construct standards that include relevant internationally accepted guidelines for conduct that are in line with business' own needs and abilities, hence potentially promoting certainty of standards; and
- It contains an element of governmental oversight to ensure that the codes are complied with.

This approach is also similar to that being taken by the International Right to Know Campaign in the United States. The campaigners, comprising over 200 environmental, labour, social justice and human rights organisations, are seeking enactment of a law requiring US corporations to disclose information on their environmental impacts, labour practices, and human rights practices throughout the world.[10] One advantage of a scheme built around self-regulation and mandatory disclosure is that compliance with the code and being able to report a clean corporate record can become a desirable commodity in the marketplace. One US commentator says that since passing domestic reporting legislation, release of toxic pollutants has declined substantially.[11]

The EDO does support the concept of legislated mandatory standards of corporate conduct in line with recognised principles of international law and treaties to which Australia is a signatory. However, the intermediate step of enacting mandatory reporting legislation would overcome many of the difficulties which the *Corporate Code of Conduct Bill* has experienced to date, and may prove a more realistic short-term goal for advocates of increased corporate accountability.

ENDNOTES

[1] Parliamentary Joint Statutory Committee on Corporations and Securities *Report on the Corporate Code of Conduct Bill 2000* June 2001, majority report p25
[2] *Ibid*, majority report p 45
[3] See e.g. *Australia Act 1986* (Cth)
[4] Parliamentary Joint Statutory Committee on Corporations and Securities *op cit* majority report pp20, 41.
[5] *Ibid*, majority report p 43
[6] *Ibid* cl 8(2)(b)
[7] *Ibid* cl 9(3)(c)
[8] For example submissions of Amnesty International, reported in Parliamentary Joint Statutory Committee on Corporations and Securities *op cit*, majority report p36.
[9] *Ibid*, minority report, p5
[10] For information about this campaign, go to http://www.irtk.org
[11] Waskow, D quoted in Knight, D "Campaign Seeks to Shine Light on US Corporations Overseas" APC networks, 13/2/01

Kyoto Update

Justine de Torres, Volunteer Solicitor, EDO(NSW)

Following nearly ten years of international negotiations to tackle climate change, on 23 July 2001 delegates at the sixth session of the Conference of the Parties in Bonn finally compromised on a revised version of the Kyoto Protocol. The Bonn agreement, labelled by Greenpeace as "Kyoto Light", represents a marked retreat from the original Protocol agreed at Kyoto in 1997.

Greenpeace has calculated that the Bonn agreement will result in a 0.3% increase in greenhouse emissions on 1990 levels by 2012. The 1997 version of the Protocol committed its 85 signatories to cuts of an average of 5.2% on 1990 emissions. Climate scientists, however, suggest that emission reductions by developed countries in the order of between 60% and 80% on 1990 levels will be necessary to alleviate climate change.

Australia has now signed the revised version of the Protocol negotiated at Bonn. Despite the fact that Australia won a range of generous concessions in the revised Protocol, however, Prime Minister Howard quickly moved to reiterate that Australia would not ratify the Protocol without the participation of the United States. President Bush has declared that the US will not ratify the Protocol, which he describes as "fatally flawed".

The Bonn agreement, labelled by Greenpeace as "Kyoto Light", represents a marked retreat from the original Protocol agreed at Kyoto in 1997.

The Prime Minister's decision places Australia outside the global consensus. Thirty-four nations have already ratified the Protocol, and fifteen European Union countries have agreed to ratification in time for the Rio +10 convention scheduled for September 2002. In a surprising declaration of independence from the United States, Japan has said that it will ratify the Protocol within a matter of months.

