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DX 722 Sydney
Ph: 02 9262 6989
Fax: 02 9262 6998
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New Ruling under the EPBC Act

Humane Society International Inc. v Commonwealth Minister for the Environment and Heritage [2003] FCA 64

Jo Bragg, Principal Solicitor EDO (Qld) Inc.

On 12 February 2003, Justice Kiefel of the Federal Court declared that Commonwealth Guidelines[1] made under the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) (**EPBC Act**) purported to give exemptions from that Act not authorised by law. That declaration was made after an application to the Court by the well-respected Humane Society International Inc. (**the Society**), which was represented by Queensland barristers Stephen Keim and Chris McGrath and solicitors at EDO Queensland.

The exemption was purported to be given to persons (proposing action with respect to listed vulnerable Grey-headed and Spectacled Flying-foxes, such as culling), from their obligation to consider the effects of those actions and, if they think the actions are controlled by the EPBC Act (because those actions have, will have or are likely to have a significant impact on either of those listed flying-foxes), to refer them to the Commonwealth Environment Minister (**the Minister**).[2] Once an action is referred, the Minister then makes a decision as to whether or not the action requires assessment and approval under the EPBC Act.

Justice Kiefel stated,
.. it would seem to me that the statement made in the Guidelines, to the effect that a person does not need to make a referral to him under the Act, goes rather further than advice to persons about how they might deal with the question posed by s 68(1). The statement is made by the Minister responsible for the administration of the Act and concerns the legal obligations of persons proposing action. The Minister is effectively saying that he does not require them to refer actions to him for consideration. In my view, in so doing the Minister has purported to exempt them from their statutory obligation. [3]

Early in the Judgement, Justice Kiefel declined to grant an order of mandamus (mandamus is an order to compel the Minister to fulfill any unperformed public duty), as she found that the Minister had not refused to undertake his duty to consider any referrals properly.[4] Justice Kiefel also decided that decisions by the Minister about the number of listed flying-foxes that might be culled without referral were not decisions reviewable under administrative law.[5] However Her Honour found that the principal effect of the Minister's statement is to deter referrals,[6] rendering judicial review of decisions[7] on referrals less likely.[8] Thus Justice Kiefel chose a declaration as the correct tool or remedy to inform the public of their statutory obligations.[9]

The Court was not presented with any scientific evidence about the effects of culling of the vulnerable flying-foxes as this was not relevant to the remedies sought by the Society. The Society's case comprised an attack on only the legality of the general exemption purported granted by the Minister. This case therefore involved less Court time than the case of *Booth v Bosworth*[10] in which Dr. Carol Booth, supported by

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New Clearing Laws Proposed for WA

Lee McIntosh, Solicitor, EDO (WA)

Western Australia currently has a patchwork of different laws relating to land clearing, which vary depending on arbitrary factors such as where the clearing takes place, the tenure of the land in question and the purpose of the clearing.[1] The *Environmental Protection Amendment Bill 2002* (**the Bill**)[2] proposes to repeal these laws and implement a single land clearing regulatory system under the *Environmental Protection Act 1986* (**the Act**).

What will the new clearing laws cover?

The Bill proposes that "clearing" will be any act that causes the death, destruction, removal of, or substantial damage to, some or all of the native vegetation in an area. "Clearing" is defined to include severing or ringbarking trunks or stems, draining or flooding land, burning and grazing of stock. The definition of "native vegetation" will include indigenous aquatic or terrestrial vegetation, but will not include vegetation in a plantation.

Unlike WA's current clearing laws, the Act will apply to most areas of land and water in WA, including rural, urban and Crown land, roadside vegetation, pastoral leases, land the subject of a mining tenement and land the subject of public works.

When will clearing be allowed?

The Bill proposes that it will be unlawful for any person to clear native vegetation unless that person:

1) has a "clearing permit";
2) has other "lawful authority"; or
3) clears under a specific exemption provided by regulations (yet to be finalised).

An individual may be fined up to $250,000 for unlawful clearing, with a maximum additional fine of up to $50,000 for each day they continue to clear. A corporation may be fined up to $500,000 for unlawful clearing with a maximum additional fine of up to $100,000 for each day it continues to clear.[3]

Clearing permits

The Bill proposes that there be two types of clearing permits; area permits and purpose permits.[4] Area permits will be issued for clearing on particular land and can only be issued to the owner of the land or someone acting on the owner's behalf. Area permits will be valid for a maximum of two years.[5] Purpose permits will be issued for clearing for a particular purpose and can only be issued to the person on whose behalf the clearing will be done. Purpose permits will be valid for a maximum of five years.[6]

All applications for clearing permits must be made to the Chief Executive Officer of the Department of Environmental Protection (**CEO**).[7] Once the CEO has received an application, the CEO must invite any public authority or person who has a "direct interest" in the subject matter of the application to comment on the application.[8] A person will probably have a "direct interest" if they are a neighbouring or downstream landowner, or if they have private interests which will be affected by the clearing. The CEO will decide in each case whether or not a person has a "direct interest".

How will the decision made?

Clearing permits will only be able to be issued by the CEO.[9] In deciding whether to issue a permit, the CEO must:

- take into account any comments received from those invited to comment on the application;
- have regard to the "clearing principles" (the principles are set out in the proposed Schedule 5 of the Act);
- have regard to any relevant town planning scheme, strategy, policy or plan made or adopted under a scheme;[10]
- have regard to any Statement of Planning Policy[11] (for example, the *Leeuwin-Naturaliste Ridge Statement of Planning Policy*);
- have regard to any local planning strategy;[12] and
- ensure that the permit is consistent with any Environmental Protection Policy.[13]

After considering the above, the CEO will be able to either refuse to grant the permit, grant the permit on conditions, or grant the permit without conditions. The CEO may only make a decision that is seriously at variance with the "clearing principles" if, in the CEO's opinion, there is a good reason for making that decision.[14] In this case the CEO must publish reasons for that decision.[15] Further, the CEO must not issue a clearing permit if the associated effect on the environment would be inconsistent with and provide less protection than any Environmental Protection Policy.[16]

Will a permit be conditional?

If the CEO decides to issue a clearing permit, the CEO will be able to make the permit subject to any conditions which the CEO considers are necessary or convenient for controlling environmental harm or offsetting the loss of vegetation.[17] For example, the CEO will be able to impose a condition requiring the permit holder to plant vegetation in other areas, to monitor operations, to conduct risk assessment, to enter into a conservation covenant or agreement to reserve, or to implement an environmental management system.[18] The CEO will also have the power to require a person to make contributions to a fund for the purpose of establishing or maintaining vegetation and to amend the conditions of a clearing permit once it is issued.[19]

What happens if permit conditions are breached?

If the holder of a clearing permit contravenes a condition of the permit (or a condition of a conservation covenant or agreement to reserve referred to in the permit), they will commit an offence.[20] An individual may be fined up to $62,500 for this offence, with a maximum additional fine of up to $12,500 per day if they continue the offence. A corporation may be fined up to $125,000 for this offence with a maximum additional fine of up to $25,000 per day if it continues the offence.[21]

The CEO will also have the power to revoke or suspend a clearing permit if the permit holder has breached a permit condition.[22]

Appeals to Minister about clearing permits

Any person who is not satisfied with the CEO's decision:

- to issue a clearing permit;
- about a condition of the permit; or
- to transfer, amend, revoke or suspend a clearing permit;

will be able to appeal to the Minister for the Environment in writing within 21 days of that decision.[23]

Clearing permits and environmental impact assessment

If a proposal is the subject of a formal environmental impact assessment under the Act, the CEO will not be able to consider an associated application for any clearing permit until the Minister for the Environment has made a decision on the proposal.[24] Any decision that the CEO makes about the clearing permit must then be in accordance with the Minister's decision.

Lawful authority

A clearing permit will not be required if clearing is carried out in accordance with another "lawful authority".[25] Proposed Schedule 6 of the Act sets out many types of "lawful authorities, which include:

- a subdivision approval;
- approval for a building (if the clearing is within the building envelope);
- decisions made by the Minister for the Environment after a proposal has been the subject of a formal environmental impact assessment under the Act;
- development approval issued under a town planning scheme that has been the subject of a formal environmental impact assessment under the Act;
- management of land by the Department of Conservation and Land Management in accordance with a Forest Management Plan;[26]
- a works approval or licence issued under the Act;
- a road or production contract with the Forest Products Commission;[27] and
- clearing for certain purposes under the *Bush Fires Act 1954* (WA).

