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NSW Land and Environment Court to Hear First Climate Change Case in a Decade

Elisa Nichols, Solicitor, EDO New South Wales

The first Australian court case to focus on greenhouse gas emissions in over ten years will be heard in the New South Wales Land and Environment court later this year.

The Climate Action Network Australia (CANA) has joined the court case over the controversial Redbank II power plant, a proposed coal-fired power station in the Hunter Valley, near Singleton.

The proposed plant was rejected by the New South Wales Minister for Infrastructure and Planning in October 2003 on the grounds that:

- there were adverse impacts from greenhouse gas emissions;
- the proponent had been unable to secure appropriate greenhouse gas offset measures; and
- the proposed development was not in the public interest.

Now the company behind the proposal, National Power, has appealed the Government's decision in the Land and Environment Court.

CANA joined the case, and will be driving home the message that Redbank II should not be built. The Environmental Defender's Office will represent CANA in the case.

"Australia's recent droughts highlight the impact we can expect from climate change in Australia," said Phil Freeman, Legal Coordinator CANA.

"By initially rejecting Redbank 2, the NSW Government recognised that the most effective action we can take to curb climate change is to ensure that our electricity is not produced from greenhouse polluting coal fired power stations. It is important for the future of our planet that this decision is upheld."

In 1994, the EDO represented Greenpeace challenging the first Redbank development in the Land and Environment Court. This challenge was unsuccessful as the Court felt that the environmental benefits of utilising coal waste in the plant outweighed the environmental impacts of the high greenhouse emissions.

Since the first Redbank case was heard, the science relating to anthropogenic climate change has become much more certain. The predicted impacts of global temperature increases are devastating. For example, some estimates are suggesting that up to 90% of the Great Barrier Reef will suffer from bleaching by 2050.

Additionally, the legal and policy framework relating to reduction of greenhouse emissions has changed in New South Wales. In 2003, the *Electricity Supply Act 1995* was amended to introduce a benchmark scheme requiring electricity suppliers to reduce their greenhouse gas emissions

Accordingly, the context is very different for this appeal against the refusal of consent to the Redbank 2 power station development.

'Wilderness is Sacrosanct' EDO Wins Landmark Wilderness Case in the Blue Mountains



In a significant victory for wilderness areas, the State Government and a film company have withdrawn their appeal against a ruling of the New South Wales Land and Environment Court that prevented filming in the Grose Wilderness area of the Blue Mountains National Park.

The landmark decision of Justice Lloyd that the proposed commercial filming of scenes for the war movie "Stealth" in the area was unlawful, is a significant statement on the value of wilderness areas and the protection that should be afforded to them.

The Environmental Defender's Office NSW, acting on behalf of the Blue Mountains Conservation Society Inc, commenced proceedings late Tuesday afternoon seeking an urgent hearing to restrain the set up and filming of scenes for "Stealth".

Justice Lloyd accepted the Society's arguments that the proposed commercial filming in a wilderness area was completely antipathetic to the intended use of the land. His Honour concluded his judgement with the words, "declared wilderness areas are sacrosanct".

For more information, please visit:

- www.edo.org.au/edonsw/site/releases/releases.asp
- www.edo.org.au/edonsw/site/inthenews.asp
- www.edo.org.au/edonsw/site/casework_key.asp

Australia-USA Free Trade Agreement Continues to Raise Significant Environmental Concerns

Jeff Smith, Director, EDO NSW

Introduction

On 4 March 2004, the full text of the 900-page Australia-US Free Trade Agreement (the Agreement) was released and tabled in Parliament. At first blush, the Agreement is an improvement on the draft version vis-à-vis environmental issues.¹ For example, the agreement now contains a discrete Chapter on the Environment. Nevertheless, significant concerns remain and there is much to unravel in the detail.

Fundamentally, there remains a concern that the Agreement lays the foundation for pushing Australia towards the US regulatory model, despite the inclusion of a specific Environment Chapter. In particular, it would seem that many new environmental regulations may still be challenged as barriers to trade. Also, provisions that are designed to limit the powers of corporations to challenge government regulatory action in private forums – based on the robustness of the legal systems in Australia and the US – are seemingly shot through with qualifications.

The next couple of months will be crucial to the fate of the Agreement. Two Parliamentary Inquiries are examining the Agreement: a Senate Inquiry and an Inquiry by the Joint Standing Committee on Treaties. The Labor Party – crucial to the passage of enabling legislation for the Agreement – has vowed not to support the laws if certain concerns are not addressed.

What does the Agreement say about the environment?

There are at least four direct and principle references to the environment. First, the Preamble to the Agreement contains a commitment to:

IMPLEMENT this Agreement in a manner consistent with their commitment to high labour standards, sustainable development and environmental protection.

Second, the Investment Chapter contains a provision outlining the relationship between investment and the environment (Article 11.1). It states:

INVESTMENT AND ENVIRONMENT

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

Third, there is a separate Chapter on the environment. Chapter 19 deals with a number of matters including:

- the proper enforcement of environmental laws;
- procedural guarantees concerning fair, transparent and equitable proceedings, including rights of access to judicial and administrative forums;
- measures to enhance environmental performance, particularly voluntary, market-based measures;
- institutional arrangements;
- cooperation;
- consultations; and
- the relationship between the Agreement and environmental agreements where both parties are signatories to multilateral agreements.

Fourth, a Joint Committee charged with supervising the implementation of the Agreement is required to consider each Party's review of the environmental effects of the Agreement at its first meeting.

What concerns remain?

Space does not permit a detailed examination of the Agreement. However, the following points should be noted.

Compensation for expropriation

The Agreement retains a provision entitling a corporation to compensation in the event that an investment is expropriated or nationalized.² Compensation for expropriation offends the settled position under Australian law. The Agreement goes some way to reflecting the Australian position but stops short by allowing for compensation for expropriation in “rare circumstances”. The provision reads:

Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment, do not constitute indirect expropriations [Annexure 11-B 4(b)].

