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Federal Environment Minister Takes Action Under the EPBC Act

Minister v Greentree [2003] FCA 857

Chris McGrath, Barrister-at-Law

In *Minister for the Environment & Heritage v Greentree* [2003] FCA 857[1] (8 August 2003), Sackville J refused an application to dissolve an earlier interim injunction under s475 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("**EPBC Act**") restraining several NSW wheat farmers from, amongst other matters, carrying out land clearing, ploughing or cropping activities (including the planting of seeds) affecting a Ramsar wetland known as the Gwydir Wetlands.

The Gwydir Wetlands covers an area of 823ha and is located approximately 60km west of Moree in northern NSW. It was listed under the Ramsar Convention on 14 June 1999. Approximately 100ha of the Gwydir Wetlands is located on a 2000ha wheat farm known as "Windella" owned and operated by the respondent farmers.

While in 1999 the portion of the Gwydir Wetlands located on the Windella wheat farm was in reasonable health, in October 2002 it was assessed to have been impacted by management practices on the farm and the severe drought affecting the area. A further assessment in July 2003 by Environment Australia revealed approximately 99% (99ha) of the area of the wetlands located on the farm had been ploughed under in preparation for the planting of a wheat crop.

Sackville J drew an inference that the area of the wetlands affected had been deliberately ploughed without approval and that "such actions give rise to the distinct possibility that the respondents have contravened the Act". His Honour also found that there is at least a possibility of a substantial degree of remediation of the wetlands in its present state. Although the injunction would prevent the respondent farmers making economic use of the area pending the resolution of the case, their detriment did not outweigh the prejudice that would or could occur to the rehabilitation of the wetlands if the interim injunction were dissolved.

Justice Sackville stated in relation to the potential for remediation that:

> "[16] It is, in my opinion, of some importance that there may be an opportunity to rehabilitate the wetlands that have been declared under the Act to be of international importance. Steps should not be permitted that would or could significantly prejudice that outcome. The evidence indicates to me that if the further action took place by way of cultivation of this land for the purposes of growing wheat, then the prospects of remediation of the land would be significantly impaired.
>
> [17] In my opinion, therefore, the balance of convenience lies clearly in favour of continuing the injunction."

The Minister has subsequently sought a remediation order and a pecuniary penalty for contravening a civil penalty provision against the farmers and an investigation is continuing, "to determine whether the activities might also constitute a criminal offence [under the EPBC Act] and should therefore be

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Review of Commonwealth Mandatory Renewable Energy Target

Ilona Millar, Principal Solicitor and Elisa Nichols, Solicitor, EDO NSW

Introduction

The *Renewable Energy Act 2000 (C'th)* aims to encourage the production of additional electricity from renewable energy sources and reduce Australia's greenhouse gas emissions. The Act commenced operation on 18 January 2001 and applies to electricity generated from a range of renewable energy sources after 1 April 2001. One of the main features of the *Renewable Energy Act* is the aim of generating an additional 9,500 gigawatt hours (**GWh**) of electricity from renewable sources. This target is known as the Mandatory Renewable Energy Target (**MRET**).

At the beginning of 2003, the Commonwealth Government appointed an independent panel to review the MRET Target (**MRET Review**). The terms of reference for the MRET Review sought public and industry comment on the following matters:

- the extent to which the Act has contributed to reducing greenhouse gas emissions;
- the extent to which the Act has encouraged the additional generation of electricity from renewable energy sources;
- the extent to which the policy objectives of the Act have been achieved and the need for any alternative approach;
- the mix of technologies that has resulted from the implementation of the Act;
- the level of penalties provided under the Act;
- the need for indexation of the renewable energy shortfall charge to the consumer price index (**CPI**) to maintain the real value of the charge and the associated penalty charge;
- other environmental impacts that have resulted from the implementation of the provisions of the Act, including the extent to which non-plantation forestry waste has been utilised;
- the possible introduction of a portfolio approach, a cap on the contribution of any one source and measures to recognised the relative greenhouse intensities of various technologies; and
- the level of the overall target and interim target.

In June 2003, EDO (NSW) lodged a submission to the independent panel on the operation of the *Renewable Energy Act*. Some of the main features of that submission are detailed below.

Reduction of greenhouse gas emissions

The objective of reducing greenhouse gas emissions was sought to be achieved by requiring electricity retailers to collectively source an additional 9,500 GWh of electricity per annum from renewable sources by 2010. At the time that the figure of 9,500 GWh was set, it was anticipated that this would represent an increase of approximately 2% on the 11% share of Australia's renewable electricity in 1997. However, as a result of increased growth in electricity consumption, this figure is more likely to represent an increase in renewable energy generation of only 0.5%.[1]

The EDO submitted that the current targets were extremely low and would not achieve any net reduction in greenhouse gas emissions by 2010. This was on the basis of three main issues.

The first was the use of a percentage, rather than a volumetric target for sourcing renewable energy. In this respect, the EDO was of the opinion that requiring a percentage of Australia's electricity to be sourced from renewable energy was preferable as it builds in the flexibility required to adjust to increased growth in demand for electricity.

The EDO expressed its support for an increase of the MRET to 10% by 2010 (and further incremental increase beyond that) as advocated by a number of environmental groups.[2] This would align Australia with the targets being set by a number of European Countries in order to meet their Kyoto commitments.

Thirdly, The EDO noted that the MRET focuses on the generation of additional electricity from renewable sources. It does not in any way seek to reduce the overall generation of electricity from those sources that produce excessive greenhouse gas emissions, such as coal fired power plants. The EDO was of the view that, in order to reduce greenhouse gas emissions, the generation of electricity from renewable sources must also be combined with regulatory measures and incentives to reduce the amount of electricity from non-renewable sources.

Encouraging additional generation of electricity from renewable energy

Section 17 of the *Renewable Energy Act* sets out those sources of energy which constitute "eligible renewable energy sources" for the purposes of the Act. The primary sources of renewable energy for the purposes of creating renewable energy certificates (**RECs**) pursuant to the *Renewable Energy Act* are hydro, wind, wood and forestry waste, solar and waste to energy sources. However, of these sources, approximately a quarter of the current MRET is likely to be achieved from electricity generated by existing large scale hydro projects, constructed many years before the introduction of the *Renewable Energy Act*. As a result of these large scale hydro projects constituting an eligible renewable energy source the impetus to invest in new technologies or improve the efficiency of existing infrastructure is diminished.

The EDO was of the view that accrediting energy from these existing sources was counter to the objective of stimulating a new renewable energy

industry. Further, the EDO questioned the ecological sustainability of such projects which have generally involved the creation of large scale dams and flooding of wilderness areas.

To ensure renewable energy sources are ecologically sustainable

As noted above, the list of eligible renewable energy sources in section 17 of the *Renewable Energy Act* includes wood waste and municipal solid waste combustion. The EDO expressed concerns that these sources are not ecologically sustainable and as such should not be included as renewable energy sources. For example, the burning of wood waste is not a clean technology. It was submitted that as the MRET is so low, achieving that target should be focussed entirely on developing clean technologies for the production of energy.