Vegetation conservation notices

The Bill proposes to create "vegetation conservation notices" - notices that require a person to repair damage, re-establish vegetation or prevent erosion.[28] A vegetation conservation notice can be issued to any person by the CEO if the CEO suspects on reasonable grounds that that person has, or is likely to, carry out unlawful clearing. Before the CEO can give a person a vegetation conservation notice, the CEO must give that person a chance to make submissions as to why a notice should not be issued. Once issued, a vegetation conservation notice can be registered on the title to any land, in which case it will bind successive landowners.

Clearing injunctions

The Bill also proposes to create "clearing injunctions" - orders of the Supreme Court that prohibit a person from being involved in unlawful clearing. The CEO can apply for a "clearing injunction" from the Court if the CEO suspects that a person is involved in, or will be involved in, unlawfully clearing native vegetation.[29]

Clearing may be "environmental harm"

The Bill proposes to make it a broad offence to cause "environmental harm". Environmental harm will include removal, destruction of, or damage to, native vegetation or habitat of native vegetation. There are two types of environmental harm – "material environmental harm" and "significant environmental harm". Material environmental harm will be caused when it would cost more than $20,000 to restore the environmental harm. Significant environmental harm will be caused when it would cost more than $100,000 to restore the environmental harm. The maximum penalty for causing environmental harm with intent or criminal negligence is $1,000,000 for a corporation and $500,000 for an individual.

Conclusion

The Bill proposes a long overdue consistent and comprehensive approach to the regulation of land clearing in WA. However, there are some deficiencies in the proposed system. For example:

- There are very limited opportunities for the public to be involved in either the granting of clearing permits (other than formal appeals to the Minister) or the taking of enforcement action about unlawful clearing.
- When deciding whether to issue a clearing permit, the CEO must have regard to both the clearing principles and relevant planning instruments. Any conflict between these instruments will be solely at the discretion of the CEO.
- The "lawful authorities" described under the Bill may exempt some substantial clearing from assessment and regulation.

Please note that this article is based on the Bill as it was introduced into State Parliament on 27 June 2002. As the Bill is currently being examined by Parliament, any legislation which is eventually passed may differ from the current Bill.

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Conservationists Await Queensland's Biodiscovery Laws

Matt Patterson, Solicitor/Policy Officer, EDO (Nth QLD)

Introduction

In May 2002, the Queensland Government released their Queensland Biodiscovery Policy Discussion Paper (the Paper),[1] a welcome attempt at introducing a system for controlling access to, and sustainable use of, biological resources in Queensland. The proposed policy has the potential to deliver a system for regulating biological resources in an equitable way that can provide greater certainty for both users and providers of these resources.

Currently Queensland has multiple regulatory requirements concerning access to biological resources that are inconsistent and incomplete (for example, plants and animals are currently regulated while microorganisms and insects are not).

Queensland claims an impressive emerging biological research and development industry sourced from places such as the Great Barrier Reef and its tropical rainforests. Products in development include new sunscreens and herbicides from corals and a eucalypt-derived insecticide.

Conservation of Biodiversity

Queensland is under a legal and moral obligation to conserve and properly manage its biological diversity. In undertaking this obligation there is a specific need to respect, preserve and maintain the knowledge, innovations and practices of indigenous peoples who have maintained a special connection with Australia's flora and fauna over thousands of years.

In its current form the Paper is strongly oriented towards promoting commercial gain from the use of biological resources and traditional knowledge based on Queensland's biological resources. Although the Paper claims that the policy is underpinned by principles of justice, equity and ecologically sustainable development, in its current form it does not provide adequately for the interests of conservation and sound environmental protection and management. This problem is highlighted in the section of the Paper arguing for the introduction of a single permitting regime that is underpinned by the imperative for commercial gain. It would be of great concern for conservation management if the restrictions presently in place on permits for scientific purposes, required under the *Nature Conservation Act 1992 (Qld)*, were replaced with purely commercially oriented permits.

The principle intention of any proposed regulatory scheme to facilitate access to biological resources should be, in accordance with the 1992 *Convention on Biological Diversity*, to which Australia is a party, the conservation of biodiversity. If this objective is to be met, it is clear that the focus for regulating access to biological resources must be to carefully restrain rather than facilitate access to those resources.

This is especially so in light of the existing regulatory framework operating in Queensland. Queensland's principal pieces of land clearing legislation, the *Vegetation Management Act 1999 (Qld)* and the *Land Act 1994 (Qld)*, have done little if anything to halt the widespread destruction of vegetation in the state which is the greatest cause of loss of biodiversity.

Environment Group Recommendations

EDO-NQ, along with regional, state and national environmental groups such as the Australian Conservation Foundation and the Wilderness Society, made a submission to the Queensland Government addressing concerns with the Paper. The submission was written in consultation with the Aboriginal and Torres Strait Island Commission, Cairns Regional Office. The submission called for a further period of consultation with stakeholders and traditional owners and asked the Queensland Government to ensure that any permitting system that sought to deal with the state's biological resources have as its primary object the protection and conservation of those resources.

Some of the key recommendations in that submission were:

- Access to resources by commercial applicants should be allowed only where there is convincing evidence that the access poses no significant risks to the environment, biological diversity and the health and safety of people and animals.
- The relevant decision-maker must be entitled to refuse to grant, amend or suspend a permit on the basis of the conservation status (i.e. rare or threatened) of the biological material.
- Any permitting system must be transparent and restrict the use of commercial-in-confidence exemptions to the allow proper dissemination of information, save for the protection that should be afforded to the traditional knowledge of Indigenous peoples.
- Access by commercial applicants must only be allowed after a rigorous environmental impact assessment (EIA) that:

a) Does not allow EIA to be avoided through discretion.

b) Provides for standard assessment requirements for any proposal for access. This assessment should be in accordance with worlds best practice EIA and at current utilise the criteria for assessment contained in Schedule 4 of the *Environment Protection and Biodiversity Conservation Regulations 2000(Cth)*.

c) Provides for public consultation (particularly consultation with affected communities) on the level of assessment.

d) Provides mechanisms for public consultation on the proposed access, ensuring that public notification takes place through national and relevant local

newspapers and the Internet. And that all relevant information is available to the public to provide for informed comment, including proper consultation with Indigenous peoples recognising that public notification through conventional forms of media is inadequate.

e) Requires public comment to be taken into account in any decision-making process.

f) Provides for mandatory public notification of a draft assessment.

g) Requires cumulative impacts to be taken into account when making the decision.

h) Requires the assessment to address all stages of the development of biological resources, including the collection of samples, screening research and product development.

i) Specifically requires impacts on threatened species to be addressed.

j) Specifically requires impacts on locally rare species to be addressed. For example, some species of plants that are rare in the Wet Tropics World Heritage Area (**WTWHA**) are common in South East Queensland and are therefore not protected by the *Nature Conservation Act 1992*. Collection in the WTWHA could result in impacts upon a significant local population of species and therefore upon the world heritage values of the WTWHA.

k) Requires the decision to grant access and any conditions attached to the approval to be publicly available.

l) Allows any person to appeal on the merits against EIA decisions (that is, open standing) and

m) Allows any person to apply for judicial review of administrative decisions made in relation to the EIA process.

♦ A Collection Protocol should be formulated that provides mandatory conditions for any access that is permitted which requires the avoidance of environmental impacts and promotes the conservation of biological diversity. This Collection Protocol should be designed to:

a) Be supervised and within the control of Traditional Owners and the Environmental Protection Agency (**EPA**).

b) Be subject to a protocol for seeking prior informed consent from Indigenous people.

c) Ensure that benefits arising from a grant of access flow to the environment.

d) Provide for sharing of information between the Commonwealth, States and Territories on biological resources and their conservation and management.

e) Provide for adequate mechanisms for monitoring, evaluating and enforcing compliance with conditions of access, administered by the EPA in consultation with Indigenous peoples.

f) Establish a mechanism for periodically reviewing all access permitted and the conditions that are attached to access.

g) Ensure that a condition of access imposed which requires any intellectual property rights sought pertaining to any component, variation of or process involving a biological resource accessed be subject to the final approval of Indigenous people and the EPA after a rigorous assessment process.