Such a provision does not provide the certainly needed for Governments to regulate in the public interest and, in fact, raises the possibility of expensive and long-running litigation on its proper interpretation.

Compensation regarding the enforcement of environmental regulations

Chapter 11, Article 11 contains a provision designed to protect the environment and the right of States to regulate these activities. It provides:

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

As argued previously, there are a number of problems with such a provision. These relate to enforceability (or lack thereof), and impracticality (it is difficult to envisage one party complaining if the other party sought to encourage investment). It also remains a live question as to whether the Environment

Chapter – and particularly, the agreement to negotiate a United States–Australia Joint Statement on Environmental Cooperation³ – provides adequate safeguards to protect the interests of the environment.

Barriers to trade: the ambit of the Agreement

Water, water related services,⁴ the regulation of genetically modified organisms (including labeling laws)⁵ and quarantine standards have not been excluded from the Agreement. This means that new regulations in these areas could be challenged as barriers to trade, being a potential market access restriction (raising the compensation issues noted above).

These provisions thus have the potential to undermine the ability of all Australian Governments (Federal, State, Local) to regulate an array of environmental services. It is imperative that Australia maintains control over the management of its own natural resources and in accordance with an evidence-based regulatory framework, not one based on the fear of potential compensation claims.

Dispute Settlement Provisions

a) Institutional arrangements

The Agreement sets up a complex mosaic of institutional arrangements and dispute provisions (Chapter 21). These appear to cede enormous control over the ongoing direction and interpretation of the Agreement to trade representatives from the parties, as well as dispute settlement panels with powers to bind the parties on pain of compensation and suspension of benefits. The efficacy of these arrangements and mechanisms – and their relationship to the established legal systems in each jurisdiction – are unclear and deserve detailed consideration.

b) The Appropriate Forum

The Agreement has moved away from draft provisions for investor-state dispute settlement. This is a welcome change and an affirmation of the fact that “both countries have robust, developed legal systems for resolving disputes between foreign investors and government”.⁶

However, once again, the Agreement does not *preclude* such means of settling disputes. Specifically, Article 16(1) of Chapter 11 allows that:

If a Party considers that there has been a change in circumstances affecting the settlement of disputes on matters within the scope of this Chapter and that, in light of such change, the Parties should consider allowing an investor of a Party to submit to arbitration with the other Party a claim regarding a matter within the scope of this Chapter, the Party may request consultations with the other Party on the subject, including the development of procedures that may be appropriate. Upon such a request, the Parties shall promptly enter into consultations with a view towards allowing such a claim and establishing such procedures.

This would open the way for disputes to be heard by an international arbitration tribunal, with no guarantee of open hearings or avenues for appeal.

Relationship between international instruments

Article 19.8 deals with the relationship between the Agreement and environmental agreements where both parties are signatories to multilateral agreements.

The Agreement is silent on the position where only one party or neither party has signed an international agreement. Future changes in the international arena are not considered. In this respect, it should be noted that the US has not yet ratified the *Convention on Biological Diversity 1992*, nor has either party ratified the *Kyoto Protocol 1997*.

In short, the Agreement may restrict Australia’s ability to make laws in these areas or, indeed, to sign such agreements at a future date.

ENDNOTES

To read the full text of the submission prepared by the Australian Network of Environmental Defender’s Offices, visit:

www.edo.org.au/edonsw/site/policy.asp

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The State and Access to Environmental Justice

From Liberal Democracy to Ecological Democracy

Dr Robin Eckersley, Senior Lecturer, Department of Political Science, University of Melbourne

1. Introduction

Ulrich Beck once quipped that '...poverty is hierarchical, while smog is democratic' (Beck 1995, 60). The environmental justice movement has challenged this claim by raising awareness about the skewed distribution of many ecological problems – locally, nationally and internationally. Privileged social classes and nations have managed to remain relatively remote (spatially, temporarily, epistemologically and technologically) from many of the ecological consequences of economic modernisation.

Toxic or nuclear waste dumps are not found in or near leafy middle class suburbs yet three out of five African Americans and Latino Americans live in communities with abandoned toxic waste sites (Bullard 2001). Many dirty industries have relocated from the developed to the developing world. Poor communities cannot afford insurance to protect them against climate related damaged likely to arise from global warming.

Yet environmental justice encompasses more than a concern about the unequal distribution of environmental goods and bads. The outdated socialist vision of 'a Jaguar for everyone' has its counterpart in the idea that environmental justice simply means toxic dumps for everyone. Such a limited view fails to interrogate how and why ecological risks are generated in the first place, whether they are necessary, who decides, and who should take responsibility.

Environmental justice also requires a critical conversation about how privileged social classes and nations might live more simply so that others may simply live. It may turn out that the world's ecosystems can only collectively sustain 'a bicycle for everyone'.

The political and legal challenge raised by the ecological crisis is, then, a double challenge: how to reduce ecological risks, and how to prevent the unfair externalisation and displacement of such risks, through space and time, onto innocent third parties.

Unfortunately, the legal system of the liberal democratic state too often delivers a somewhat stingy and contradictory form of environmental justice that fails to meet this double challenge. It provides only a limited range of participation rights and legal remedies that favour some classes over others at the same time as it continues to sponsor a range of economic practices that continue to generate environmental problems.

This paper seeks to account for these contradictions in terms of the historical development of the liberal democratic state. It also suggests that the green democratic state - based on a postliberal, ecological democracy - would be better placed to deliver environmental justice. Finally, a range of constitutional and democratic reforms are suggested that might offer a more secure basis for the delivery of environmental justice.