In addition to requiring domestic action on climate change by developed countries, the Bonn agreement outlines the following "supplementary" mechanisms for achieving reduction goals:

u **Funding** - two additional climate change funds have been established to assist countries (particularly "least-developed countries") adapt to the impacts of climate change, limit emissions and switch to cleaner technologies - worth an estimated total of US$530 million per annum. More funding is set aside to encourage OPEC countries to develop economies which will be less dominated by fossil fuel production.

u **Reduction mechanisms** - a number of mechanisms have been included in the agreement which will allow countries to use financial incentives to reduce greenhouse emissions.

u **Emission trading** - tradeable emission rights have been introduced to enable countries that ratify the Kyoto Protocol to find least-cost solutions to meeting their emission reduction obligations, through trading credits between participating countries.

u **Clean development** - industrialised countries will be able to claim emission credits for establishing climate-friendly technology projects developing countries. Projects may include carbon sinks, but nuclear power projects will not earn credits despite lobbying from Australia Canada and Japan.

u **Joint implementation** - industrialised countries will also be able to jointly invest in clean technology projects. Nuclear power projects are again excluded.

u **Carbon sinks** - One of the most contentious issues of the Protocol was the extent to which carbon sinks could be used to offset greenhouse emissions. Australia, Japan, Russia and Canada argued that since forests absorb carbon in photosynthesis, their forests (and farmland) should gain them emission credits. Despite its hot opposition to sinks as an offset mechanism, the European Union was forced to compromise on the issue, allowing emission credits for forestry management schemes in limited circumstances in order to achieve the political commitment of key countries, Canada and Japan.

Countries which fail to meet their emission targets will face a reduction in their emission allowances, and limitations on their ability to use flexible mechanisms, such as emission trading.

Although all the parties to the Bonn agreement recognise it is only a first step toward tackling the climate change crisis, the Protocol is capable of delivering real and valuable cuts in emissions from business as usual emission projections. Momentum is building in support of mandatory reduction of greenhouse emissions, with all nations other than the United States now accepting this deal.

With Australia as one of the most "at-risk" to the impacts of climate change of all the developed countries, the Australian Government's continuing support for the United States appears increasingly short-sighted and contrary to the national interest.

Mahogany Glider habitat saved

Matt Patterson, Solicitor, EDO (Northern Queensland)

The Cardwell Shire Council in far north Queensland proposed the building of a minor waste transfer station on land that supports a number of endangered species including the mahogany glider. Local resident Ms Wieruszewski appealed the proposal in the Planning & Environment Court and the matter has been settled, with the Council agreeing to withdraw its development application.

The case is notable for two reasons;
Firstly, that the Council sought to have the appeal dismissed on the basis that an objection was incorrectly addressed and secondly the use of the *Environmental Protection and Biodiversity Conservation Act 1999 (Cth)* ("EPBC") to impose protective conditions on developments that do not formally trigger the Act.

Facts

EDO-NQ, acting on behalf of the appellant, Ms Wieruszewski, filed an appeal in December 2000 against Council's decision to approve its own development application to build a waste transfer station on land opposite her property near Euramo.

The development application was for the "material change of use" of the premises and required "impact assessment" under the *Integrated Planning Act 1997 (Qld)* ("IPA"). Public notification of the proposed development followed and Ms Wieruszewski and her partner lodged two submissions with the Council opposing the development. Council approved the development and Ms Wieruszewski lodged an appeal in the Planning & Environment Court against that decision.

Her appeal contained a number of grounds including failure to comply with the Council's Strategic Plan. The site is zoned agricultural and is surrounded by many cleared grazing and agricultural properties. It therefore forms part of an important wildlife corridor and is habitat for the endangered mahogany glider. The mahogany glider *(Petaurus Gracilis)* was believed to be extinct until its rediscovery in 1989. Its habitat has been reduced to less than 20 percent of its former size.

The land has been mapped as an endangered regional ecosystem by the Environment Protection Authority (EPA), and Queensland Parks and Wildlife Service had recently published the Mahogany Glider Recovery Plan 2000-2004. The recovery plan indicates that a number of species listed as endangered under the *Nature Conservation Act 1992 (Qld)* and the EPBC Act, also inhabit areas where the mahogany glider is found. These include the mist-frog, waterfall frog, the Southern Cassowary and three species of orchid.

As the site was flood-prone there was a risk that litter and other pollutants would wash into nearby Corduroy Creek, the Murray River and the Great Barrier Reef Lagoon.