♦ Ensure that new species discovered during the biodiscovery process are reported to the EPA and Environment Australia and are automatically deemed to be 'endangered' under the *Nature Conservation Act (Qld),* 1992, until proven otherwise.

Conclusion

Environment groups argued in their submission that the Paper provided a useful starting point for regulating access to biological resources in Queensland but was considerably flawed.

The latest advice from the Department of Innovation and Information Economy is that a draft Bill will be put to further consultation with stakeholders before mid-2003. For a full copy of the environment groups submission, please contact Matt Patterson at EDO-NQ.

ENDNOTES

[1] A copy of the Paper is available on the website of the Department of Innovation and Information Technology, www.diiesrq.qld.gov.au/research/downloads/Biodiscovery_dp.pdf

New Land Clearing Laws Proposed for Western Australia

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ENDNOTES

[1] See article *Land Clearing: reforming the law in WA* by Michael Bennett published in Impact No 65 March 2002.

[2] The Bill was introduced into WA State Parliament on 27 June 2002.

[3] Proposed Schedule 1 item 8D *Environmental Protection Act 1986* (EPA Act)

[4] Proposed section 51E EPA Act.

[5] Proposed section 51G EPA Act.

[6] IBID.

[7] Proposed section 51E EPA Act.

[8] Proposed section 51E EPA Act.

[9] Proposed section 51E EPA Act.

[10] Proposed section 51O EPA Act.

[11] Proposed section 51O EPA Act. Statements of Planning Policy are non binding statutory policies made under the *Town Planning and Development Act 1928* (WA).

[12] Proposed section 51O EPA Act.

[13] Proposed section 51P EPA Act. Environmental Protection Policies are binding statutory instruments made under Part III of the *Environmental Protection Act 1986.*

[14] Proposed section 51O EPA Act.

[15] Proposed section 51Q EPA Act.

[16] Proposed section 51P EPA Act.

[17] Proposed section 51H EPA Act.

[18] Proposed section 51I EPA Act.

[19] Proposed section 51K EPA Act.

[20] Proposed section 51J EPA Act.

[21] Proposed Schedule 1 item 1E EPA Act.

[22] Proposed section 51L EPA Act.

[23] Proposed section 101A EPA Act.

[24] Proposed section 51F EPA Act. Note that any person can refer a matter to the Environmental Protection Authority to formally assess a proposal.

[25] Proposed Schedule 6 EPA Act.

[26] The Department is responsible for managing all conservation estate and State forests/ timber reserves in WA and must do so in accordance with any management plan in place for the area: *Conservation and Land Management Act 1984* (WA).

[27] The Forest Products Commission is responsible for entering into contracts for the sale of forest produce in WA: *Forest Products Act 2000* (WA).

[28] Proposed section 70 *Environmental Protection Act 1986.*

[29] Proposed section 51S *Environmental Protection Act 1986.*

Against compensation: Water, Property Rights and the Law

Jeff Smith, Director, EDO (NSW)

In December 2002, the Council of Australian Governments (**COAG**) asked the Chief Executive Officers' Group on Water of the Natural Resource Management Ministerial Council to undertake public consultation on property rights in relation to water. A report is to be finalised for COAG by April 2003.

COAG has been seeking to deal with this complex issue since 1994, when the Commonwealth and all State and Territory Governments agreed on a strategic framework to achieve an efficient and sustainable water industry. Since that time, water resource management in Australia - particularly those states comprising the Murray Darling Basin (New South Wales, Queensland, South Australia and Victoria) – has been transformed.

The framework sought to establish the true worth of water, explicitly linking environmental and economic objectives. The framework includes a number of market based measures involving the proper pricing of water, establishing secure property rights for water (separate from land rights) and providing for permanent trading in water entitlements. Specific provision was made for water for the environment, for institutional reform (with water service providers to operate on the basis of commercial principles) and for improved public consultation and education arrangements.[1]

A key element of this framework is undoubtedly property rights, with the need to create property rights or entitlements a precondition for any market in tradable water entitlements. Such entitlements were identified by COAG as the best way to secure the maximum benefit from water resources and, in turn, lessening environmental impacts of water use.

However, it does not follow that a right in property does, in itself, give rise to compensation. Indeed, the right to compensation is quite narrow, both under the Constitution (Federal and State), common law and legislation. Where the Government "acquires" property, compensation may be required (although there is no provision under the State Constitutions to do so). Mere regulation of activities does not generally give rise to a right to compensation. The law on these questions is quite complex but the tenor is simple: only in limited circumstances is compensation payable. A comprehensive analysis of the law in Australia pertaining to water property rights and compensation can be found on the EDO website at http://www.edo.org.au/edonsw/edonsw.htm

Against this background, rural producers are presently lobbying for a more general right of compensation to be included in the States' water legislation, where access to water available to agriculture is decreased as a result of allocation of water from water sources for environmental purposes.[2] Such arguments are generally accompanied by demands for perpetual rights to access water (rather than entitlements for a term), which may provide the conceptual basis for such compensation.

While the right to compensation under law is narrow, it is certainly open for Governments to compensate farmers. Furthermore, as Bates[3] and others have argued, there are political and moral arguments as to why Governments may feel compelled to offer compensation in such circumstances. That said, compensation for regulation would potentially have a number of drawbacks. It is these arguments that form the basis of this article. It is to these we now turn.

First, there is the danger that demands for compensation may create an expectation by others of a right to a piece of the compensation pie.

As Bates has argued in defence of compensation in certain circumstances, there is a difference between regulating polluting activities (for which there is no right to pollute insofar as there are impacts on others), and restricting rights pertaining to natural resource management, which do not impact on other landholders. However, it is submitted that the difference is one of degree, rather than type.

The difference between the impacts of regulating pollution and restricting rights is simply that they are more diffuse, in time and/or space. The regulation of ozone-depleting substances is arguably analogous to restrictions on land clearing – both activities may have no impact on neighbours and both are based on broader public and environmental grounds. Restrictions on trade and commerce more generally – whether imposed for environmental, public safety, occupational health or moral grounds – may also give rise to calls for compensation. As discussed below, compensation is a backward-looking payment and an inefficient use of public monies. As such, the line should remain drawn between compensation for acquisition and regulation.

Second, compensation for restrictions on land clearing or reductions in water use entitlements may create a climate whereby Governments are hesitant to regulate properly and effectively for fear of the financial repercussions. As many commentators have noted, this has been the case where such schemes have existed in South Australia and Victoria.[4] As noted in the Report of the Water CEOs Group to COAG, a flexible and adaptive management approach is central to the success of the reforms.[5]

In the USA case of *Tahoe-Sierra Preservation Council, Inc. v. Tahoe*

Regional Planning Agency[6] Justice Stevens echoed a similar concern in relation to "reluctant regulation", noting that land use regulations *"are ubiquitous and most of them impact upon property values in some tangential way — often in completely unanticipated ways. Treating them all as per se takings [restrictions requiring compensation] would transform government regulation into a luxury few governments could afford."*

Third, moving away from the well-established principle that compensation should only be paid where property is acquired may potentially involve the community in complex and costly litigation over what regulations require compensation. This has certainly occurred in the USA with Court decisions made on an ad hoc basis amidst what would seem to be an increasingly acrimonious, divisive and ideologically-driven public debate.[7] If Australia goes down this path, the security sought by COAG and other interests may prove illusory.

Fourth, a key aspect of the COAG reforms is to more fully price water. This is an explicit recognition of the subsidisation of water resources in Australia. To allow compensation in these circumstances would simply replace one form of subsidy with another.

Fifth, there are difficulties associated with dividing restrictions into public and private elements. The National Farmers' Federation has proposed that compensation be linked to "public-good environmental benefits". In particular, they are seeking:

a statutory-based, compensation package in state and Commonwealth legislation for those cases where a property's market value is reduced because there are limits or constraints imposed on using or developing certain natural resources.