2. Access to environmental justice: an expanded understanding

It is now widely acknowledged that access to environmental justice means much more than having access to legal redress for environmental harm. Access to environmental justice extends beyond administrative and legal remedies to include inclusive political participation in environmental decision making (from policy making, law making, administration, enforcement and adjudication).¹

Building on the pioneering work of environmental justice advocates and scholars such as Robert Bullard (1990)

and David Schlosberg (1999) and it is possible to tease out at least five dimensions to this expanded notion of environmental justice:

1. Recognition of the expanded moral community that is affected by ecological risks (i.e. not just all citizens, but all peoples, future generations and nonhuman species)
2. Participation and critical deliberation by citizens and representatives of the larger community-at-risk in all environmental decision making.
3. Precaution to ensure the minimisation of risks in relation to the larger community
4. Fair distribution of those risks that are reflectively acceptable via democratic processes that includes the standpoint of differently situated parties
5. Redress and compensation for those parties who suffer the effects of ecological problems.

Of these five dimensions, participation and critical deliberation are central insofar as they give practical effect to recognition while also facilitating decisions that are conducive to precaution, fair distribution, redress and compensation. In this sense, the environmental justice (as an outcome) is something that we should expect to flow from environmental democracy (as a fair/inclusive procedure).

Environmental injustices occur when unaccountable social agents are allowed to pass on, in space and time, the environmental costs of their decisions to innocent third parties in circumstances when the affected parties (or their representatives) have no knowledge of, or say in, the risk generating decisions.

It follows that environmental justice is the absence of environmental victimization. Environmental justice is done when potential risk generators are called to account for their decisions before they are implemented. This means that all affected parties - or their representatives - are able to have their say in risk generating decisions.

Of course, it is often difficult and sometimes impossible for diffuse environmental interests and all affected parties to participate in environmental decision making. This makes it necessary for the state, as guardian of the environmental public interest, to provide the institutions, environmental rights and proxy forms of representation that can guarantee systematic consideration of the environmental public interest.

Without such a regulative framework, the longer term interests of the expanded moral community are likely to be overwhelmed by the present needs of more powerful social actors. At the same time, a vibrant civil society and a green public sphere are essential to maintain independent environmental public interest advocacy and critical deliberation over what will invariably remain highly contested environmental discourses.

The institution of the Environmental Defender's Office occupies a somewhat unique role in this regard, standing midway between the state and civil society, maintaining a degree of critical independence from the state while remaining dependent on it for its responsibilities, powers and funding.

Before suggesting how environmental democracy and public interest advocacy might be better institutionalized, it is helpful to understand why environmental public interest advocacy has traditionally been such an uphill battle.

3. The limitations of the liberal democratic state

Although liberal democratic states have demonstrated their superiority over authoritarian states in matters of environmental protection and environmental justice, liberal states still suffer from a range of democratic deficits when judged from the standpoint of environmental justice:

- Liberal democratic states formally represent only the citizens of territorially bounded nation states, rather than non-compatriots, future generations and nonhuman species
- Formal democratic rights are not substantively enjoyed by all citizens; political actors who are better resourced, better informed and strategically located vis-à-vis the political and legal system invariably have a distinct

advantage over socially and economically marginalized groups and classes in pressing their claims

- The diffuse notion of the public interest is always at a disadvantage when dealing with a small number of well-organised interest groups with a direct material or financial stake in policy outcomes.
- Political parties and political leaders typically make decisions within the temporal frame of electoral cycles rather long-range ecological horizons; the major political parties have historically represented business and labour interests (producer interests), rather than broader consumer and environmental interests
- Many environmental problems are complex and require specialized knowledge, which tends to disenfranchise the lay public from informed political debate
- Governments face a range of contradictory imperatives to promote economic development and also provide environmental welfare and protection
- Economic globalisation is compromising the political autonomy and steering capacity of states in relation to domestic environmental management

These various deficits may be attributed to many pressures, but in terms of the regulative ideals of the liberal democratic state it may be ultimately traced to a number of long standing tensions between liberalism and democracy.

These tensions are inscribed in the constitutional framework of the liberal democratic state and they are also reflected in the ways in which the common law and statutory law have developed to accommodate environmental problems.

Planting the Seed

Public Participation and the Environment Protection and Biodiversity Conservation Act



'EDO's new publication on the EPBC Act, 'Planting the Seed', is one of the best publications for the general community that I have seen on the Act.'

Chris McGrath
Barrister-at-Law

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Liberal values were born in an emerging market society in Europe that assumed an expanding resource base and a continually rising stock of wealth. Liberalism *preceded* modern democracy and created the world in which democracy had to adapt. The social forces that stood to gain the most from capitalism turned out to be the same social forces that were the key players in the early process of democratising the state.

Traditional liberal values also rested on a muscular individualism and an understanding of the selfinterested rational actor as 'natural' (which made it 'normal' for individuals to privatise gains and socialise costs); the sanctity of private property rights; a dualistic conception of humanity and nature that denied human dependency on the biological world; an instrumental posture towards nature that denied its intrinsic value; the notion that freedom can only be acquired through material plenitude; and the over-confident belief in the rational mastery of nature through further scientific and technological progress.

Liberalism not only preceded democracy in the modern age, it also provided its own rationale for the state (to protection the rights of individuals), an account of its formal structure (separation of powers, representative government), an account of the terms upon which coercive state power may be exercised (by means of democratic law enacted by the peoples' representatives), and an account of civil society (made up of autonomous individuals). Thus the liberal democratic state actively reproduced the social structures that underpinned liberal values (despite the proclaimed neutrality of the liberal state by liberal philosophers).

The core problem with the orthodox liberal construction of freedom is that it historically served to depoliticise decision making in those very domains that most typically generate diffuse yet cumulative ecological impacts and injustices. Decisions to invest, produce, and consume are essentially considered individual and private matters, unless

such decisions can be shown to cause direct and demonstrable harm to identifiable agents (which is never an easy matter).