Application to Dismiss

In the course of the proceedings, Council's solicitors filed an application to have the appeal dismissed on the limited ground that the appellant had no right of appeal under the IPA because the resident's submission was not properly made. The basis for that contention was that the appellant and her partner had not correctly put their address on their letter to Council outlining their objections to the proposed development.

Held

In a written judgment delivered on 24 May 2001, His Honour Judge White noted that the appellant did not receive a postal service and collected her mail from Euramo Post Office. He rejected Council's argument, stating:

> "I have no doubt that any servant of the Cardwell Shire Council with reasonable knowledge of the local authority area would have no difficulty in locating the appellant's property for the purposes of delivering a notice."

The application was dismissed and the Council ordered to pay the resident's costs.

EPBC Act

During the course of proceedings, and following requests from EDO-NQ, the respondent referred the development proposal to Environment Australia pursuant to s68 of the EPBC Act, for the Commonwealth Minister's decision on whether the proposal was a "controlled action" or not.

Following submissions, the Minister published his decision on 10 July 2001 that the action was not controlled and approval under the federal scheme was not required. That is, the action was not going to have a significant impact on listed threatened species.

In making its decision however, the Commonwealth stated that the action would not be controlled provided it was taken in a certain manner. The manner in which the proposed action would have to be taken was:

- 90% of the site would not be developed [as per the proposal]; and
- that Council must seek to ensure conservation and protection from future development of the remaining 90% through a covenant under the *Land Title Act 1994 (Qld)*.

On one view, failure to comply with these conditions would

assist in proving an offence under the EPBC Act, that is a breach was an action that has or will have a "significant impact" on a listed threatened species under the EPBC Act. There is no universal test for what constitutes a "significant impact" and much would presumably turn upon the facts of each case.

It is hoped that the impending judgment of Her Honour Justice Branson in the Federal Court Flying Fox case [Booth v Bosworth & Anor] will provide some judicial guidance on the meaning of "significant impact".

Comment

The Court's decision on the interlocutory application is important in protecting rural and remote residents' appeal rights in planning decisions under IPA (what is this? – Integrated Planning Act – see para 6). The Judge took a commonsense approach to the matter in ruling that it was within a local government's capacity to take positive steps to locate residents. Furthermore, the case demonstrates that the EPBC Act can be used to impose protective conditions upon land use even when an action is not declared "controlled".

Planning for Urban Bushland

Tim Holden, Acting Policy Director, EDO(NSW)

Introduction

The large number of inquiries made to the EDO provides us with a unique perspective on problems with the legal framework for the protection of urban bushland and how it could be improved.

In this article I will consider three main issues:

1. what is local government's role in planning for the protection of urban bushland?
2. does this framework provide adequate protection for urban bushland?
3. will the proposed changes to the planning system set out in the Government's *Planfirst* white paper improve the protection of urban bushland?

What is local government's role in planning for the protection of urban bushland?

Protecting bushland using environmental planning instruments

The legal framework for the protection of urban bushland in NSW is complex. For example, urban bushland may have some protection if it is a threatened ecological community, consists of threatened species or is habitat for threatened species listed under either the New South Wales *Threatened Species Conservation Act* 1995 (NSW) or the Commonwealth's *Environment Protection and Biodiversity Conservation Act* 1999. Urban bushland may also be protected by inclusion in a national park.

All of these responsibilities lie with the State Government. However Local Government can also play an important role in the protection of urban vegetation using:

- their local environment plan (LEP) and planning powers;
- a tree preservation order;
- a management plan if it occurs on land that is classified as community land.

The *Environmental Planning and Assessment Act 1979* ("EP&A Act") allows an environmental planning instrument, such as a Local Environment Plan (LEP) or a regional environment plan (REP) to make provision for "protecting or preserving trees or vegetation". Local councils can require in their LEP that consent be obtained for the clearance of native vegetation. Often LEPs have these types of provisions in "environment protection zones". However there is no reason why a council could not impose controls on tree clearing on public and private land generally.