The level of assistance is to be based on a "before and after" test of the property's market value. However, only those things of "public benefit" will be included in the "before and after" assessment.[8]

In a similar vein, other commentators have advocated models that seek to distinguish between private and public good in terms of conservation management. For instance, Fensham and Sattler have devised a methodology for providing compensation to landholders *"who shoulder a disproportionate share of the financial burden for biodiversity conservation"* based on the notion of a duty of care (although not a duty as lawyers would understand it).[9] The idea of a duty of care – as used by Binning and Young – is to require sustainable land management of landholders.[10] Restrictions that demand more than this – what Binning and Young term "public conservation services" – should be paid for by the community.

These approaches are an attempt to delineate more precisely the circumstances where the community should pay compensation. Their attraction is their recognition of the dualistic nature of property – rights and responsibilities go with ownership.[11] However, the divide is conceptually problematic. Is it not the raison d'être of government to regulate in the public interest? Is it illegitimate for governments to regulate in anything but the public interest?

Perhaps the real problem with this approach is its implicit legitimation of the debate; its assumption that landowners deserve compensation. It is certainly true that governments have historically encouraged natural resource management practices which have been detrimental to the land and that they are now discouraging such practices. However, this so-called 'about face' has not been as abrupt as some have suggested, at least not universally. In South Australia, land clearing laws have been in place for nearly 20 years, while laws pertaining to threatened species and biological diversity have been around for 10 to 15 years.[12] It is true that the water reform process has lagged behind land clearing but the COAG Communique on Water dates back nine years – about the timeframe for licences or plans.[13]

Sixth, some commentators have argued for a pragmatic approach to compensating for restriction. This sentiment is echoed by Dr Black[14]: *"If Governments are now prepared to pay substantial sums of money to help achieve what is our desired aim [biodiversity-determined controls on clearance], we should not hinder the process".*

While there are certainly cogent arguments for a pragmatic approach to environmental issues in some circumstances (such as where factors such as time and irreversibility are evident), this approach seems flawed.

On the one hand, supporting compensation needs to be weighed against the other disadvantages discussed in this article. On the other hand, it suggests that the options are compensate or bust. This is clearly not the case and this approach ultimately amounts to a failure of imagination and a limited reading of the experience in Australia and overseas.

There are a wide range of alternative financial devices that need to be considered as part of any cost-benefit analysis of the problem. Compensation results in the inefficient use of limited resources devoted to the protection of the environment, and provides no incentive for farmers to alter unsustainable practices. It is a curious irony that the accepted wisdom today is that national parks need to be actively managed, not 'locked-up' yet for private land the idea of compensation is based on 'locking-up' land, rather than active management.

The limited monies available to redress social dislocation and improve the environment should seek to go as far as possible. Looked at from the economic perspective of opportunity cost, the question arises: what alternate programs could be funded for the price of any compensation to farmers, and is overall wellbeing maximised by compensating the farmers? It is submitted that financial

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International Environmental Law - Part 3

Public Participation and Environmental Impact Assessment

Gillian Walker, Volunteer solicitor, EDO (NSW)

After having examined both sustainable development and the precautionary principle, the final part of this series will examine public participation and environmental impact assessment as principles of international environmental law, and their integration into Australian law.

1. Public Participation

A. Public Participation in International Law

Principle 10 of the Rio Declaration underscores the fundamental need for broad-based public participation in environmental and social issues.[1] It states that:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Although not one of the more prominent principles of international environmental law, perhaps because its importance is self-evident, the obligation to ensure appropriate levels of public participation in environmental decision-making is one which, as will be discussed below, has been comprehensively implemented into Australian environmental law.

B. Public Participation under Australian Law

As set out in Principle 10 of the Rio Declaration, there is an obligation upon States to ensure public participation in all levels of environmental decision-making. This obligation can be separated into three sections, being accessing information, contributing to the decision-making process, and accessing judicial and administrative proceedings, each of which require a distinct action by a State to satisfy the principle of public participation in international environmental law.

i) Accessing Information

The first component of ensuring appropriate public participation, is making information regarding environmental issues accessible to the community.

In satisfying this requirement, Australian environmental law, at both a Commonwealth and State level, provides for broad access to a variety of information held by the government.

The legislation relating to freedom of information[2] (FOI) provides the public with a legally enforceable right to access the majority of government records. Those agencies and documents which are exempt from FOI requests, such as those relating to national security, are listed in the Schedules to both the Commonwealth and State legislation. In addition to these exempt materials, there are times when a third party whose interests are affected by the material in question will need to be consulted. FOI is a powerful tool for those seeking to ensure they are appropriately informed about activities which impact upon, or have the potential to impact upon, the environment.

Australian law also provides for public access to more specific information. At a Commonwealth level, the *Gene Technology Act* 2000 provides for the maintenance of a Record of Genetically Modified Organisms (**GMOs**) and Genetically Modified Product Dealings.[3] This record is a complete list of all GMOs and all dealings in which they are involved, such as transporting, experimenting, breeding or growing. The record contains information such as details of licence holders and licence conditions, those undertaking what are known as 'notifiable low risk dealings' for which a licence is not required, and those producing genetically modified products.[4]

At a state level, information relating to environmental issues is available from a number of sources. In New South Wales, for example, local government, who are responsible for the vast majority of decisions relating to development and environmental impacts, must provide access to their documents in a similar manner to that under FOI legislation, under the *Local Government Act* 1993.[5] S100 of the *Environmental Planning and Assessment Act* 1979 provides that a Register of Consents and Certificates must be kept by local government, and includes information in relation to development applications and their determination. The Register is to be made available for public inspection without charge. The *Native Vegetation Conservation Act* 1997 also provides that a Public Registry of Clearing Applications must be kept and made publicly available for inspection.[6] The Registry includes details as to applications made to clear native vegetation, the determination of those applications, and any appeal which is brought relating to that decision.

In relation to Principle 10 of the Rio Declaration's specific reference to including 'information on hazardous materials and activities in their communities', the NSW Environment Protection Authority maintains a Public

Register under s308 of the *Protection of the Environment Operations Act 1997* (POEO Act). This register contains information about licences, licence applications, environment protection and noise control notices, exemptions from the provisions of the POEO Act or its regulations, convictions in prosecutions and the results of any civil proceedings.[7]

ii) Participation in Decision-Making

The second aspect of Principle 10 of the Rio Declaration, is the need to provide the public with "the opportunity to participate in decision-making processes". It is an accepted principle in Australian law that when an environmental impact assessment, or public inquiry relating to an proposed development, is undertaken, there must be provision for public participation. In the case of environmental impact assessments, this is usually ensured by the public display of the relevant materials and invitation for public submissions, which must then be taken into account in the decision-making process.[8] Environmental impact assessment will be discussed in more detail below.

iii) Access to Judicial and Administrative Proceedings

The third aspect of the public participation envisaged by the Rio Declaration is that of "effective access to judicial and administrative proceedings, including redress and remedy". Australian environmental law does provide for access to legal proceedings, although to differing degrees in different jurisdictions.

In New South Wales, the laws relating to the capacity of the public to access judicial and administrative proceedings are extremely progressive. Environmental legislation provides for 'open standing', allowing any person, whether aggrieved or not, to seek judicial review in respect of a breach of environmental law in NSW. The primary example of these open standing provisions is found in s123 of the *Environment Planning and Assessment Act* 1979 (NSW), which reads: *Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.*

Unfortunately, this liberal approach to public participation in environmental litigation is not duplicated in all Australian jurisdictions.[9] There is, however, an increasing recognition of the importance of open standing provisions and it is hoped that such legislative innovation will soon be commonplace.

At a Commonwealth level, until recently, there were no provisions by which any member of the public could seek redress and remedies for breaches of environmental law. The law as to standing at this level was elucidated by the courts, often in relation to the *Administrative Decisions (Judicial Review) Act* 1977 (**ADJR Act**) under which review of government decisions by the Federal Court can be sought. The ADJR Act details in s5 that only 'a person who is aggrieved' may seek to challenge a government decision, and this threshold has been replicated in many State statutes. There has been a plethora of judicial discussion of the extent to which 'a person aggrieved' can extend to those seeking to participate in decision-making relating to environmental matters. For a person to be affected or aggrieved, under that test, the person must have a special interest in the subject matter of the action (see for example, *North Queensland Conservation Council Inc v The Executive Director, Queensland Parks and Wildlife Services* and *Australian Conservation Foundation v The Commonwealth* (1978-1980) 146 CLR 493 at 530)

The introduction of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) has greatly expanded the test of standing for persons seeking to remedy or restrain breaches of the Commonwealth's environmental law and to challenge Federal decisions on environmental matters.