The common law of contract and torts has traditionally provided only a limited repertoire of remedies for 'environmental problem displacement'. The onus is typically on those suffering ecological harm to *prove* damage, causation and dereliction of legal duty. Large scale, non-reducible ecological problems were typically disaggregated in terms of the particular affected individuals and corporations. The spectacular growth in environmental legislation in the latter half of the 20th century is testimony to the limitations of traditional common law in providing environmental justice.

Yet much of the new environmental legislation merely offered processes and procedures that sought to channel, mediate and 'balance' competing interests (with the upshot that vested corporate interests are made commensurable with those of 'vested' public interest advocates). Moreover liberal pluralism sees policy making merely as reconciling competing preferences', *as if* all preference holders are equally well placed to articulate and assert those preferences. Whereas fundamental liberal freedoms (including freedom of contract) are expressed in the idiom of rights and entrenched in the formal and/or informal constitutional structures of the liberal democratic state and therefore able to 'trump' competing welfare considerations, environmental concerns are ranked differently. Unlike liberal civil and political freedoms, environmental considerations are considered non-fundamental and therefore always negotiable. This expectation of trade-off and balance tends towards a 'short termism' in environmental policy-making, which is exacerbated by the limited time horizons of political parties and political leaders.

This utilitarian framework of cost-benefit analysis and trade-off has been inscribed into many of the major innovations in environmental law and administration that took place in the 1970s in most western countries, most notably the

processes of environmental, social and technology impact assessment (Mackay 1994). However, this framework merely serves to furnish 'advice' to the executive, which retains the discretion to accept or reject such advice. Such impact assessment typically applies only to significant development projects, yet many ecological problems arise from the cumulative effect of small-scale activities that undergo no such assessment. Moreover, the growth of environmental legislation must be understood against a long and deep historical background of respect for property rights. This is reflected in the general reluctance by legislatures and courts to impose any restrictions on property rights in the absence of clear proof of harm to others.

Of course, property owners now face a steadily growing range of legal restrictions to the way they use their property. For example, the emergence of rules of strict liability in relation to serious risks absolves plaintiffs of the obligation to establish fault (as distinct from damage). Environmental impact assessment procedures require developers of large-scale projects to show that proposed developments do not pose any serious risk to the environment. Indeed, it is now possible to track an emerging countervailing discourse of individual or collective environmental rights and entitlements that have increasingly served to qualify property rights. However, we have yet to see any wide-ranging ecological reconstruction of property rights at the level of liberal principle (Hayward 2000). Nonetheless, as Gary Varner has argued, the trajectory of development of environmental regulation is such that the day may come when we 'treat land as a public resource owned in common and held by individuals only in a stewardship (or trust) capacity' (Varner 1994, 43).

Once we historicise the particular *liberal* form in which the modern liberal democratic state and legal system have developed, it becomes possible to think about democracy and the state taking on other 'prefixes', in this case 'ecological'. This also makes it possible to rethink what role states might play and what form they might take in embodying and giving effect to new social and

environmental purposes and expanded ideals of democracy and justice. The quest for environmental justice may be understood as an attempt to adjust democracy to a world of more complex and intense economic, technological and ecological interdependence in recognition of the insight that ecological freedom and justice *for all* can only be fully realised under a form of governance that enables and, where necessary, enforces ecological responsibility.

4. Ecological democracy and the green democratic state

I argue that ecological democracy requires social deliberation and decision-making about long-term, generalisable or public goods and interests, rather than political bargaining among self-interested actors in defence of private goods and interests.

To summarise a much longer series of arguments about the relationship between deliberative democratic practice and ecological sustainability, such critical deliberation is more likely to drive decision making towards the protection of public interests because it requires the proponents of any argument to anticipate the effect of their argument upon differently situated others.

Whereas political bargaining narrows the negotiating agenda and favours the more powerful players in the bargaining process, public deliberation draws out public arguments that must be able to withstand critical questioning from multiple vantage points.

Environmental Defenders Offices (EDOs), through their public interest advocacy, have a crucial role to play in redressing the ‘democratic deficits’ of liberal democracy and bringing us closer to ecological democracy. Indeed the very *raison d’être* of EDOs may be seen as an encapsulation of the ideals of environmental democracy, which includes:

- representing an expanded moral constituency (‘speaking for nature’ and empowering marginal

social groups and classes)

- taking a long-range perspective
- improving the quality, flow, availability and accessibility of environmental information
- ensuring more transparency in policy-making and administration
- challenging the entrenched power of technocratic and corporate elites
- encouraging and enabling more citizen participation in economic and environmental planning and decision making
- bringing new issues and concerns on to the political agenda
- introducing new ways of framing and defining environmental policy problems and thereby challenging structures of authority that define, assess and manage risks.

Today, we live in a crossover phase where conventional liberal values exist alongside postliberal, ecological values. When ecological values finally become practically embodied in the constitutional framework and due processes of the democratic state then we can say that the liberal democracy has given way to ecological democracy and the liberal democratic state has given way to the green democratic state. By way of conclusion, let me provide a brief sketch of such a state.

At the broad level of constitutional purpose, the green democratic state would be outward looking rather than parochial or nationalistic, reflected in a preamble that includes a commitment not only to human rights but also a statement of responsibility to protect biodiversity and the life-support services of the Earth’s ecosystems and to uphold environmental rights and environmental justice.