The EDO was also concerned that the scheme provides an economic incentive to produce wood waste, rather than encouraging more efficient use of the material in sawmilling, despite the inclusion in the Act of limitations on the sources of woodwaste that could be burned[3]. Concerns were also expressed about the system being open to abuse, as it encouraged smaller trees that would otherwise be left in a logging operation to be removed and used for fuel. This was seen in the proposed Mogo charcoal plant where the wood waste that was to be used was actually comprised of smaller trees that would not otherwise have been commercially viable in logging terms.

The EDO also questioned the ecological sustainability of both combustion of solid municipal waste and large scale hydro projects which rely on damming our waterways. The concerns raised here related to the benefit of municipal waste projects as opposed to promoting recycling incentives and the reliance on potential for future hydro projects to have significant documented downstream and biodiversity impacts.

The level of penalties provided under the Act

The *Renewable Energy Act* currently sets the renewable energy shortfall charge at $40 per megawatt hour (**MWh**). At current rates, the average cost of delivery of new renewable energy sources to meet the MRET is about $58/MWh. However, the costs associated with renewable energy sources, such as wind energy, are declining rapidly[4].

In contrast, the cost of delivery of non-renewable electricity is less than $40/MWh keeping in mind that subsidies to the tune of approximately $900 million per year are available to the power sector.

In these circumstances, and in the absence of a level playing field for all electricity generators, it is the EDO's view that the $40 penalty is too low to provide any real deterrent to electricity producers to invest in renewable technologies. Accordingly, the EDO supported an increase in the renewable energy shortfall charge to a sum that represents an economic value to energy suppliers such that it will be commercially beneficial for them to comply with the requirements of the *Renewable Energy Act*.

Indexation to CPI

The current basis for calculating the renewable energy shortfall charge in s.37 of the *Renewable Energy Act* is not linked to the CPI. As such, it is estimated that the "real" value of the charge in 2010 will equate to only $24/MWh. Such a sum would arguably have no deterrent value to electricity suppliers as it would be far more economically beneficial for them to pay the charge than to invest in renewable sources.

The EDO supported a scheme that appropriately values the cost of electricity and reflects changes in the market.

The operating environment of the Act

Public Participation

Public participation is firmly embedded in the fabric of Australian environmental law. This emphasis involves recognition of the fact that the involvement of the community improves the quality of environmental decision-making. The Federal government has embraced these principles in the *Environment Protection and Biodiversity Conservation Act 1999* which provides numerous avenues for public participation and attempts to create a transparent operating environment.

This commitment to public participation is not equally apparent in relation to energy law. For example, the *Renewable Energy Act* has no provisions for public participation or enforcement of breaches of that Act. Accordingly, the EDO made recommendations to the MRET Review that:

- Applications for accreditation of power sources under the Act be publicly notified with a 28 day period for public submissions. Advertisement should take place in newspapers and on the internet.
- The annual statements required by ss.44-46 of the Act should be placed on a public register and made available on the internet. Public accessibility of this kind of information is crucial to the transparency of the scheme.
- The meaning of "affected person" under s.66 of the Act should be expanded in relation to an application for accreditation to include any person.

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Review of the Environmental Policy of the Export Finance and Insurance Corporation

Elisa Nichols, Solicitor, EDO NSW

The Export Finance and Insurance Corporation (**EFIC**) is Australia's export credit agency. It is a predominantly self-funding, wholly government-owned corporation. EFIC assists Australian companies to export overseas by providing loans and insurance against political instability and non-payment.

EFIC has been involved in the financial and insurance backing of a number of projects with high environmental impact in our region including the Ok Tedi and Lihir mines in Papua New Guinea and recently the Sepon gold mine in Laos. The Ok Tedi and Lihir mines both proceeded without environmental impact assessment and have caused well-documented environmental and social impacts on customary landholders in Papua New Guinea.

In 2000, EFIC introduced its Environmental Policy[1]. The Environmental Policy is currently under review. The EDO prepared a critique of the Environmental Policy. The following is an extract of some of the key elements of this critique.

Content of Guidelines

The Environmental Policy essentially provides standards for environmental impact assessment (**EIA**). It is not a policy designed to outline EFIC's stance in relation to environmental impact issues, nor to guide the approach that EFIC will take in deciding whether or not it will support a project. We are of the view that the Environmental Policy should be a positive statement of the environmental values that EFIC will apply in the exercise of its functions.

Ecologically sustainable development

A key omission is the failure to identify environmentally sustainable development (**ESD**) as the underlying basis for the policy. It is standard both nationally and internationally for ESD to be the basis for environmental policies. In Australia, this is expressed in the National Strategy for Ecologically Sustainable Development.

It is noted that the EFIC Environmental Policy states that EFIC will report on their ESD activities in their annual report in accordance with s.516A of the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**). However, the Environmental Policy does not articulate any intention to apply ESD principles in their functions.

The Commonwealth Auditor-General states, "The view that ESD is not relevant to non-environmental agencies is widely held, and will need to be addressed by Department of Environment and Heritage".[2] This appears to be reflected in the absence of reference to ESD in EFIC's Environmental Policy. It is noted that EFIC's Annual Report 2001/2002 states that the Environmental Policy "helps us address the principles of ecologically sustainable development", but does not detail how this is the case, particularly as no reference is made to the principles of ESD in the Policy.

Standards for Environment Impact Assessment (EIA)

The Standards for EIA section of the Environmental Policy needs to be considerably broadened. A good precedent is found in paragraphs 1-6 of the World Bank Operational Policy 4.01 (OP 4.01).[3] OP 4.01 details the purpose of the environmental assessment, some of the content required in an environmental assessment and indicates the World Bank's position in relation to certain matters. Paragraphs 2 and 3 identify that an environmental assessment should:

1. evaluate a project's potential environmental risks and impacts on its area of influence;
2. examine project alternatives;
3. identify ways of improving project selection, siting, planning design and implementation by preventing, minimising, mitigating or compensating for adverse environmental impacts and enhancing positive impacts;
4. include the process of mitigating and managing adverse environmental impacts throughout project implementation;
5. take into account the natural environment (air, water and land), human health and safety, social aspects (involuntary resettlement, indigenous peoples and cultural property) and transboundary and global environmental aspects;
6. consider natural and social aspects in an integrated way; and
7. take into account the variations in project and country conditions, the findings of country environmental studies, national environmental action plans, the country's overall policy framework, national legislation and institutional capabilities related to the environmental and social aspects, and obligations of the country under relevant international environmental treaties and obligations.

At a minimum, these standards should be included in EFIC's Environmental Policy. The Policy should also make it clear that an environmental impact statement (**EIS**) which does not meet these standards will not be accepted by EFIC.

Projects that EFIC will not support

The risk categorisation approach is a useful tool in determining EIA requirements. Categorisation could be improved by the addition of a list of activities or impacts that EFIC will not finance. For example, OP 4.01 states that the World Bank does not finance projects that contravene national legislation or international environmental treaties. The EFIC Environmental Policy should contain a positive list of the types of projects that EFIC will not finance including:

- projects that do not comply with international environmental and

human rights treaties to which Australia is signatory;

- projects which do not comply with the national legislation of the sponsor; and
- projects which do not meet with Australian environmental management standards.