Section 475(1) of the EPBC Act provides that *an interested person (other than an unincorporated organisation) or a person acting on behalf of an unincorporated organisation that is an interested person may apply to the Federal Court for an injunction.* An 'interested person' is defined in section 475(6) of the EPBC Act and effectively provides that any Australian citizen [or resident] who's interests have been, are or would be affected by certain conduct or proposed conduct; or who has engaged in a series of activities for protection or conservation of, or research into, the environment at any time in the 2 years immediately before the conduct, will have standing to seek an injunction. A similar test of standing applies in relation to organisations (section 475(7)).

In addition, section 487 of the EPBC Act expressly extends, for the purposes of seeking to review administrative decisions made under the EPBC Act, the meaning of the term 'person aggrieved' in the ADJR Act. Under section 487(2) and (3) of the EPBC Act, a person aggrieved will include an Australian individual or organisation that, at any time in the 2 years immediately before the decision, has engaged in a series of activities in Australia or an external territory for protection or conservation of, or research into, the environment.

The effect of these extended standing provisions is that, where previously concerned individuals or conservation groups had to establish a 'special interest' in the subject matter under review, they are now more readily able to challenge Federal environmental decisions and seek to restrain breaches of Commonwealth environmental laws. The application of these extended standing provisions can be demonstrated by the two recent cases of Booth v Bosworth (2001) and the Humane Society Inc v Minister for the Environment [2003] which are reviewed earlier in this edition of Impact.

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A Legislative Response to Greenhouse Gas Emissions:

Electricity Supply Amendment (Greenhouse Gas Emission Reduction) Act 2002

Elisa Nichols Solicitor EDO (NSW)

The Commonwealth Government has persistently refused to ratify the Kyoto Protocol to the United Nations Framework Convention on Climate Change. The Kyoto Protocol was adopted by consensus in 1997 and contains legally binding emissions targets for developed countries, including Australia, in the post 2000 period. Under the Protocol, Australia is not required to reduce its greenhouse gas emissions but may increase its emissions by 8% by the period 2008-2012. While the Kyoto Protocol is only one tool aimed at reducing emissions, the Commonwealth Government's refusal to sign has meant that there are no Australia-wide mandatory requirements for industry to take positive steps to reduce greenhouse gas emissions.

In light of this, it remains the role of the States to introduce legislation aimed at reducing greenhouse emissions. On 1 January 2003, the *Electricity Supply Amendment (Greenhouse Gas Emission Reduction) Act* 2002 (NSW) (**Greenhouse Amendment**) commenced in New South Wales. This legislation is the first enforceable greenhouse gas reduction legislation in Australia. The Greenhouse Amendment inserts a new Part 8A into the *Electricity Supply Act* 1995 (NSW) which implements the mandatory greenhouse gas benchmark scheme. The scheme provides both mandatory targets and economic incentives to encourage compliance.

Objects

The objects of Part 8A are to reduce greenhouse emissions associated with the production and use of electricity and to encourage participation in activities to offset the production of greenhouse gas emissions.[1] To achieve these objects, the Greenhouse Amendment establishes State and individual greenhouse gas benchmarks for the reduction of greenhouse gases. The Greenhouse Amendment also sets up a certificate scheme for activities that promote the reduction of greenhouse emissions and establishes penalties for failure to meet the benchmarks.

Application of the Greenhouse Amendment

The Greenhouse Amendment applies to 'Benchmark Participants' which are:

- Retail suppliers of electricity (e.g. Ergon Energy, Energy Australia).
- An electricity generator or person, prescribed by the Regulations, that supplies electricity directly to a customer under an electricity supply arrangement.
- A market customer as registered under the National Electricity Code that supplies a market load for use in NSW.
- A large customer (i.e. a customer that uses 100 gigawatt hours or more per year at one site, or at more than one site provided one of those sites used 50 gigawatt hours or more per year) that has elected to be subject to a greenhouse gas benchmark.
- A person carrying out State significant development who has elected to be subject to a greenhouse gas benchmark.[2]

At present, large customers and persons carrying out State significant development are voluntary participants in the scheme. The next phase of legislative activity in relation to greenhouse gas reduction will hopefully see these participants subject to a mandatory scheme.

What are the greenhouse gas benchmarks?

The State Greenhouse Gas Benchmarks are specified in the Greenhouse Amendment in s.97B. The State Benchmark for 2003 is 8.65 tonnes of carbon dioxide equivalent of greenhouse emissions per head of State population. The State Benchmarks reduce each year with the years 2007-2012 being set at 7.27 tonnes of carbon dioxide equivalent of greenhouse emissions per head of State population. The graph below illustrates the reductions.

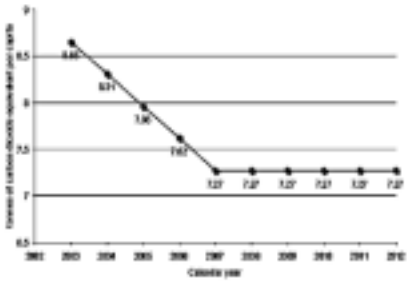

Figure 1 - State Greenhouse Gas Benchmarks

Individual Greenhouse Gas Benchmarks are set by applying a formula.[3] To determine an Individual Benchmark, the Benchmark Participant's proportion of the total NSW demand for electricity will be multiplied by the Electricity Sector Benchmark. The Electricity Sector Benchmark is determined by multiplying the State Benchmark by the State population. The methodology for determining the Benchmark Participant's proportion of the NSW demand is contained in the Greenhouse Gas Benchmark Rules.[4] One weakness of the scheme is the amount of detail contained in Rules which are not legislative documents.

Compliance with Benchmarks

Each Benchmark Participant must lodge a benchmark statement by 1 March of each year to report on its compliance for the previous calendar year. Compliance is determined through the demand for which the Benchmark Participant is responsible in megawatt hours and multiplying that by the NSW pool coefficient. The NSW pool coefficient, published in November each year, means the average greenhouse gas emissions intensity of electricity sent out to customers as determined by the Independent Pricing and Regulatory Tribunal (**IPART**). From this figure, the Individual Benchmark, Abatement Certificates and any Renewable Energy Certificates referable to NSW sales and surrendered to the Renewable Energy Regulator are deducted.[5]

If this formula results in a positive figure, it is called a 'greenhouse shortfall'. Any greenhouse shortfall which is 10% or less of the Individual Benchmark may be carried over the following year. Any greenhouse shortfall which cannot be carried over is subject to a penalty of $10.50 (CPI indexed) per tonne.[6] It is arguable that this penalty is insufficient as it may be cheaper for benchmark participants to pay the penalty than to take the necessary steps to comply. However, a notable feature is the statement in s.97CA(7) that it is the wish of Parliament that any greenhouse penalties payable to the Crown be used for the promotion of greenhouse gas reduction activities and programs nominated from time to time by the Minister.

NSW Greenhouse Abatement Certificates

NSW Greenhouse Abatement Certificates are a tradable currency that can be used to offset greenhouse emissions by a Benchmark Participant. Abatement Certificates can be created by:

- A generator connected to a grid servicing the National Electricity Market generating electricity from low emission sources above its 1 January 2002 baseline. The original proposed date in the *Electricity Supply Amendment (Greenhouse Gas Emission Reduction) Bill* 2002 was 1 January 1997 which would have allowed generators to accumulate 'windfall' certificates for activities already undertaken. This means that there must be real emissions reductions for Benchmark Participants to create Abatement Certificates.
- Owners of carbon sequestration rights in 'Kyoto consistent' forests in NSW, or forests in other States if they introduce a mandatory reduction scheme with proposed reductions not less than those proposed in the NSW scheme, using their rights for Abatement Certificates.
- Persons reducing their use of electricity in NSW by undertaking recognised 'demand side abatement' activities implemented after 1 January 2002. 'Demand side abatement' refers to the reduction of electricity by end users. Activities include reduction of electricity use in production processes, efficient lighting, heating or air conditioning and on-site generation.
- Large customers and State significant projects reducing on-site emissions through measures implemented after 1 January 2002. Measures include increased fuel efficiency, substitution of low emission fuel and capture and combustion of coal mine methane.