Local environment plans

An environmental planning instrument cannot prohibit clearing that is lawful under an Regional Vegetation Managemet Plan ("RVMP"), however there are two situations in which Council can use LEPs to protect urban bushland.

Firstly, the *Native Vegetation Conservation Act* 1997 (NSW) ("NVC Act") does not apply to land that is:

- listed in Schedule 1 of the NVC Act. This list includes Newcastle, Wollongong and the Sydney metropolitan areas;[1] or
- zoned under the EP&A Act as residential (but not rural residential), village, township, industrial or business[2].

Councils are the sole approval body for clearance of native vegetation in these circumstances.

Second, Councils can control the clearance of native vegetation until an RVMP is in place[3]. Even though provisions of the LEP would not be applicable once an RVMP was in place, in the three and a half years since the NVC Act commenced, not one RVMP is in operation[4].

State Environmental Planning Policy (SEPP) 19

SEPP 19 "Bushland in Urban Areas" applies to bushland zoned or reserved for public open space purposes in council areas in the Sydney metropolitan area. While SEPP 19 has some very positive aspects, it has significant limitations.

SEPP 19 has four key requirements.

cont...page 12

...cont' from page 11

u It prohibits the disturbance of bushland that is zoned for public open space purposes without the consent of Council.[5] A council must not grant consent unless:
(i) it has made an assessment of the need to protect and preserve the bushland;
(ii) it is satisfied that the disturbance of the bushland is essential for a purpose in the public interest and no reasonable alternative is available; and
(iii) it is satisfied that the amount of bushland proposed to be disturbed is as little as possible and, the bushland will be reinstated upon completion of that work as far as is possible.

u When granting development applications for private land that adjoins SEPP 19 bushland, councils must take into account the need to retain bushland and the effect the development will have on the bushland.[6]

uWhen preparing draft LEPs, the council must give priority to retaining bushland unless there are significant environmental, economic or social benefits that outweigh the value of the bushland.[7]

uIn circumstances where disturbance of bushland is allowed without consent, such as bushfire hazard reduction, the relevant public authority must have regard to the aims of SEPP 19 prior to taking any action.[8]

In many instances when a development proposal arises in relation to SEPP 19 bushland it is put forward by the council that is responsible for that bushland. The proposal then goes to the council, which considers it and often, surprisingly, approves its own proposal. This obviously raises questions about whether councils should be approving their own proposals.

Protecting vegetation using tree preservation orders

While broad control of native vegetation clearing is possible using an LEP, the use of tree preservation orders is more common. However whether a tree preservation order is implemented, is completely up to the discretion of each council. There is no minimum standard that applies throughout New South Wales.

Also, tree preservation orders often appear to be driven by a desire to protect amenity and aesthetics. If the primary objective is to protect remnant species and ecosystems, understorey species must also be protected, not just trees.

Protecting urban bushland on community land

Under the *Local Government Act 1993 (NSW)* (LG Act), any land that is under the control of a council must be classified as either community or operational land.[9] Land that is classified as community land must be managed and used in accordance with the applicable plan of management.[10]

Community land has to be categorised as a natural area, a sportsground, a park, an area of cultural significance, or general community use. If land is categorised as a natural area it must be further classified as bushland, wetland, escarpment, watercourse, or foreshore.[11]
This includes not just undisturbed bushland, but also includes highly disturbed bushland, so long as the land is capable of being rehabilitated. So community land containing remnant vegetation should in some circumstances be classified as bushland even if; the understorey has been removed, there is significant weed invasion, dead and dying trees are present and there is no natural regeneration of trees and shrubs.

The management plan for community land classified as bushland must include seven core objectives.[12] It must state how the council proposes to achieve these objectives, and also how the council proposes to measure its performance in achieving the objectives. The core objectives for bushland include:
u to ensure the ongoing ecological viability of the land by protecting the ecological biodiversity and habitat values of the land, the flora and fauna;
u to restore degraded bushland; and
u to retain bushland in parcels of a size and configuration that will enable the existing plant and animal communities to survive in the long term.