Transparency

The issue of commercial confidentiality mentioned in the current Environmental Policy is an irrelevant consideration in relation to the environmental impacts of the project. We can think of no circumstances where the manner in which the project will be carried out and the potential impacts could be claimed to be commercial in confidence. To our knowledge, no examples exist in Australian environmental assessment legislation which allow details of the impacts of a project to be withheld on the grounds of commercial confidentiality. This provision should be removed from the Policy to make it clear that the entirety of all EIS's produced will be available to the public.

In particular, we refer to the World Bank Policy on Disclosure of Information, which is a relatively open policy based on a presumption in favour of disclosure, rather than concealment.[4]

Public consultation standards

The Environmental Policy needs to specify far more detailed guidelines for public consultation.

These include:

- Requirements about advertising of public exhibition periods. It is suggested that at a minimum, projects should be advertised in Australia in a newspaper with national circulation and on both the EFIC and the Department of Environment and Heritage websites.
- All consultation documents should be available in electronic format to facilitate participation by both the Australian and international communities.
- All documents for consultation should be available in both English and the official language of the host country and the language of any affected populations.
- There should be a minimum of two consultation periods. A shorter period should be undertaken prior to the screening process to allow the community to indicate the level of assessment they believe is appropriate in relation to that specific project. The second level would be public exhibition of the environmental assessment documents. Both levels of consultation should be undertaken in the project affected area and in Australia.
- Given the complex nature of these projects and their location outside of Australia, the consultation period should be extended to 120 days.
- Consultation should occur for all Category A and Category B projects. Consultation for Category B projects should be advertised as widely as Category A projects but may be subject to a shorter time frame such as 90 days given that the environmental assessments will be less complex.

Consultation on indigenous lands

Sponsors for any proposed projects on indigenous lands or where indigenous lands may be affected (e.g. downstream lands) must be able to demonstrate that they have consulted with landholders and have the prior informed consent of those landholders. In this context, it must be made clear that dissemination of information itself is not enough. Those affected must give informed consent before any externally initiated projects are approved by EFIC.

Sponsors should hold culturally and logistically appropriate public hearings, open to all people dependant on the area, relevant government agencies and officials, and representatives of appropriate non-governmental organizations. Women and other disenfranchised subgroups should not only be heard but also, if necessary, be accorded separate identities and representation in any decision-making.

The results of the discussions should be written up and publicly disseminated in a timely fashion. Where illiteracy is high, a summary of the discussion should be orally disseminated. Special attention should be given to any commitments made in response to local concerns. A detailed report on the consultation methods used, the groups consulted with and the written results of these discussions should be included as an appendix to any environmental assessment done. This report should also include information about any compensation arrangements made with affected landholders.

Monitoring

The EFIC Environmental Policy includes no provisions for the monitoring of projects. In the past, EFIC has been involved in financing projects that have been environmental and human rights disasters such as the Ok Tedi project in Papua New Guinea. Given the inadequacy of environmental and human rights standards, and endemic problems such as corruption and lack of good governance in many countries which are likely to receive EFIC funding, it is essential for EFIC to engage more directly in ensuring that projects it funds meet international standards.

Section 516A(6) of the EPBC Act requires EFIC to document the effect its activities have on the environment, any measures EFIC is taking to minimise this impact and mechanisms for reviewing and increasing the effectiveness of these measures. Without any monitoring of projects that EFIC has funded, it is not possible for EFIC to effectively comply with the reporting requirements.

At a minimum, EFIC should consider a clause similar to Clause 20 of OP 4.01.

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Productivity Commission Inquiry: Native Vegetation and Biodiversity Regulation

Rachel Walmsley, Policy Officer, EDO NSW

In July 2003, the EDO Network made a submission on the impacts of native vegetation and biodiversity regulations to the Commonwealth Productivity Commission.

The starting premise for the review was that regulatory regimes in a number of States and Territories, along with the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**), play a crucial role in the transition to more sustainable management of Australia's native vegetation and biodiversity. The introduction of these regimes (particularly within the past five years), has raised concerns over possible negative impacts on farming practices, productivity, property values and returns and the investment behaviour of affected landholders. These concerns appear to have been exacerbated in part, by a lack of information and awareness about the implications of the new regimes.

The EDO confined its submission to two terms of reference:

(f) the degree of transparency and extent of community consultation when developing and implementing the regimes; and

(g) recommendations (of a regulatory or non-regulatory nature) that governments could consider to minimise the adverse impacts of the regimes, while achieving the desired environmental outcomes, including measures to clarify the responsibilities and rights of resource users.

The EDO argued that having public participation and transparency requirements built into decision-making processes results in better decisions being made, and that this is increasingly recognised in environmental law in Australia. The principles of public participation and transparency have generally been incorporated into the relevant legislative frameworks covering native vegetation and biodiversity, with the regimes providing opportunities for both formal and informal public participation. However, the EDO argued that best practice standards have not yet been achieved or implemented across all Australian jurisdictions.

The submission examined the Commonwealth public participation and transparency provisions in the EPBC Act, and relevant provisions from the State regimes. With regard to the Commonwealth regime it was concluded that:

- there was sufficient consultation with stakeholders in the lead up to the Act's introduction;
- there has been extensive landholder engagement during the regimes' existence;
- the Act contains a number of important improvements vis-à-vis the Act's predecessor, the *Environment Protection (Impact of Proposals) Act 1974 (Cth)* (**EPIP Act**), including opportunities for formal and informal public participation;
- the Act provides satisfactory provisions requiring transparency in the decision making processes of the Act; and
- notwithstanding these positives, that a number of improvements could be made to the regime with respect to public participation and transparency.

With respect to the state-based regimes, it was argued that participation is generally encouraged. To that end, public participation must be allowed at the policy formulation stage, right through to the stage at which, for example, individual applications for clearing are considered. The submission examined the participatory access enabled through the regional vegetation management planning regimes across South Australia, New South Wales, Queensland and Victoria. From this analysis it was submitted that there are many inconsistencies between the regimes in the type, quality and meaningfulness of the participation and transparency inscribed in these regimes, and that the states have further work to do in achieving best practice standards.

With regard to the second term of reference, the EDO recommended that a shift of focus is required. Given the extent of resource problems facing Australia currently, the key issue must be achieving the best sustainable environmental outcomes, rather than the financial bottom line of farm businesses. It was argued that the starting point for this inquiry should not be to what extent have the native vegetation and biodiversity regimes affected the financial bottom line. Rather, the recommendations of the inquiry should be based on the assumption that the current management of native vegetation and biodiversity is unsustainable, and that a new policy mix needs to be developed to effectively remedy this.

The response was divided into four parts:

- improving the current framweork;
- clarifying rights and responsibilities;
- cost sharing; and
- other approaches.