In terms of substantive provisions one might envisage a charter of citizens’

environmental rights and responsibilities as complementing the standard list of civil and political rights. This additional cluster of substantive and procedural environmental rights and responsibilities, might include:²

- A right to environmental information (backed up by mandatory state of the environment reporting, and community right-to-know legislation in relation to pollutants and other toxic substances)
- A right to be informed of risk generating proposals
- A right to participate in the environmental impact assessment of new development and technology proposals
- A right to participate in the negotiation of environmental standards
- A right to remedies when environmental harm is suffered or threatened
- Third party litigation rights to enable NGOs and concerned citizens to ensure that public environmental laws, including minimum environmental standards, are being upheld³
- A responsibility on the part of all state decision makers and corporations to adopt a cautious approach to risk assessment (this might be expressed in terms of the constitutional entrenchment of the precautionary principle, which is enlarged to include future generations and nonhuman species as moral referents)
- A responsibility to avoid, or where necessary pay compensation for, causing any environmental harm to innocent third parties (this might be expressed in terms of the constitutional entrenchment of the polluter pays principle)

- The constitutional entrenchment of an independent public authority – a much bigger and better resourced Environmental Defenders Office or Commissioner for the Environment - charged with the responsibility of politically and legally representing public environmental interests, including the interests of nonhuman species and future generations

- Environmental legal aid for marginalised social groups and public interest advocates

- More provocatively, the provision of the constitutional authority for the holding of crossborder referenda and reciprocal representation in deliberative fora in relation to matters of transboundary or common environmental concern with citizens of other states in those circumstances where they may be seriously and jointly affected by proposed developments taking place within the state (the activation of this authority would require reciprocal agreements with other states)⁴

- In the case of federal states, clear and unequivocal legislative powers to protect the environment by the national or central government to prevent evasion of both domestic environmental responsibility (i.e., by means of buck passing to provincial units) and to facilitate the swift enactment and implementation of environmental treaties

These suggestions are merely illustrative rather than exhaustive of the possibilities for greening the state and the constitution. Clearly, the green democratic state is not a neutral state – but then again nor is the liberal democratic state. Both shape and reflect different social values and different conceptions of moral and political community.

5. Conclusion

The constitutional renovations I have sketched clearly build upon, rather than reject, the liberal and republican legacies of constitutional democracy, the rule of law, the separation of powers, and the accountability of the executive to parliament and the public. However, the additional range of substantive and procedural environmental rights and decision rules would secure more systematic consideration of a much wider environmental constituency than just the citizens of the nation-state. The green democratic state would become a facilitator of transboundary democracy and therefore increasingly ‘transnational’ in its orientation. The purpose of the green constitution would be to provide a structure of government that enables, and where necessary enforces, ecological responsibility on behalf of the broader community-at-risk.

However, the ultimate success of the green democratic state should be measured not simply by the appearance of constitutional renovations and democratic procedures of the kind that I have suggested. Rather it should be measured by the changes in the economy and civil society that it has helped to facilitate – when ecological rationality becomes as ‘natural’ as economic rationality. A critical (green) public sphere is absolutely crucial in facilitating this broad cultural shift towards ecological values and ecological citizenship, in the same way that the bourgeois public sphere facilitated the shift towards the widespread diffusion of liberal market values and liberal citizenship. Although presently small and under-resourced, Environmental Defenders Offices are crucial harbingers and facilitators of ecological democracy, which I have suggested is best means by which comprehensive environmental justice can be delivered.

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This paper was presented by Dr Robyn Eckersley at the EDO Western Australia *Access to Environmental Justice Conference*, on Friday, 20 February 2004.

To download an electronic version of this paper, and other papers presented at the conference, visit the EDO Western Australia website:

www.edo.org.au/edowa.

ENDNOTES

¹ President Clinton signed an Executive order in 1994 mandating that federal agencies incorporate environmental justice into their work and programs. The US EPA's definition of environmental justice is as follows: 'The fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations and policies. Fair treatment means that no group of people, including racial, ethnic, or socioeconomic groups should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies' (U. S. Environmental Protection Agency 1998; Bullard and Johnson 1998).

² A more detailed defence of ecological democracy and the green democratic state is provided in Eckersley (1998 and 2004).

³ The Ontario Bill of Rights (Bill 26, 1993) – which is partly inspired by the Michigan environmental bill of rights – creates a range of new procedural and litigation rights in relation to a specified range of environmentally significant decisions. The legislation also creates an Environmental Commissioner and an electronic registry of policies, acts and other instruments relating to the environment. Section 123 of the NSW Environmental Planning and Assessment Act 1979 serves as the pioneer in Australia in providing public third party litigation rights.

⁴ This is not as far-fetched as it might first appear. The Aarhus Convention 1991 (the UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters – adopted June 1998) provides transboundary rights of this kind. The Aarhus Convention has been described by UN Secretary General Kofi Annan as 'the most ambitious venture in the area of 'environmental democracy' so far undertaken under the auspices of the United Nations' (Extracted from UN/ECE web page, <http://www.unece.org/env/pp/>). The environmental information provisions require member states to provide regular State of the Environment Reporting along with more active information on environmental policies and programs on the internet not only to its own citizens but also to citizens of member states. The Convention also provides a right of participation in environmental policy-

making, including the determination of environmental standards and the making of development decisions to all citizens of member states. Significantly, Article 2.5 provides that participation is open to 'the public affected or likely to be affected by, or having an interest in, the environmental decision making; non-governmental organizations promoting environmental protection shall be deemed to have an interest'. These provisions thus extend participation not only to those 'expressly affected or interested' by the environmental issue but also to environmental NGOs who share a common concern about environmental matters. The notion of shared due process rights, encompassing access to information, the courts, and the right to participate in technology and environmental impact assessments, has also been provided by the UN/ECE Convention on Environmental Impact Assessment in a Transboundary Context (adopted 1991, entered into force on 10 September 1997).

Continued from Page 3.

ENDNOTES

¹ The Australian Network of Environmental Defenders Offices (ANEDO) had previously voiced a number of concerns about the possible environmental consequences flowing from a draft version of the Agreement: ANEDO submission December 2003. Around 200 submissions were made by industry, professional and non-government bodies, companies, unions and individuals.