Abatement certificates cannot be created from an abatement activity if that activity has been used to create a Renewable Energy Certificate or for the purposes of compliance with another mandatory scheme intended to promote the reduction of greenhouse gases. This prevents Benchmark Participants from 'double counting' abatement activities. Each Abatement Certificate represents one tonne of abated greenhouse gas emissions and can be used to set off against actual emissions for which the Benchmark Participant is responsible. Abatement Certificates are referable to the year of their creation but have no expiry date and can be saved for future use to credit against emissions.

Where an Abatement Certificate has been improperly created, it can be cancelled if it is still in the hands of the creator. If it has been transferred to a bona fide third party, the scheme administrator can cancel an equivalent number of valid certificates held by the creator. It is also an offence to improperly create an Abatement Certificate.[7] Further, it is an offence to give to IPART or Scheme Administrator information or a document that the person knows to be false or misleading in a material particular. The maximum penalty is 2,000 penalty units (currently $220,000) or 6 months imprisonment.

Conclusion

The Greenhouse Amendments are a significant gain in the legal response to climate change in New South Wales. They provide a precedent to be followed by other States or the Commonwealth if it legislates for a national response to the issue. The Greenhouse Amendments will also provide an easy precedent for expanding the scheme to cover other industries. It now remains to see whether this scheme will be an effective tool for the reduction of greenhouse emissions by electricity suppliers in New South Wales.

ENDNOTES

[1] s.97A *Electricity Supply Act* 1995
[2] s.97BB *Electricity Supply Act* 1995
[3] Source: www.greenhousegas.nsw.gov.au
[4] s.97BC *Ibid*
[5] The Rules can be found at www.greenhousegas.nsw.gov.au/legislative_framework.htm#rules
[6] Renewable Energy Certificates are created under the *Renewable Energy (Electricity) Act* 2000 (Cth). More detail about the scheme can be found on the Office of the Renewable Energy Regulator website at www.orer.gov.au
[7] s.97CA *Electricity Supply Act* 1995
[8] s.97J *Ibid*

New Ruling under the EPBC Act
Continued from page 1

expert evidence, successfully gained an injunction against an individual farmer to stop extensive illegal culling of Spectacled Flying-foxes by that farmer.

Interestingly, the Court did not need to decide the legal standing of the Humane Society International Inc. to bring the action, as there was no challenge to the Society's standing to bring these proceedings.[11]

The implications of this decision

Any fruit grower who culled vulnerable flying-foxes earlier this season assuming[12] that he or she were exempt from the need to refer the matter to the Minister under the EPBC Act may have breached the EPBC Act.[13] However whether or not the EPBC Act was breached would depend in each case upon the individual impacts or likely impacts of the action on the vulnerable flying-foxes.

The Minister therefore now needs to correct the Commonwealth Guidelines[14] to avoid any growers being misled by the unauthorised exemption contained in those Guidelines. If the Minister, either now or in the future wants to give fruit growers a lawful exemption from referral obligations under the EPBC Act, then this may be achieved either through an approved bilateral agreement[15] or Ministerial declaration,[16] both of which involve preparation of a management plan. The preparation of a management plan and input by the public through submissions on the draft bilateral agreement,[17] and Parliamentary scrutiny of the management plan,[18] will help ensure that all relevant factors, such as the extent of illegal culling, are considered before any exemptions are granted.

Every fruit grower needs to now make up his or her own mind whether his or her proposed culling of those vulnerable flying-foxes has, will have or is likely to have a significant impact on either of those listed flying-foxes. If the answer is yes, then irrespective of any State permits to cull held by the grower, the proposed action should be referred to the Minister for a decision as to whether or not it requires assessment and approval under the EPBC Act. This is because the purported exemption from referral given in the Commonwealth Guidelines[19] for growers with State permits, has been held by the Federal Court not to be authorised by law, so growers receive no protection from that unauthorised exemption.

This case also shows that environmental groups, such as the respected Humane Society International Inc., can and will take legal action to protect species vulnerable to extinction if the Minister fails to act in accordance with the provision of environmental legislation. This legal action encourages understanding of and compliance with environmental legislation. Such legal action provides a counterbalance to political pressure exerted by growers who wish to continue lethal methods of controlling even vulnerable listed species.

ENDNOTES

[1] *Administrative Guidelines on Significance: Supplement for the Grey-headed Flying-fox* dated November 2002 and the *Administrative Guidelines on Significance: Supplement for the Spectacled Flying-fox* dated November 2002.

[2] Under s 68(1) of the *Environmental Protection and Biodiversity Conservation Act* 1999 (Cth).

[3] *Humane Society International Inc. v Commonwealth Minister for the Environment and Heritage* [2003] FCA 64 at Paragraph 54.

[4] At Paragraph 49.

[5] At Paragraph 44.

[6] At Paragraph 52.

[7] Under s75(1) of the EPBC Act, the Minister must decide if the referred action is a controlled action and which provisions of the EPBC Act are controlling provisions to guide later assessment. For example on a referral to cull listed Spectacled or Grey-headed flying-foxes the controlling provisions might be s18 EPBC Act, listed threatened species and communities.

[8] *Humane Society International Inc. v Commonwealth Minister for the Environment and Heritage* [2003] FCA 64 at Paragraph 53.

[9] At Paragraph 58.

[10] (2001) 117 LGERA 168.

[11] *Humane Society International Inc. v Commonwealth Minister for the Environment and Heritage* [2003] FCA 64 at Paragraph 27.

[12] Based on the Commonwealth Guidelines, see footnote 1.

[13] s 18(4) EPBC Act.

Vulnerable species

(4) A person must not take an action that:

a) has or will have a significant impact on a listed threatened species included in the vulnerable category; or

b) is likely to have a significant impact on a listed threatened species included in the vulnerable category.

Civil penalty:

a) for an individual—5,000 penalty units;

b) for a body corporate—50,000 penalty units.

[14] See footnote 1.

[15] s 46 (1) EPBC Act.

[16] s 32 EPBC Act.

[17] s 49A EPBC Act requires public consultation on the draft bilateral agreement as a prerequisite to making the bilateral agreement. Under s46(3), the Minister is required to lay a copy of the management plan before each house of the Commonwealth Parliament and it is subject to a motion of disallowance, s 46(5).

[18] Under s 46(3), the Minister is required to lay a copy of the management plan before each house of the Commonwealth Parliament and it is subject to a motion of disallowance, s 46(5). For the declaration, the management plan is subject to a motion to oppose accreditation in either house of Parliament, s 33(4)-(8) EPBC.

[19] *Administrative Guidelines on Significance: Supplement for the Grey-headed Flying-fox* dated November 2002 and the *Administrative Guidelines on Significance: Supplement for the Spectacled Flying-fox* dated November 2002.

Part 2 - Public Availability of Information Under the IFOA Process

Due to the currency of the new ruling under the *Environment Protection and Biodiversity Conservation Act,* the second part in our series on the Integrated Forestry Operations Approvals process was not printed in this issue.

Part two of this article will be published in the June edition of Impact.

We apologise for any inconvenience.

Against Compensation: Water, Property Rights and the Law
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assistance or incentives for the performance of certain duties offer a more efficient and equitable solution and are to be preferred.

Reversing the decline in the quality of the Australian landscape before it is too late will require fundamental change: industrially, culturally and institutionally. Financial assistance – adjustment packages based on equitable principles that address real hardships – and financial incentives will be part of such a change.

Financial assistance can be based on models used in other industries. Structural adjustment packages have been used for both the fishing and timber industries. Generally, they are comprised of assistance packages targeted to workers and industries, with additional help for those who wish to exit the activity.[15]

Financial incentives - such as property agreements and covenants, grants for restorative works, competitive auctions, tax and rate relief and trading schemes – are forward-looking and provide an ongoing commitment to the protection of the environment.[16] They would serve to complement structural adjustment packages.