The EDO suggested a number of legislative changes that could be implemented to improve the design of the current legislative framework. It was recommended that specific and binding environmental standards be developed and implemented. Furthermore, it was argued that the statistical and economic verification of the impacts on farmers of native vegetation and biodiversity regulation needs to proceed carefully, and that a more thorough and balanced analysis needs to be conducted on the effects of the regimes. It was argued that landholder property rights need to be weighed against the broader community right to a healthy environment,

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Victorian Water Law: Environmental Flows

Barnaby McIlrath, Solicitor EDO VIC

The need to provide increased environmental flows has received considerable media coverage in recent times. Widespread concern over the state of the Murray River system has largely driven the debate under the auspices of the Murray Darling Basin Commission's Living Murray initiative. But while debate over environmental flows occurs between the Murray Darling States, it is important not to lose sight of what is required within Victoria under the law. After all the Murray is not the only river system which is in need of replenishment. Only 22% of Victoria's rivers are considered to be in good condition.

The Bracks Government's policy on river health, the Victorian River Health Strategy ('**VRHS**'), contains environmental flow objectives which are, in part, a response to the requirements of the Council of Australian Governments (**'CoAG'**) water reforms. In 2001, the National Competition Council ('**NCC**') found Victoria had made insufficient progress in providing environmental flows to stressed rivers.[1] The Australian Conservation Foundation and Environment Victoria both expressed concern that the VRHS does not contain defined objectives and that results are not likely to be achieved for some time. This concern was shared by the NCC which stated in 2002 that *"the timeframes may be too long such that there is doubt as to whether the outcomes will be achieved."*[2]

On 4 June 2003, the revised State Environment Protection Policy (Waters of Victoria) ('**the revised SEPP**') was gazetted by the Victorian Cabinet. The new policy is being promoted by the Environment Protection Authority (**'EPA'**) as *"reflecting scientific approaches and Victoria's catchment management arrangements."*[3] It seeks to set the framework to protect, rehabilitate and ultimately sustain the environmental quality of Victoria's streams, lakes, estuaries and marine environments and the uses of those environments.[4]

The introduction of the revised SEPP should be assessed in the context of the Bracks Government's commitment to achieve *"significant improvements to the ecological health of Victoria's rivers by 2010 by increasing environmental flows and undertaking riverbank and catchment management works."*[5]

The revised SEPP represents the only legislative standard in Victoria by which to judge Victoria's performance in delivering environmental flows to Victoria's rivers. There are other factors which shape the Bracks Government's approach to providing environmental flows including National Competition Policy and Commonwealth funding which is contingent on implementation of CoAG water reforms which include the provision of environmental flows.[6]

Legislative Provision of Environmental Flows in Victoria

Before describing the attributes for the revised SEPP, it is important to first explain how environmental flows are provided under the legislative scheme in Victoria. The *Water Act 1989* controls the allocation of water between competing users among the state. The environment is to be considered as one of those users.

However, the *Water Act* is not particularly clear about providing water for the environment and unlike other states, does not require that the environment receives a pre-determined share of available water. Environmental water has largely been provided after the needs of all other users have been determined. Allocations to the environment often require concessions from other users and often bear little resemblance to recommendations in environmental flow studies.[7] Whilst the needs of the environment are legally relevant when water allocations are being considered, the concept 'environmental flows' does not actually appear in the *Water Act.*

As outlined above, the revised SEPP represents the only legislative standard which states goals for the achievement of environmental flows. Under the *Environment Protection Act* 1970 ('**EP Act**') it is the responsibility of the EPA to recommend to Cabinet, State environment protection policy for the protection of any portion or portions of the environment or any segment(s) of the environment.[8] Under s.16 Cabinet, on the recommendation of the EPA may declare the environment protection policy to be observed with respect to any portions or segments of the environment.[9] This wording indicates that SEPP has the status of subordinate legislation in Victoria and is in reality a legally binding obligation despite the classification suggested by the word 'policy'. This binding status is confirmed by High Court authority[10] and s.305B of the Water Act which indicates that the Victorian Civil and Administrative Tribunal ('**VCAT**') is bound to give effect to its terms in any appeal or application for review brought before it.

The revised SEPP seeks to achieve environmental flow objectives by identifying beneficial uses of the environment including protection of aquatic ecosystems, recreational uses, aesthetic enjoyment, protection of cultural and heritage values, agriculture and irrigation, industrial and commercial use, aquaculture and human consumption.[11] The provision of environmental flows is most commonly associated with the protection of aquatic ecosystems, but is relevant to all of these uses.[12]

The Need for a Revised SEPP

Whist it must be borne in mind that the objective of the revised SEPP is not solely devoted to the provision of environmental flows, it remains an important aspect of the policy.

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Genetically Modified Organism Free Zones

Lee McIntosh, Solicitor EDO WA

On 31 July 2003, the Gene Technology Ministerial Council agreed to issue its first policy principle under the *Gene Technology Act 2000* (Cth) (**the Act**) . The *Gene Technology (Recognition of Designated Areas) Principle 2003* (**the Principle**) is designed to recognise State laws which designate areas that grow either genetically modified (GM) or non-GM crops for marketing purposes. The Principle has not yet been formally gazetted in its final form, but we understand it will be published in September 2003. The Principle goes part way towards allowing States to protect their environment from the potential hazards of GM organisms (**GMOs**). However, the Principle has several shortcomings.

How does the Principle operate?

The Principle was issued under section 21 (1) (aa) of the Act, which provides that the Ministerial Council may issue a policy principle recognising areas which are designated under State law for the purpose of preserving the identity of GM crops or non-GM crops for marketing purposes. Accordingly, the Principle recognises that any State may designate areas for the purpose of identifying GM and non GM crops for marketing purposes.[1]

Once a designation is made under State law, the Principle will affect the dealings which the Gene Technology Regulator (**the Regulator**) is permitted to authorise for GM dealings. In summary, the Act prohibits all "dealings" with GMO's unless authorisation has been granted for that dealing. There are four authorisations available for dealings:

1. Exempt dealings – Regulations can prescribe dealings which do not involve an intentional release of a GMO into the environment as "exempt", in which case those dealings do not require a licence.[2]
2. GMOs listed on the Register – if the Regulator is satisfied that any risks posed by a dealing are minimal and that it is not necessary for persons undertaking the dealing to have a GMO licence in order to protect the health and safety of people or to protect the environment, the Regulator can list that dealing on the GMO Register.[3]
3. Notifiable low risk dealings – those prescribed by Regulations as dealings which would not involve the intentional release of a GMO into the environment and involve minimal risk to the health and safety of people and to the environment.[4]
4. Licensed dealings – any other dealings, regardless of whether or not they involve the intentional release of a GMO into the environment.[5]

Under the Principle, once an area is designated under State law:

- the Regulator is not required to consider a licence application if she is satisfied that to issue the licence would be inconsistent with the designation;[6]
- the Regulator is prohibited from actually issuing a licence if she is satisfied that issuing the licence would be inconsistent with the designation;[7] and
- the dealing cannot be classified as a "notifiable low risk dealing" if it is inconsistent with the designation.[8]

However, the Principle does not provide comprehensive protection for GM free areas. Indeed, there are several ways in which an authorisation may still be issued to permit GMOs in areas which are designated under State law as GM free.