² Article 11.7

³ Article 19.6(1).

⁴ Water related services that should be excluded from the AUSFTA include natural waterways (i.e. rivers and lakes); water collection, purification and distribution services and infrastructure; wastewater management, and recycling/reuse treatment to distribution services and infrastructure.

⁵ As noted in Cebon M (2003) Australian US Free Trade Agreement: Environmental Impact Assessment at www.ozprospect.org/pubs/FTA.pdf.

⁶ Investment Fact Sheet on the Department of Foreign Affairs and Trade website: see www.dfat.gov.au/trade/negotiations/us_fta/outcomes/index.html.

Federal Court Decision – False and Misleading Environmental Claims

A recent decision by the Federal Court sends a clear warning to businesses seeking to promote their products or services using false or misleading environmental claims.

The Australian Competition and Consumer Commission (ACCC) began legal proceedings against Sanyo Airconditioning Australia, alleging that it had made misleading claims about the environmental benefits of the gases used in its air conditioning units.

A promotional brochure for the air conditioners claimed the units were 'for a new ozone era - keeping the world green' with 'environmentally-friendly HFC R407C added'.

HFC R407C and HCFC refrigerant R22 are in fact powerful greenhouse gases which contribute to global warming, and do not benefit the environment.

The Federal Court found that the company had breached the Commonwealth *Trade Practices Act 1974* by making false, misleading and deceptive representations.

The court ordered that the company:

- be restrained from engaging in similar misleading conduct;
- implement a trade practices compliance program; and
- pay the ACCC's costs.

"This outcome sends a warning to businesses attempting to promote their products or services using misleading environmental claims", said ACCC Chairman, Mr Graeme Samuel.

"Environmental claims, including those in the form of statements, logos and images, must be accurate, clearly identify the environmental benefit to which the claim refers, and must be verifiable."

"In light of the court's orders, extra care should be taken by businesses intending to promote the environmental aspects of their products or services to accurately specify the environmental benefits claimed."

India's National Environmental Law Regime: Population, Poverty and Pollution Control

Elaine Johnson, Volunteer, EDO New South Wales

India is a unique nation in many ways, securing her place in the world as one of the most economically, culturally and ecologically diverse countries, as well as one of the largest, with a massive population today of over one billion people. However, combining overpopulation with the effects of widespread poverty and the rapid rate of industrialisation, massive strains on the India's natural resources are inevitable. In turn, environmental degradation has been responsible for exacerbation of conditions of poverty and threats to human health, as well as the resulting displacement of what is a conservative estimate of at least 16 million people over the past four decades in India.¹ These "environmental refugees",² due to the rapidly growing population in India, are often unsatisfactorily resettled and/or living in conditions of poor environmental quality.³ It is suggested here that population growth, poverty and the pollution control are inextricably linked, and that this is the crux of the problem faced by India today.⁴

In light of the displacement and poor environmental conditions of those who are affected by pollution, this paper explores the current and potential effectiveness of India's environmental law regime in addressing this most urgent problem and in achieving the objectives of sustainable development as defined in international environmental law.⁵ This article is essentially presented in two parts: the first provides an overview of the current principles, laws and institutional arrangements of India's environmental law regime with respect to pollution, whilst the second analyses this regime in terms of its effectiveness, in particular taking a critical look at the role of the judicial system in correcting environmental wrongs.

Overview of Principles, Laws and Institutional Arrangements

Before looking at specific pieces of legislation, it is important to have a brief understanding of the legislative context in which they are made. Legislative authority in India, as in Australia, is divided according to subject area between the Central government and the States through Article 246 of the Constitution.⁶ This article divides powers to legislate according to three lists: the Union List (powers of the Central government), the State List (powers of State governments) and the Concurrent List. All subject areas listed under the Concurrent List may be legislated for by either the States or the Centre, however should such laws come into conflict, Central legislation prevails. The Central government also retains any residual powers not listed⁷ and may legislate on matters in the State List if it is in the 'national interest' to do so.⁸ Further, the Central government may enact laws on State matters where the States concerned consent to Central legislation.⁹

The environment itself is not specifically allocated to either Central or State Legislatures, however, in terms of pollution control it is important to note that functions such as public health, sanitation, water supplies, agriculture, irrigation and fisheries come under the State List, whilst regulation of interstate rivers (to the extent that such regulation is "in the public interest")¹⁰ is found in Union List. In addition, Article 253 provides for implementation of international obligations, and has been used by Parliament to enact environmental protection and pollution control legislation such as the *Air (Prevention and Control of Pollution) Act* of 1981 and the *Environment (Protection) Act* of 1986 which were passed to implement decisions reached at the United Nations Conference on the Human Environment.¹¹

The Constitution

The Constitution of India¹² is one of the more progressive constitutions worldwide in the field of environmental protection in that it imposes duties on both individuals (Article 51A(g)) and the State (Article 48A) to protect the environment. The Articles contain similar provisions to "protect and improve" the environment, with specific mention of forests and wildlife, and with respect to individual responsibility, also to lakes, rivers and "compassion for living creatures".¹³ Article 48A is included under Part IV of the Constitution which contains 'directive principles' that are not enforceable, but nevertheless considered fundamental to governance of the country.¹⁴ Environmental statutes created under this directive principle are considered to be 'beneficent,' in that it is considered the duty of the court to give priority to environmental provisions in litigation concerning the environment,¹⁵ and Article 48A has indeed acted as a guide in some judicial decisions.¹⁶ In addition, some fundamental rights contained within the Constitution have been interpreted by the judiciary to constitute the right to a healthy environment, as discussed below.