There are two major problems with the community land provisions. First, the guidelines as to the classification of community land are discretionary. A council could classify as a sportsground, land that clearly met the bushland guidelines. This would allow the council to avoid having to comply with the bushland objectives.

Second, even if the council classified the land as bushland there is no prohibition on the construction of buildings or the clearing of land. In both these cases SEPP 19 will apply and the council will be required to take the uncertain step of applying to itself for approval.

Does this framework provide adequate protection for urban bushland?

Against what criteria should the legal framework be assessed? The protection of urban bushland raises some very difficult issues. Within the context of our current society, balances will need to be struck between retention of urban bushland and what are regarded as essential activities. However the planning system should be improved so that it at least meet the following criteria:
u First, there should be an express acknowledgement that the protection and restoration of urban bushland on both public and private land is an overarching priority.
u Second, there should be a mandatory assessment of

remnant urban bushland within the local area. This would identify significant bushland and also provide a benchmark against which a council's urban bushland policies could be assessed.

u Third, there must be a requirement to review LEPs every three years so as to ensure that they are consistent with and promote the goal of protecting and restoring urban bushland, and LEPs must contain sustainability indicators for urban bushland so as to enable their success to be measured.

u Fourth there should be a requirement that all public land containing bushland *must* be classified as community land and categorised as bushland unless it is required for an essential public purpose. Currently under the Local government Act it is up to the relevant council to decide whether to classify public land as operational or community.

u Fifth, disturbance of significant urban bushland must require consent. It is not sufficient that councils simply "have regard" to the loss of bushland when making their decisions. The approach to bushland on private land should be similar to that for bushland on public land under SEPP 19.

u If the development proposal has been put forward by the council it should not be able to grant itself consent. It must be required to obtain consent from the Minister.

Will the changes proposed in *Planfirst* improve the protection of urban bushland?

The Department of Urban Affairs and Planning (DUAP) has recently proposed major changes to the NSW planning scheme. If the proposals contained in the White Paper are adopted:

u local plans will be required to include a "local profile" of the council areas and also a statement of outcomes that the plan will seek to achieve;[13]

u local plans will contain sustainability indicators;[14] and

u there will be monitoring and review of all local plans every three to five years.[15]

These are very positive initiatives, however there is very little detail as to how these matters will be applied. For example will urban bushland be addressed in the local profile? Will the statement of outcomes specify that urban bushland should be retained? Will the sustainability indicators address matters that are related to urban bushland?

To date there has been very little State government leadership on urban bushland. Whether or not the *Planfirst* proposals are successful the State government must do more to ensure that urban bushland is protected. In addition to changes to the planning framework the planning instruments themselves must be changed if urban bushland is to be protected. Rather than hope that councils agree that this is a priority and reform their plans, State government should ensure that this occurs by either:

u expanding SEPP 19 so that it also applies to private land; or

u issuing a direction under section 117 of the EP&A Act requiring councils to include provisions in their draft LEPs that will protect urban bushland.

Conclusion

Getting the law right is only the first step. The law must then be administered responsibly and where necessary enforced. There are many examples of instances where government agencies have failed to protect the environment, either because of lack of political will or lack of resources.

It is in situations such as this where good laws can allow the community to step in and take action.

ENDNOTES

1 NVC Act section 10
2 NVC Act section 9.
3 NVC Act section 23.
4 However the Department of Land &Water Conservation has indicated that the Mid-Lachlan RVMP will commence on 1 December 2001.
5 SEPP 19 clause 6.
6 SEPP 19 clause 9.
7 SEPP 19 clause 10.
8 SEPP 19 clause 7.
9 LG Act sections 25 and 26.
10 LG Act section 35.
11 LG Act section 36.
12 LG Act section 36J.
13 DUAP "Planfirst, Review of planmaking in NSW White Paper" (2001), page 24.
14 As above, page 12.
15 As above, page 14.