The Regulator is not prevented from accepting an inconsistent licence

As noted above, if the Regulator is satisfied that to issue the licence would be inconsistent with a designation, the Regulator will not be required to consider the licence application. However, the Regulator is not *prohibited* from accepting such an application, and therefore may decide to accept it even if she believes it will not be consistent with a State designation.

Limited prohibition on Regulator's decisions

As noted above, the Regulator will be prohibited from issuing a licence if she is satisfied that issuing the licence would be inconsistent with a State designation. In order for this prohibition to operate, the Regulator must be satisfied that the licence will be inconsistent with a State designation. That is, she must have evidence before her which shows that the licence will be inconsistent with the State designation. This places the evidentiary onus upon the Regulator to find information which shows the licence will be inconsistent with State designation. The Regulator's initial presumption must therefore be that the licence will be consistent with State designation, and the prohibition will only operate when there is sufficient evidence to overcome this presumption. It is therefore unlikely that the prohibition will operate in many circumstances. Indeed, the Principle specifically states that it is not intended to impact on the Regulator's primary obligation to consider whether or not to issue a licence.[9]

The limited effect of the prohibition is even more pronounced when considered in light of the fact that the Regulator is not required to consult the public about any licence she proposes to grant unless the dealings which will be authorised by the licence may pose significant risks to the health and safety of people or the environment.[10] This means that the public will rarely have the opportunity to provide the Regulator with information which could satisfy her that the licence is inconsistent with State law. Nor is the Regulator required to consult about this issue with any of the specific advisory

bodies set up under the Act. While the Regulator *may* consult any person considered "appropriate", she is not *required* to consult any particular person. Specifically, she is not required to consult any of the statutory bodies established under the Act such as the Technical Advisory Committee, the Community Consultative Committee or the Ethics Committee.

Limited rights to review the Regulator's decision

It is the Regulator's decision whether or not she is satisfied that a licence is inconsistent with State law. This decision can only be reviewed by licence applicants and licence holders, as they are the only ones who may apply to the Administrative Appeals Tribunal for a review of decisions under the Act.[11] This means that neighbouring landowners, organic producers and community groups are excluded from seeking review of the Regulator's decisions, even though they may be affected by those decisions. In addition, while any "person aggrieved" may apply for an injunction to restrain a person from engaging in conduct that would be an offence against the Act[12], the Courts have found that in order to be considered a "person aggrieved", a person must suffer not just as any member of the public, but as a person who suffers a grievance beyond what an ordinary member of the public suffers. The requirement that a person be "aggrieved" before they can bring an action for an injunction will therefore seriously limit the capacity of members of the community to apply for an injunction. It will, in all likelihood, be only those people whose commercial interest will suffer due to a proposal who will be able to bring such proceedings.

Limited application of the Principle

The Principle will only affect the Regulator's decisions in respect of licences. It will not affect her decisions in respect of other authorisations such as exempt dealings, GMOs listed on the Register or notifiable low risk dealings. The Principle will therefore have severely limited application.

EDO WA submission on draft Principle

In a submission on the draft Principle, EDO (WA) recommended that the limitations identified above could easily be remedied by adoption of the following measures:

- requiring the Regulator to consult widely about whether a licence application is inconsistent with a State law before accepting that licence application;
- requiring the Regulator to consult widely about whether a licence application is inconsistent with a State law in assessing whether or not to grant the licence application; and
- requiring the Regulator to consider the Draft Principle when making other decisions under the Act.

While the final Principle has not yet been gazetted, we understand that it will be published in substantially the same form as the draft, meaning that none of these recommendations were adopted.

State designations of GM free areas

A number of States have commenced the process of designating GM free zones. For example, NSW has passed the *Gene Technology (GM Crop Moratorium) Act 2003 Act*, and WA has introduced the *Genetically Modified Crops Free Areas Bill 2003* into its parliament. However, most of the mechanisms which the States are proposing presume (arguably incorrectly) they are limited by the scope of the GM area provisions of the Principle and the Act. The State mechanisms are therefore themselves limited in scope and will not provide substantive protection to GM free areas. For example:

- The proposed designations will require areas to be free from GM *food crops*. However, there could be other crops, for example, cotton, which States wish to prohibit.
- The proposed designations will only deal with *cultivation* of GM food crops. They will not, however, deal with the movement of, storage of, research into or any other dealings with GM food crops.
- The designations are restricted to creating GM free zones for a "marketing purpose". There may, however, be many reasons other than "marketing purposes" for which the State wishes to designate GM free zones. For example, a State may wish to designate GM free zones to protect biodiversity in a particularly sensitive area.

ENDNOTES

[1] Clause 5 of the Principle
[2] *Gene Technology Regulations 2001*(Cth) Regulation 6
[3] *Gene Technology Act 2000* Part 6 Division 3
[4] *Gene Technology Act 2000* Part 6 Division 2
[5] *Gene Technology Act 2000* Part 5
[6] *Gene Technology Act 2000* section 43 (2) (e)
[7] *Gene Technology Act 2000* section 57
[8] *Gene Technology Regulations 2000* (Cth) clause 2.1, schedule 3
[9] *Gene Technology Act 2000* section 55
[10] *Gene Technology Act 2000* section 49
[11] *Gene Technology Act 2000* Part 12 Division 2
[12] *Gene Technology Act 2000* section 147

Minister v Greentree

Continued from page 1

referred to the Director of Public Prosecutions [for criminal prosecution]."[2]

This case is particularly significant because, while there have been several actions by conservationists under s475 of the EPBC Act previously and two criminal prosecutions by the Commonwealth against Indonesian fishermen using dolphins for shark-bait, this is the first civil action by the Federal Environment Minister under the Act.

ENDNOTES

[1] See http://bar.austlii.edu.au/au/cases/cth/federal_ct/2003/857.html

[2] Media advisor to Dr David Kemp, quoted in Brown S, "Kemp flexes EPBC Act muscles over destruction of listed wetlands", *Environmental Manager*, Issue 453, 9 September 2003, p 1 (Thomson CPD subscription service) at http://www.cpd.com.au/cpdnews/print/EM/EM453_pf.pdf viewed 9 September 2003.

MRET Review

Continued from page 3

- A general open standing provision should be introduced allowing any person to bring proceedings to remedy a breach of the Act.

End date of 2020

The MRET is set to conclude in 2020. However, section 40 of the *Renewable Energy Act* caps the MRET at 9,500MWh for each year after 2010. As mentioned above, the increase in renewable energy if the MRET is set at this level is only 0.5% by 2010. Such a sum will be significantly less by 2020 if energy consumption continues to increase. The EDO is concerned that under this framework greenhouse gas emissions will not have decreased by 2020 and recommended that the MRET scheme should continue to apply and increase incrementally until greenhouse gases are decreased to a level at which Australia can meet or exceed its Kyoto commitments.