Finally, there are clear equity arguments associated with such an approach.[17] Under National Competition Policy reforms, significant job losses have been felt across a number of industries, including the utilities sector. The Productivity Commission has openly acknowledged these effects, but has highlighted the broader community benefits and sought to encourage and assist people to cope with the changes.[18] Yet in the context of management of natural resources, strong support has been given to an approach which could "reward undeserving recipients and have an unequal impact on different industries and regions".[19]

ENDNOTES

[1] COAG Communique 1994, 25 February 1994 in Hobart. See recently Kemp D (2002) "*Water – What's It Worth*" Paper presented at the Deniliquin Murray Valley Community Action Group Summit, 21 November 2002 at pp 4-5.

[2] See National Farmers Federation (2002) *Property Rights Position Paper* May 2002 and also see Opening Address by the Honourable John Anderson of the third day of the 2002 Outlook Conference in Canberra.

[3] See, for example, Bates G (2002) *Environmental Law in Australia* 5th Edition at p 34.

[4] See Bonyhady T (1992) "Property Rights" in Bonyhady T *Environmental Protection and Legal Change* Federation Press at p 67 (South Australia) and Raff M (1998) "Environmental Obligations and the Western Liberal Property Concept" 22 *Melbourne University Law Review* 657 at p 659 (Victoria). For a concise overview of these issues see also Bates G (2002) *Environmental Law in Australia* Butterworths at pp 33-38.

[5] Water Property Rights Report to COAG of the CEOs Group Draft Water Entitlement and Allocation Principles (G through to I).

[6] 2002 WL 654431 (US. 23 April 2002).

[7] See *Pennsylvania Central Transport Company v. New York City* 438 U.S. 104. For a comprehensive bibliography in relation to the takings cases and debates see also Dorsett MH (1999) *Shifting Terrains: Upsetting the Balance Between Public and Private in the Takings Debate* (Southwest Missouri State University, which can also be found at http://208.13.158.54/departments/plan/issue/linkpgs/takings.html.
For a sense of the complexities at work, see Raff M (1998) "Environmental Obligations and the Western Liberal Property Concept" 22 *Melbourne University Law Review* 657 at pp 681-683.

[8] National Farmers Federation (2002) *Property Rights Position Paper* May 2002.

[9] Fensham RJ and Sattler PS "A Proposal for Financial Assistance and a Duty of Care to Accompany Legislation Controlling Remnant Native Vegetation Clearing on Freehold Land in Queensland."

[10] Binning C and Young M (1997) *Motivating People – Using Management Agreements to Conserve Remnant Vegetation* CSIRO, Canberra.

[11] See generally Raff M (2000) "We Need a New Wave of Environmental Law" Architect Victoria at pp 22-25.

[12] See, for example the Biodiversity Convention 1992, the *Endangered Species Protection Act 1992* (CTH), the *Endangered Fauna (Interim Protection) Act* 1991 (NSW) (the predecessor to the *Threatened Species Conservation Act* 1995) and the *Flora and Fauna Guarantee Act* 1988 (VIC).

[13] NSW and Victoria have ten year terms, Victoria 15 years and South Australia five years.

[14] Black AB (2002) "Property Rights, Politics, Policy and Pragmatism" in *Environment SA* Volume 9 # 1 at p 4 (Letters).

[15] See Crosthwaite J (2002) "Vegetation Clearance – Is Compensation or Adjustment the Issue?" 1 *Ecological Management and Restoration* 2

[16] See Crosthwaite J (2001) "Policy Formulation – the Duty of Care and Putting the Farm First", a paper presented to the Australian Agricultural and Resource Economics 45th Annual Conference, South Australia 22-25 January 2001

[17] It is beyond the remit and expertise of the Environmental Defender's Office to comment on Government microeconomic reform, except insofar as calls for compensation by farmers raise equity issues. Clive Hamilton, Director, Australia Institute (personal communication).

[18] See, for example, Productivity Commission 1999 Annual Report.

[19] See "Farmers compensation push is legally unsound, says leaked Ministerial brief" noted in Environmental Manager Volume 418, 3 December 2002 at p 1.

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C. Public Participation as a Whole

When the implementation in Australia of the guidelines for public participation detailed in principle 10 of the Rio Declaration are examined as a comprehensive regime, it is clear that Australian environmental law provides for significant public participation in environmental processes. Although there is undoubtedly room for improvement, especially in the area of accessing judicial and administrative remedies at a Commonwealth level, it is important to bear in mind that Australia's opening up of environmental law and decision-making to the public, when compared to the practices of other countries, is to be applauded.

2. Environmental Impact Assessment

A. Environmental Impact Assessment in International Law

Environmental law in its current state of development would read into treaties ... a duty of environmental impact assessment ... being a specific application of the larger general principle of caution, embody[ing] the obligation of continuing watchfulness and anticipation.[13]

The duty to undertake environmental impact assessment of those developments which occur on both a national and international level, is clearly found within the Rio Declaration.[14] Principle 17 states that "environmental impact assessment… shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment."

The obligation to undertake environmental impact assessment is also found in a number of international documents, including the 1991 *Convention on Environmental Impact Assessment in a Transboundary Context*,[15] the 1993 *North American Agreement on Environmental Cooperation*,[16] UN General Assembly resolutions,[17] the 1978 UNEP Draft Principles of Conduct, and Agenda 21. Importantly, the principle has also been adopted in practice at an international level, as evidenced by the World Bank's use of impact assessment as an essential principle.[18] The adoption of a binding policy by the Bank in 1989 helped make the requirement for impact assessment a custom of all other multilateral financial institutions.[19]

In addition to the references to environmental impact assessment contained within declarations and treaties, there is a strong argument that the obligation to undertake such assessment where there is a likelihood that an activity will have a significant impact on the environment has risen to the level of customary international law.[20] Vice-President Weeramantry has consistently observed that the principle of impact assessment is 'gathering strength and international acceptance' and that it has risen to a level of 'general recognition at which [the International Court of Justice] should take notice of it.'[21]

B. Environmental Impact Assessment under Australian Law

The process of environmental impact assessment is seen as a 'vital step' in the prevention and management of environmental degradation, and in the implementation of the principle of sustainable development.[22] Environmental impact assessment has been comprehensively adopted in Australian planning law and is not limited only to the preparation of formal Environmental Impact Statements or Species Impact Statements, but extends to where a decision-maker must legally consider factors relating to the impact of a proposal on the environment.[23]

As with sustainable development, environmental impact assessment (**EIA**) has a uniform national policy approach. In 1991, the ANZECC *National Approach on EIA* was produced, and espoused comprehensive principles in relation to impact assessment in Australia. This was built upon by the 1992 *Intergovernmental Agreement on the Environment*, in which a set of principles upon which all levels of government agreed to base their impact assessment procedures were provided.[24] It is argued, however, that these principles provide little assistance to those authorities carrying out assessment, operating instead as a 'wish list'.[25] The *Intergovernmental Agreement on the Environment* has been since supplemented by 1996 *Guidelines on the need for and level of EIA in Australia* and the 1997 *Australian National Agreement on EIA*. Both documents provide a framework for determining the level of assessment required for a development proposal and to co-ordinate assessment procedures where more than one government is involved.[26] At a legislative level, this uniform approach to impact assessment policy has not, however, been implemented.[27]

At the Commonwealth level, the responsibility for environmental impact assessment is shared with the State governments, in what is known as 'co-operative federalism'.[28] The Commonwealth limits its role in impact assessment to what are termed 'matters of national significance', which are listed in the *Environmental Protection and Biodiversity Conservation Act* 1999. These include World Heritage properties, Ramsar wetlands, nuclear actions such as uranium mining, and listed threatened and migratory species. Where activities are likely to have a significant effect on one of these matters, assessment and approval requirements at a Commonwealth level are triggered.[29] Any other activities are assessed at a state or territory level, under their relevant planning regimes, all of which include some form of requirement for environmental impact assessment.[30]

The question of the effectiveness or appropriateness of the various environmental impact assessment procedures put in place by state and federal planning legislation does not fall within the scope of this article. For the current purposes, it is enough to demonstrate that this principle of

international environmental law has been applied at a domestic level in Australia. The provision for assessment procedures at every level of government across all jurisdictions in Australia indicates that this principle, especially when compared to the somewhat vague implementation of sustainable development and the precautionary principle as discussed above, is an accepted and fundamental aspect of all Australian planning regimes.