Sectoral Legislation

The main national Acts dealing specifically with pollution control are the *Water (Prevention and Control of Pollution) Act* of 1974 (the Water Act), the *Water (Prevention and Control of Pollution) Cess Act* of 1977 (the Water Cess Act) and the *Air (Prevention and Control of Pollution) Act* of 1981 (the Air Act). Hazardous industry is regulated by the *Factories Act* of 1948, as amended, and the *Public Liability Insurance Act* of 1991 (PLIA) provides for immediate compensation for victims regarding hazardous substances, and obligates owners of such substances to take out liability insurance and to make a contribution to the Central government's

Environmental Relief Fund which has been created for the purpose of providing relief to such victims.¹⁷

Water pollution is a constitutional subject area governed by the States, however, the Water Act was made by Parliament pursuant to Article 252 of the Constitution, which permits Parliament to enact laws on subjects in the State List, with the consent of the State Legislatures concerned. The Water Act establishes pollution control boards (PCBs) at the State and Central levels, which are responsible for establishing and enforcing industrial effluent and sewage pollution standards. Originally, enforcement was carried out by way of prosecution and injunction only, however, the Act was amended in 1988¹⁸ giving PCBs powers to close down offending industrial plants, issue orders for the cancellation of their power and water supplies or impose stringent penalties.

The Water Cess Act was passed to assist in remuneration of the PCBs. It has the effect of creating economic incentives for reduced consumption and pollution of water, by way of a tax (cess) on local authorities and certain industries. In addition, the Act includes a 25 percent rebate on the tax for those who install effluent treatment equipment, thus encouraging positive investment in pollution control.

The Air Act utilises, where relevant, the administrative structure of the Water Act, thus all aspects of water and air pollution are controlled by a single board. The Act operates by administering permits for air pollution within designated areas that must comply with standards set by the Central board. Like the Water Act, prior to amendment (in 1987), offences were punishable only by inadequate penalties issued by the courts. Similar enforcement mechanisms to the Water Act are now in place within the Air Act, and both pieces of legislation follow a similar framework.¹⁹

Environment (Protection) Act of 1986
In 1984, one of the world's worst industrial accidents occurred in the Indian city of Bhopal, when a gas leak from a Union Carbide chemical plant instantly killed around 2,500 people, affecting over 100,000 more who are still

suffering the side-effects today.²⁰ This prompted the Indian government into legislative action, from which emerged the *Environment (Protection) Act of 1986 (EPA)*. The EPA is implemented through regulations and rules, and the Central government has a broad power to create further rules under the Act.²¹ Its scope is far-reaching in that its provisions and rules are intended to override *any other law*.²² The EPA deals with the control of both pollution and hazardous substances, amongst other subjects, and gives the Central authority broad power to "take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution."²³

Environmental pollution and hazardous substances are included in the EPA at Sections 7 and 8 respectively, but are regulated primarily through delegated legislation created by the Central Department of Environment, Forests and Wildlife.²⁴ Hazardous industry is regulated by a number of rules depending on the industry group, whilst pollution is regulated primarily by the *Environment (Protection) Rules of 1986 (EPR)* which prohibit emissions and effluent discharge into the environment over and above standards set by the EPR. Standards are set as either source, product or ambient standards, and include industry-specific pollution levels. In addition, the *Noise Pollution (Regulation and Control) Rules of 2000* and the *Environmental Impact Assessment Regulations of 1994* impact on the regulation of pollution at a national level in India.

The EPA introduced the concept of granting extensive powers to the Central authority to issue administrative orders directly, and to close a polluting industry if necessary by shutting down its power and water supplies, or any other service.²⁵ Environmental offenders face prison terms of up to five years and/or a fine of up to Rs. 100,000 (\$3,062) with an additional fine of up to Rs. 5000 (\$153) per day for each day the pollution continues.²⁶ An ultimate prison term of up to seven years may apply if the offence continues beyond a year of the date of conviction.²⁷ The EPA also includes strict liability provisions for any person who was "directly in charge of, and was

responsible to, the company for the conduct of the business of the company"²⁸ as well as the company itself. Defences to this are lack of knowledge or due diligence.²⁹ The *National Environment Appellate Authority Act of 1997 (NEAA)* provides for the establishment of an authority to which appeals against grants of environmental clearance for industrial activity may be heard. Only "aggrieved persons" have standing before the authority, and these include persons likely to be affected by the clearance and other persons "likely to be affected by such order and functioning in the field of the environment."³⁰

The Judiciary

The judiciary in India, in particular the Supreme Court, has proved to be one of the most influential institutions in the Indian environmental law regime. Although well known for its determination of a right to a healthy environment in India through its interpretation of Article 21 of the Constitution,³¹ which provides for the fundamental right to life and personal liberty,³² the Supreme Court has also delivered a number of other fundamental environmental norms, including:

- The 'polluter pays' principle, requiring the polluter to bear remedial, compensation and clean up-costs.³³
- The 'precautionary principle,' requiring that in the absence of scientific certainty as to the impact of an activity on the environment, authorities must err on the side of caution in regulation of that activity.³⁴
- Sustainable development objectives and intergenerational equity in government environmental decision-making.³⁵
- The State as the trustee of all natural resources for the use and enjoyment of the public (the 'public trust' doctrine).³⁶
- An obligation on enforcement agencies to strictly enforce environmental laws,³⁷ and the inability of the government to use non-availability of funds as a defence.³⁸

Public interest litigation and the role of the judiciary in enforcing environmental

laws takes place *outside* the statutory framework for pollution control, and is an exercise of the constitutional obligations of the court. The large number of cases it delivers on environmental justice serves to demonstrate a possible lack of performance by enforcement agencies responsible for pollution control, in particular, the PCBs established under the EPA and the Air and Water Acts.