Baselines for pre-existing generators

Section 14 of the *Renewable Energy Act* enables the regulator to establish a baseline for renewable energy power having reference to the amount of power generated, by a particular power station, from renewable energy sources in 1997. Section 18 of the *Renewable Energy Act* then enables an accredited power station to create RECs for energy generated in addition to the baseline.

As the Australian EcoGeneration Association has noted, baselines for some pre-existing large scale hydro generators appear to be set at levels well below their long run system yield. In, other words, they are able to generate RECs without any new technology and generation investment.[5] Such a process, given the limited MRET, may undermine the objectives of increasing renewable energy uptake by industry.

The EDO expressed the opinion that baselines should be set at a level that encourages investment in renewable technology and promote greenhouse gas abatement beyond "business as usual" and should not provide credit to existing unsustainable enterprises

Commercially competitive renewable energy

One of the chief barriers to a rapid increase in renewable energy use is the cost of the technology. Therefore, it is essential that the Federal government support these industries while they are developing to a point where they will reach an economy of scale. Additionally, to effectively reduce Australia's greenhouse emissions, it is also essential that the Federal government stop supporting the development of greenhouse intensive energy sources.[6] The EDO submitted that to be effective, it was imperative that the *Renewable Energy Act* operate in a policy context aimed at the reduction of greenhouse gas emissions.

Relationship with other Commonwealth and State energy policies

In 2002, the New South Wales Parliament passed the *Electricity Supply Amendment (Greenhouse Gas Emissions Reduction) Act 2002* (**the Greenhouse Act**). This Act is aimed at reducing the greenhouse gas emissions of electricity suppliers. The *Renewable Energy Act* is limited to encouraging the increase of renewable energy technologies. In contrast, the Greenhouse Act operates in a broader policy context by encouraging reduction of emissions in existing non-renewable power stations by improvement of technology and allowing for offsetting of emissions through carbon trading mechanisms. While the Greenhouse Act is not without flaws, the EDO submitted that this kind of broad-based approach to greenhouse emission reduction should be introduced by the Commonwealth government, allowing a national scheme of emission reduction and carbon trading.

Conclusion

In 2001, the Federal and State governments established the Council of Australian Governments Energy Market Review. The Parer Report, which detailed the findings of that review, was released in February 2003. One of the key recommendations of the Parer Report was that an economy wide emissions trading system replace the various Commonwealth and State emissions reduction programs. This was on the basis that there was significant overlap and duplication between the various schemes.

The Independent Panel appointed to review the MRET has not yet finalised its report to Parliament. However, it is

anticipated that the Panel's findings will be presented towards the end of 2003. It will be interesting to see how this Review will sit with the Parer Report and whether the Commonwealth Government will adopt the recommendations to abolish the MRET system.

The EDO and a number of conservation groups have expressed grave concerns about the effectiveness of a purely market based scheme to address greenhouse gas abatement and climate change problems. Accordingly, the stage is set for intense renewed debate on climate change issues when the MRET Review is published.

ENDNOTES

[1] See Australian EcoGeneration Association "Powering Australia's Future" (August 2002) and Next Energy "Putting Renewables on Target – a 10% Mandatory Renewable Energy Target" study commissioned by Greenpeace (2003)

[2] For example, Greenpeace, the Australian Conservation Foundation, World Wildlife Fund and Climate Action Network Australia

[3] Reg.8 *Renewable Energy (Electricity) Regulations 2001*

[4] See Next Energy Report p.13-15

[5] Australian EcoGeneration Association "RECs, Baselines and Industry Development" (2002)

[6] An example is the excise exemptions and funding provided to the Stuart Shale Oil project in Gladstone, Queensland. The projected emissions of this project, operating at full commercial capacity, will exceed the combined current emissions of all Australia's power generators.

EFIC Review

Continued from page 5

This clause requires borrowers to report on:

- compliance with measures agreed with the World Bank on the basis of findings in the environmental assessment;
- the status of mitigation measures; and
- the findings of monitoring programs.

Legal Enforceability

The Environment Policy is essentially a non-binding set of guidelines. Nothing in the *Export Finance and Insurance Corporation Act 1991* (Cth) (**EFIC Act**) requires that the environment be considered in the decision making of EFIC. Further, because the functions of EFIC fall within the categories of government decision making and funding, actions by EFIC are not caught by the EIA provisions of the EPBC Act (ss.524-524A EPBC Act). It is unacceptable that EFIC should be relatively free of environmental regulation. This goes against all other national and international legal trends in relation to government and corporate activities. Similarly, while export credit agencies are relatively free of regulation internationally, other international financial institutions like the World Bank have comparatively comprehensive environmental criteria.

It is essential that full environmental impact assessment of all projects that EFIC considers supporting is undertaken in Australia in accordance with Australian or best practice international standards. It is not sufficient to rely on environmental standards in the host country which are often weak, not enforced or undermined by issues such as corruption. Australian governmental corporations should set best practice standards for operations in any country.

In relation to legal enforceability, there are two main potential mechanisms for making environmental assessment of projects submitted to EFIC legally enforceable. These are discussed below.

Application of the EPBC Act

The activities of EFIC are not subject to Commonwealth EIA laws as they fall within an exemption for funding activities by government agencies.[5] Prior to the enactment of the EPBC Act, EFIC funding was subject to the *Environment Protection (Impact of Proposals) Act 1974*. The simplest way to have a legally binding environmental assessment regime would be to remove this exemption in relation to EFIC activities.

Because of the specific characteristics of the types of projects that EFIC fund, particularly in relation to their impact on development, local peoples and environments, additional criteria beyond those specified in the EPBC Act should be identified. These would include:

1. The World Bank Handbook should be taken into consideration when making a decision whether or not to give an environmental authority.
2. Additional criteria for consultation with affected populations in the host country. These criteria could be contained in a detailed schedule to the EPBC Regulation. The criteria needs to specify culturally appropriate consultation formats.
3. All EIAs should be available in electronic format to facilitate participation from the international community.
4. All EIAs should be available in the language of the host country, particularly that of affected populations.
5. The length of time provided for comment any of the various options of environmental impact assessment should be extended to take into account the potential for comments from the international community.

The benefits of using the EPBC process are as follows:

1. The EIA process is managed by the Department of Environment and Heritage, which has the expertise and experience to make full environmental assessments.

2. The process is subject to a high level of public participation and scrutiny. Advertisements for public comments must be published on both the Department of Environment and Heritage website and in national newspapers.
3. The EPBC Act provides for a number of different types of EIAs depending on the type of the project. This would be similarly appropriate in the EFIC context given the different categorisations of projects under the Environmental Policy.
4. Persons with interest in environmental issues at both a national and international level are far more likely to have regular access to the Department of Environment and Heritage website than the EFIC website. This would provide for broader consultation.
5. The legislation provides extended standing for community members to enforce the legal requirements of the EPBC Act.

Legal requirements under the EFIC Act

The second way to ensure that environmental and human rights considerations are adequately considered by EFIC is to make these considerations legal requirements under the EFIC Act. This method of legal regulation has a precedent in Canada where environmental assessment of projects supported by Export Development Canada is legally required by the *Export Development Act 1985*.