Conclusion

Despite the great strides forward which have been made in environmental law in the past three decades, there are still vast distances to travel. States, however, no longer have to attempt this journey alone. Through universal conferences such as Stockholm, Rio and Johannesburg, the international community is identifying the environmental problems which threaten our planet, and working towards common solutions by developing a legal regime which operates on both an international and, necessarily, a national, level. Using Australian environmental jurisprudence as an example, it is clear that principles of international law can operate as influential considerations in decision-making for all jurisdictions. This influence of international law on domestic environmental law has only just commenced, and, in the words of Vice-President Christopher Weeramantry:

We have entered an era of international law in which international law subserves not only the interests of individual states, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare.[31]

ENDNOTES

[1] Charles Di Leva 'International Environmental Law and Development' (1998) 10 *Georgetown International Environmental LR* 501 at 525

[2] *Freedom of Information Act* 1982 (Cth), *Freedom of Information Act* 1989 (NSW), *Freedom of Information Act* 1982 (Vict), *Freedom of Information Act* 1992 (WA), *Freedom of Information Act* 1992 (Qld), *Freedom of Information Act* 1989 (ACT) *Freedom of Information Act* 1991 (SA), *Freedom of Information Act* 1991 (Tas).

[3] See s138 *Gene Technology Act* 2000 (Cth)

[4] The GMO Record is available online at http://www.health.gov.au/ogtr/index.htm

[5] See Part Two *Local Government Act* 1993.

[6] The *Native Vegetation Conservation Act* Registry is available online at http://www.dlwc.nsw.gov.au/care/veg/register.html

[7] The EPA Registry is available online at http://www.epa.nsw.gov.au/prpoeo/index.htm

[8] Legislation enabling public participation in environmental decision-making includes ss79, 79A and 113 of the *Environmental Planning and Assessment Act* 1979 (NSW), *Native Vegetation Conservation Act* 1997 (NSW) which incorporates the assessment procedure under the *Environmental Planning and Assessment Act* 1979(NSW), Part 4 Div 2 of the *Integrated Planning Act* 1997 (Qld), and s46B of the *Development Act* 1993 (SA).

[9] Open standing provisions can be found in environmental legislation outside of NSW, however, they do not apply as comprehen-sively. Examples include s195A *Environmental Protection Act* 1994 (Qld), 4.3.22 *Integrated Planning Act* 1997 (Qld), s85 *Development Act* 1995 (SA), s34 *Wilderness Protection Act* 1992 (SA), s167*Heritage Act* 1995 (Vic), s114 *Planning and Environment Act* 1987 and s96 *Heritage of Western Australia Act* 1990 (WA).

[10] [2000] QSC 172 (14 June 2000), available online at www.austlii.edu.au.

[11] *North Queensland Conservation Council Inc v Executive Director, Queensland Parks and Wildlife Service* [2000] QSC 172 (14 June 2000) at 8.

[12] See *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492 and *Australian Conservation Foundation Inc v Minster for Resources* (1989) 19 ALD 70.

[13] Separate Opinion of Vice President Weeramantry *Case Concerning the Gabcikovo-Nagymaros Project* (1998) 37 ILM 162 at 214

[14] Charles Di Leva *op cit* at 522

[15] (1991) 30 ILM 800

[16] Regional agreement between Canada, USA & Mexico (1993) 32 ILM 289 article 10(7)

[17] Such as Resolution 2995 (XXVII) 1972

[18] Separate Opinion of Vice President Weeramantry *Case Concerning Gabcikovo-Nagymaros Project* (1998) 37 ILM 162 at 214; Di Leva op cit at 522

[19] Di Leva *op cit* at 522

[20] *Ibid*

[21] Separate Opinion of Vice President Weeramantry *Case Concerning the Gabcikovo-Nagymaros Project* (1998) 37 ILM 162 at 214. See also the decisions of VP Weeramantry in *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in Nuclear Tests (New Zealand v France)* Case ICJ Rep 1995 p 344, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* ICJ Rep 1996 p 140.

[22] Laura Hughes 'Environmental Impact Assessment in the *Environmental Protection and Biodiversity Conservation Act* 1999 (Cth)' (1999) 16 *EPLJ* 304 at 305

[23] Farrier et al The Environmental Law Handbook 3rd ed 1999 p 487

[24] Schedule 3 Part 3

[25] Hughes *op cit* 311

[26] *Ibid* 312

[27] *Ibid* 311

[28] *Ibid* 306

[29] See ss26-28 of the *Environment Protection and Biodiversity Conservation Act* 1999. For an overall discussion of the operation of the EPBC Act see Lisa Ogle 'The Environment Protection and Biodiversity Conservation Act 1999 (Cth): How Workable Is It?' (2000) 17 *EPLJ* 468 and Sophie Chapple 'The Environment Protection and Biodiversity Conservation Act 1999(Cth): One Year Later' (2001) 18 *EPLJ* 523

[30] See the *Environmental Planning and Assessment Act* 1979 (NSW), the *Land (Planning and Environment) Act* 1991 (ACT), *Environmental Assessment Act* 1982 (NT), *Integrated Planning Act* 1997 (Qld), *Development Act* 1993 (SA), *Environment Effects Act* 1978 (Vic), *Environmental Protection Act* 1986 (WA) and the *Land Use Planning and Approvals Act* 1993 (Tas).

[31] Separate Opinion of Vice-President Weeramantry, *Case Concerning the Gabcikovo-Nagymaros Project* (1998) 37 ILM 162 at 216

EDO Network News

EDO Network Meeting

In February, EDO South Australia hosted a very successful EDO network meeting. These meetings take place one to two times a year and are hosted by different offices. The meetings are an excellent opportunity for the nine EDO offices from each state and territory to get together and discuss current and future work.

ACT

ACT office's solicitor Kath Taplin is soon to commence maternity leave. With wish Kath and David all the best with their new family.

NSW

EDO NSW welcomes three new staff members. Ilona Millar is the new solicitor replacing Justine de Torres who is on maternity leave. Pepe Clarke is the new education coordinator. Pepe has previously worked for EDO Victoria and is both a community educator and law graduate. We also welcome Christine Palomo as the new education assistant. Christine previously worked for Conservation Volunteers Australia

Queensland

Terri Westacott Administrator at EDO Qld has left to pursue her

Beth Mellick, Administrator and Marketing coordinator at EDO Vic has been appointed as the new External Relations Coordinator for the office. This has opened up a position for an Administrative Assistant at the EDO. Notification of the position will be posted on the Community Legal Centres BBS early in March.

SUPPORT US!

EDOs provide legal advice and representation to individuals and community groups who are working to protect the environment; contribute to law reform; run community education programs and develop plain English resources on environment laws and public participation.

You can support the work of the EDOs by volunteering, providing pro bono services, making tax deductible donations, including EDO in your will or subscribing to Impact. Contact your nearest EDO for more information.

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Australian Capital Territory
Level 1, Centre Cinema Building
1 Bunda St Canberra ACT 2600
02 6247 9420
edoact@edo.org.au

New South Wales
Level 9, 89 York St
Sydney NSW 2000
02 9262 6989
edonsw@edo.org.au

Northern Territory
8 Manton St
Darwin NT 0800
08 8982 1182
edont@edo.org.au

North Queensland
Ground floor, 130 Grafton St
Cairns Qld 4870
07 4031 4766
edonq@edo.org.au

Queensland
Level 4, 243 Edward St
Brisbane Qld 4000
07 3210 0275
edoqld@edo.org.au

South Australia
Level 1, 408 King William St
Adelaide SA 5000
08 8410 3833
edosa@edo.org.au

Tasmania
131 Macquarie St
Hobart Tas 7000
03 6223 2770
edotas@edo.org.au

Victoria
Level 1, 504 Victoria St
North Melbourne Vic 3051
03 9328 4811
edovic@edo.org.au

Western Australia
2nd floor, 533 Hay St
Perth WA 6000
08 9221 303
edowa@edo.org.au