National EDO Network News

EDO SA is moving

EDO South Australia will be in new premises from 18 September 2001. The contact details are:
First floor, 408 King William St Adelaide SA 5000
Ph (08) 8410 3833
Fax (08) 8410 3855

EDO Network People

Matt Ridley is the new Office Manager at EDO (NSW) from the beginning of September. Matt's background is in administration, marketing, events management and journalism in both commercial and non profit organisations.

From August to November 2001, EDO (NSW) will be hosting exchange visits by Jonathon Thomas, Almah Tarariah, Wendy Serkum and Effrey Dademo from the Environmental Law Centre in Papua New Guinea.

East Timor Update

EDO (NSW) Director, Lisa Ogle, remains on leave in East Timor, where she is currently employed by the United Nations Transitional Administration in East Timor ***("UNTAET").*** Lisa is working with the Environment Protection Unit of the fledgling East Timor Transitional Administration, where she is helping to develop environmental law and policy in preparation for the new government.

Elections were held on 30 August 2001 to elect an 88-member Constituent Assembly, whose task it will be to draft a constitution for the new country. It is anticipated that a constitution will be ready by end December 2001, with independence to be declared in early 2002.

The new government of East Timor has a number of environmental issues to deal with. Many people still do not have access to clean water and sanitation, particularly in rural areas. Forest cover, which was denuded under both the Portuguese and Indonesian administrations, continues to be depleted for fuelwood, causing massive soil erosion. Waste litters the streets of Dili, as there are no waste collection facilities. All land title records were destroyed in the violence following the vote for independence in August 1999, and land ownership and development rights are yet to be determined.

Lisa expects to return from East Timor in late 2001.

EDO Publications

EDO offices produce affordable, plain English guides to environment and planning laws, and related laws for environmental campaigners such as freedom of information and defamation. Some of our publications include:

NSW Environmental Law Toolkit

(available from EDO NSW)

Introduction to Victoria's key Environment and Planning Law

(available from EDO Victoria)

A Guide to Environment Law in Western Australia

(available from EDO WA)

The Environmental Law Handbook

(available from EDO Tasmania)

Disappearing Acts: A Guide to Australia's Threatened Species Law

(available from EDO NSW)

Environmental Law Factsheets

Fact Sheets and kits on environment and related laws can be found on the websites of EDO offices in NSW, Queensland, South Australia, Western Australia and Victoria.

Coming soon.....

"Back to our Seagrass Roots"
Conference Papers from the National EDO Network Conference to be held on 2 November 2001.
Contact EDO Qld for details.

Greening a Sunburnt Country
A plain English guide to Commonwealth environment law to be published by the National Environmental Defender's Office Network in early 2002.
Contact EDO NSW for details.
(The National EDO Network acknowledges the support of the Conservation Alliance and Environment Australia for this publication.)

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BACK TO OUR SEAGRASS ROOTS: practical approaches for achieving coastal sustainability

A conference presented by the National Environmental Defenders Office Network and hosted by the Environmental Defenders Office (QLD) Inc.

Friday, 2 November 2001

8.00am – 4.40pm
Brisbane Hilton, 190 Elizabeth Street Brisbane QLD

Keynote Speaker: Don Henry, Australian Conservation Foundation

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Gone Fishing*: Examine a legal case to prevent an inappropriate aquaculture facility in South Australia, and the practical challenges faced by commercial fishing.*
The Dirt*: Investigate different approaches to coastal management between the States, the role of law in reducing land-sourced marine pollution and community perspectives on planning in the Moreton Bay region.*
Parking Space: *How are we looking after our marine parks? Speakers discuss balancing stakeholder interests in the Hinchinbrook management plan, incorporating indigenous issues into marine parks management as well as looking at the threats facing the Great Barrier Reef.*

All registrations cover lunch, morning and afternoon tea and conference package.

Full registration: *$180* ***(+ GST = $198.00)***
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Scholarship: *If you, as a group or individual, know of a person who is interested in the conference, contributes significantly to the community but due to financial hardship, may be unable to afford the registration, please consider nominating them for one of EDO's two seminar scholarships. Please send in contact details of the nominator, the nominee and a brief resume of reasons for the nomination.*

To register contact
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