Section 3(2) of the EFIC Act contains matters that EFIC must have regard to in the performance of its functions. These should be amended to include the principles of ESD.

Part 5 of the EFIC Act relating to national interest transactions should include an additional section detailing considerations for the Minister. These would include:

1. the principles of ESD;
2. any EIA prepared in relation to the project;
3. any report received from the Department of Environment and Heritage during consultation;
4. all submissions received during the consultation phase; and
5. the World Bank Handbook.

An additional part could be inserted into the EFIC Act, or a regulation created, detailing environmental assessment requirements and considerations for all projects as outlined in the Environmental Policy and with the amendments suggested in this document.

The benefits of this approach would include:

1. the legislation could be tailored to take into account the specific sensitivities of projects supported by EFIC including cultural and development issues; and
2. the legislation could still be structured in such a way that environmental assessments are undertaken by the Department of Environment and Heritage.

ENDNOTES

[1] The EFIC Environmental Policy can be found on the EFIC website at www.efic.gov.au

[2] *Annual Reporting on Ecologically Sustainable Development*, Audit Report No.41 of 2002-2003

[3] The *World Bank Operational Manual* can be found at www.worldbank.org

[4] *World Bank Policy on Disclosure of Information* p.2 see http://www1.worldbank.org/operations/disclosure/documents/disclosurepolicy.pdf

[5] s.524A *Environment Protection and Biodiversity Conservation Act 1999*

Productivity Commission Inquiry

Continued from page 6

and that it is only through this process that the property rights of landholders can be equitably considered and strengthened where appropriate. Finally, it was suggested that there needs to be an improvement in communication on all sides, that complex structures be reduced, and that farmers be provided with the science and funding necessary for on ground conservation.

The submission also examined a legal analysis of claims for compensation; clarification of rights and responsibilities of landholders (including an analysis of catchment care and duty of care concepts); and explored other avenues for cost sharing in the transition from outdated regimes to the more relevant natural resource management laws and policy required today.

A number of other approaches were suggested that could be used in providing a policy mix to equitably achieve sustainable outcomes for the management of native vegetation and biodiversity. These included: better use of mapping, further use of property and conservation agreements, insurance and liability incentives, as well as further taxation measures. Finally, it was submitted that a cautious approach needs to be exercised with respect to transferable rights and the creation of markets, given the risk of entrenching present market distortions and perverse outcomes.

For a copy of the submission, please contact Rachel Walmsley at rachel.walmsley@edo.org.au.

Victorian Water Law

Continued from page 7

In describing the need for change, the EPA have identified the following deficiencies in the previous policy ('**the 1988 SEPP**'):

> · *The 1988 SEPP focuses largely on point source pollution;*
> · *Since 1988 a new era of working in partnerships has emerged where government, business and community members are working together to protect the environment which foreshadows a much larger role for catchment management authorities and regional coastal boards*[13]

The EPA states:

> *"Modern SEPPs need to be flexible and support other tools, plans, actions and processes aimed at protecting the environment, particularly regional tools."*[14]

Specifically in relation to the provision of environmental flows the Policy Impact Assessment ('**PIA**') had this to say:

> *"The draft SEPP recognises and supports the work of water authorities and NRE (now the Department of Sustainability and Environment) and the new responsibilities of CMAs in developing and implementing measures to provide environmental flows (for example through streamflow management plans and bulk entitlements)."*[15]

Far from identifying any particular inadequacies in the 1988 SEPP as regards environmental flow provision, the PIA refers to the efforts of other government agencies to reinforce what is occurring outside the EPA. The question which must be asked is, how will the changes improve the protection of aquatic ecosystems and river health? In the absence any particular criticism of the 1988 SEPP's environmental flow provisions we might assume that any major changes will amount to an improvement of the regulatory regime in Victoria.

The Language of the New SEPP

The new policy contains specific provisions which relate to environmental flows in clauses 40, 41, 42 and 45. Clause 40 targets water conservation generally, whilst clause 41 is specifically targeted at water allocation and environmental flows. Clause 42 relates to releases from water storages and clause 45 regulates groundwater management in accordance with State Environment Protection Policy (Groundwaters of Victoria). The provisions stress the need to protect beneficial uses, most notably the protection of aquatic ecosystems by providing water of adequate quality and quantity. However the prescriptiveness with which environmental flows must be provided differs markedly from the specific controls on releases from water storages and groundwater management.

Clause 45 requires groundwater managers to *ensure* that their activities do not pose an environmental risk to surface water beneficial uses, particularly through the excessive extraction of water and the subsequent prevention of surface water environmental flows.[16] Releases from water storages under clause 42 need to be managed to provide flows of a suitable quality and quantity and seasonal pattern to protect beneficial uses. To *ensure* this, relevant water authorities and other water operators need to assess if releases from water storages pose an environmental risk.[17] These provisions are considered to be a clear improvement on the 1988 SEPP which contained no specific provisions for groundwater management or releases from water storages. These controls establish a clear duty on water managers and the EPA is to be congratulated for this.

However these clear controls should be contrasted with clause 41 which is the primary provision devoted to ensuring environmental flows are provided to sustain aquatic ecosystems through the following mechanisms:

> (1) relevant protection agencies, particularly relevant water authorities, the Department of Sustainability and Environment and catchment management authorities need to work with other protection agencies, business and communities to develop and implement measures to provide environmental flows;
> (2) no increased allocation from any river, stream, lake, wetland or estuary should be approved unless it is consistent with the *Water Act 1989* and is subject to a process which is designed to provide environmental flows;
> (3) the Department of Sustainability and Environment will work with catchment management authorities, relevant water authorities and the Environment Protection Authority to develop a program to review and periodically independently audit the provision of environmental flows and their effectiveness in protecting beneficial uses.

Clause 41 is not prescriptive when compared to clauses 42 and 45. The requirement to *'work with'* other agencies, business and communities is incapable of any meaningful application or monitoring. For the purpose of assessing compliance with the SEPP it would be impossible to conclude that a protection agency has failed to work with another agency to provide environmental flows. Clause 41 appears to be in keeping with one of the stated objectives of the revised policy, being flexibility.[18]

The EPA are clearly determined to support the development of partnerships between government, water authorities, business, community and catchment management authorities.[19] Given the policy objectives of the Bracks Government, the NCC's previous concerns about Victoria's progress in providing environmental flows and the poor state of our rivers, additional flexibility is arguably not desirable.

Environmental Flows

Environmental flows were previously regulated by clause 36 of the 1988 SEPP. Clause 36 stated that management should provide adequate flow patterns to protect beneficial uses. This terminology places a clearer duty on water managers than does clause 41 of the revised SEPP. There is no requirement to '*work with'* other protection agencies, there is simply a requirement to ensure sufficient water is delivered. It appears that the legislative protection of environmental flows has taken a backward step.

The legal test of validity for the revised clause 41 is found in s.18 of th EP Act. The test is essentially whether the policy establishes the basis for maintaining environmental quality sufficient to protect existing and anticipated beneficial uses and whether it includes, in sufficiently clear terms, a program by which the stated environmental quality objectives are to be attained and maintained.[20] If clause 41 encapsulates the program for environmental flows, a fair description might suggest that it is insufficient to protect aquatic ecosystems. The term *'work with'* is arguably not clear enough to give an adequate basis for planning and licensing functions.

New Diversions

The revised clause 41 requires that no new allocation should be granted unless it is consistent with the *Water Act 1989* and subject to a process designed to provide environmental flows. In comparison with the 1988 requirements, this seems also to be a step backwards for river health. Under the revised SEPP there will be no assurance that new diversions will only be allowed where ecological systems are maintained. This is largely because of the uncertainties surrounding the quantity, quality and seasonality of flow required to sustain aquatic ecosystems. Just because a process to provide environmental flows is in place does not mean the results will be adequate.[21]

The previous clause 36 required guidelines to be developed to ensure all new diversions, abstractions and operations of impoundments and weirs will accommodate the water requirements for the maintenance of ecological systems and beneficial uses. The requirement to protect aquatic ecosystems is inherent in this terminology which applies to a wide cross-section of water managers. The revised clause 42 merely clarifies this position in respect of water storage operation.

Whereas the *Water Act* does not mention the term environmental flow or aquatic ecosystem and was enacted soon after the 1988 SEPP, it has somehow become a substitute for the EP Act and SEPP. This is a worrying example of the EPA's statutory independence being eroded and also risks contravening the requirements of s.18 of the EP Act.

Auditing Environmental Flows

The introduction of audits of environmental flows and their effectiveness in protecting beneficial uses is clearly something to welcome in the revised policy. Whilst evidence suggests that where environmental flows have been achieved as a result of the Bulk Entitlement conversion process they have rarely been adequate to protect aquatic ecosystems, the need for ongoing auditing of such flows is undisputed.[22] The science of river flow is continually evolving and there is much to be learnt.

However, a deliberate intent to reduce the clarity of the document is evident when the final clause 41 is compared to the draft. Whereas the draft simply stated that *"the EPA will audit the provision of environmental flows and their effectiveness and will provide guidance on addressing audit outcomes"*, the final version requires the Department of Sustainability and Environment to again *"work with CMAs, water authorities and the EPA to develop a program to review and periodically independently audit environmental flow provision and effectiveness."* The auditing of environmental flows suddenly seems to be further from reality. The EPA states that *"the costs of a water or catchment based audit ranges from $50 000 to $100 000. The EPA budget will support a limited number of audits but additional funding may be required where the community desires additional audits"*.[23] The Minister for Water has indicated that no additional funding will be provided to the EPA for this purpose.[24]

The 1988 SEPP approached the status quo in a slightly different manner. Although there is little evidence to suggest any progress has been made on this front, the 1988 SEPP required that existing allocations should be examined to determine the potential to provide appropriate flow regimes including flows of sufficient quality, quantity and seasonal pattern and adequate flows for lake replenishment, wetlands and estuarine salinity. There is nothing in the revised SEPP which foreshadows any program to reclaim water for the environment, despite the fact that CoAG requires that action including re-allocation be taken where environmental water requirements are not being met.[25]

Conclusion

The revised SEPP is a step backwards for environmental flows in Victoria. Whilst improvements have been made in relation to the operation of water storages and groundwater management, the only independent legislative standard linking the need to protect aquatic ecosystems with adequate environmental flows has been reduced to a standard more consistent with current managerial approaches, widely acknowledged to be inadequate. The revised SEPP does not promote a scientific basis for providing environmental flows and reinforces the status quo, where environmental flows are allocated after the rights of other water users have been satisfied. In short, it reflects the position of the Bracks Government in 2002:

> *"In making a decision on an appropriate environmental flow regime that either does not meet (or does not meet in the short term) the scientifically recommended one, it is Victoria's view that the community has agreed to accept a higher level of environmental risk and/or a certain level of environmental degradation as a consequence."*[26]

ENDNOTES

[1] 2001 Assessment of Governments' Progress in Implementing National Competition Policy and Related Reforms - Victoria Water Reform (www.ncc.gov.au).

[2] National Competition Council 2003 Assessment of Government's progress in Implementing National Competition Policy and Related Reforms – Victoria, p.3.35.

[3] 'State Environment Protection Policy (Waters of Victoria)', EPA Website. URL: www.epa.vic.gov.au/Water/EPA/wov.asp

[4] *Draft Policy and Policy Impact Assessment: State Environment Protection Policy (Waters of Victoria),* Environmental Protection Authority, November 2001, p.51.

[5] *Water for the Future: Labor's Plan To Secure Victoria's Future Water Needs*. 2002 p.2.

[6] Council of Australian Governments. For more information on the reforms and National Competition Policy visit (www.ncc.gov.au/water).

[7] NCC 2002 Assessment p.3.31.

[8] s. 13(1)(c) *Environment Protection Act* 1970 (Vic)

[9] s.16(1) *Environment Protection Act* 1970 (Vic)

[10] Phosphate Co-operative Company v EPA (1978) 18 ALR 210; 52 ALJR 148

[11] Beneficial uses are defined under the EP Act to include a use of the environment or any element or segment of the environment which is declared in State environment protection policy.

[12] Under clause 41 of the Waters of Victoria Policy the provision of environmental flows is directed at protection of aquatic ecosystems.

[13] *Draft Policy and Policy Impact Assessment*, Executive Summary, p.iv.

[14] *Draft Policy and Policy Impact Assessment,* p.51.

[15] *Draft Policy and Policy Impact Assessment*, p.95.

[16] Clause 45.

[17] Clause 42.

[18] *Draft Policy and Policy Impact Assessment*, p.51

[19] See *Draft Policy and Policy Impact Assessment* (in particular p.iv of the Executive Summary).

[20] This is part of the legal test for validity as outlined in s.18 Environment Protection Act.

[21] See below in relation to auditing of environmental flows and in particular, footnote 22.

[22] See for example, Inquiry into the Allocation of Water Resources. Environment & Natural Resources Committee. Parliament of Victoria. November 2001 Findings 2.4 (p.23) and 4.18 (p.129).

[23] *Draft Policy and Policy Impact Assessment,* p.69.

[24] "EPA Gets New Powers" M.Fyffe. The Age, June 6 2003.

[25] National Principles for the Provision of Water for Ecosystems, Principle 5.

[26] This position was expressed by the NCC in the 2002 assessment at p.3.34.

EDO Network News

New South Wales

EDO New South Wales has recently expanded its staff with the arrival of Scott King as Scientific Advisor. Scott was previously working for the Department of Infrastructure, Planning and Natural Resources.

We also welcome Jessica Simpson as the new locum solicitor. Jessica previously worked in planning and environmental law in private practice.

Western Australia

Kirstine Forestier and Vivian Markovich have commenced as project solicitors. They will be working on EDO WA's Natural Resource Management and Environmental Management Systems legal service projects.

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