The Effectiveness of India's Environmental Law Regime

“If the mere enactment of the laws relating to the protection of the environment was to ensure a clean and pollution free environment, then India would, perhaps, be the least polluted country in the world. But this is not so. There are stated to be over 200 Central and state statutes which have at least some concern with environment protection, either directly or indirectly. The plethora of such enactments has, unfortunately, not resulted in preventing environmental degradation which, on the contrary, has increased over the years.”³⁹

The preceding overview of India's environmental law regime suggests, at first glance, that pollution levels in India should be controlled to a relatively safe standard. The reality appears to be quite different. This section reviews the environmental law regime by exploring several aspects, such as the impact of judicial activism and the use of economic instruments. For this purpose, it is helpful to use the sustainable development objectives listed in Chapter 8 of Agenda 21 as a guide. The following discussion will focus on two such objectives:

1. Providing an effective legal and regulatory framework; and
2. Making effective use of economic instruments and market mechanisms.

Providing an Effective Legal and Regulatory Framework

As outlined in part one, amendments to pollution legislation (the Air and Water Acts and the EPA) during the late 1980's granted State agencies broad powers of enforcement and regulation, including the closure of industrial plants. This change has the effect of streamlining enforcement, giving it the potential to become a more effective regime. However, these powers are rarely used, primarily due to consideration by government agencies of the economic dislocation that will usually result from curtailing the operation of industry in a country which is currently endeavouring to increase development in pursuit of economic advancement. Lack of enforcement appears to be the greatest challenge faced by India in achieving effective pollution control and most likely reflects India's current economic policy, adopted in 1991, which strongly promotes industrialisation.⁴⁰ Importantly, during this time, allocations for pollution control were cut by the Central government by 35.5 percent over a five-years period⁴¹ suggesting a negative polarity exists between the policies of economic advancement and pollution control in India.

This view is one taken by members of the Supreme Court. For example, the paragraph extracted above is taken from the Supreme Court's judgement in *Indian Council for Enviro-Legal Action v Union of India*,⁴² where the court suggests that non-enforcement of anti-pollution laws is in fact worse than not enacting the law at all, and that where environmental degradation results, the effects are felt by generations to come. The judgement emphasises the magnitude of the affects non-enforcement has on India's current and future pollution problems, warning that if continued, this practice will eventually lead to a “lawless society.”⁴³

'Judicial Activism'

By far the most positive aspect of the

pollution law regime in India is its provisions relating to public interest litigation and the role of the public in enforcing pollution laws. Many cases have been brought before the courts since the 1970's by individuals, such as the leading activist advocate M.C. Mehta, and environmental non-government organisations, such as the Indian Council or Enviro-Legal Action. The relaxing of *locus standi* requirements for public interest cases was initiated by 'activist' judges in the Supreme Court, most notably Justice Krishna Iyer and Justice Bhagwati.⁴⁴ 'Judicial activism' in India arises from the Supreme Court's status as the apex court, which includes broad powers, even to the extent of invalidating constitutional amendments.⁴⁵

In 1975 the President of India declared a 'state of emergency'⁴⁶ which suspended the right of citizens to have their Constitutional rights, such as the right to free speech, enforced by the court. When the Emergency ended in 1977, the Supreme Court began its most active period to date. In particular, the introduction of legal aid services and 'representative standing'⁴⁷ changed the face of litigation in India, as well as introducing some of the most progressive concepts world-wide.⁴⁸ 'Representative standing' allows volunteers to represent the interests of the underprivileged in court, whilst 'citizen standing' extends standing in environmental cases to concerned citizens or environmental organisations for the purposes of ensuring that government regulatory agencies act in the public interest and do not abuse their powers, or misuse funds.⁴⁹ Judicial activism in the field of pollution control has been of vital importance when taking into consideration the large number of India's rural and urban poor who do not possess the relevant 'know-how' or economic means to initiate actions to improve environmental health. Another significant contribution to pollution prevention made by the judiciary is in relation to procedures, including the practice of accepting letters written to individual judges as constituting writ petitions, from which a court action is initiated.⁵⁰

Despite activist pro-environment and pro-community court rulings from the

Supreme Court, the level of non-compliance by industry is high, which brings us back to the problems faced in India of lack of enforcement of environmental laws (in both statute and the common law). A 1999 report by Dasgupta reveals that many factories subject to closure orders by the court were in fact still in operation in their original location, and those that had relocated had failed to install the 'cleaner' technologies that were required of them.⁵¹ In addition, the effects of increased public interest litigation are not all positive. For example, the broad scope of the doctrines of 'representative standing' and 'citizen standing' has been limited to some extent by confusion over the difference between the two,⁵² clogging of the courts with public interest litigation challenges its effectiveness, and community groups and individuals are often faced with the difficulties of being placed with the evidentiary burden. With respect to this last concern, the court, again showing innovation, has turned the burden of proof around to the developer or industrialist in some cases using an interpretation of the precautionary principle.⁵³

Judicial 'Excessivism'?

In response to an inactive executive and its agencies, the judiciary has gone so far as embarking on what has been described as "creeping jurisdiction,"⁵⁴ whereby the court has taken into account policy considerations such as balancing the need for development with environmental conservation, as well as issuing directions to the Central Government requiring the establishment of specialist authorities under the EPA.⁵⁵ The effects of "creeping jurisdiction", like those of judicial activism, have their drawbacks. For example, in 1998 the Supreme Court issued an order mandating the conversion of a fleet of diesel-powered buses in Delhi to natural gas.⁵⁶ This order went over and above the powers of the regulatory authorities, meeting stiff resistance from government agencies who will inevitably be required to implement the provisions of the order. The result is that to date little has been achieved by way of giving effect to the court order, despite a further court order last year requesting action and rejecting government arguments regarding the

science and practicality of the proposal. Judicial activism in this context has been described by one commentator on the subject as judicial "excessivism"⁵⁷ that overlooks some of the more basic needs in India such as increased funding of the PCBs in order for them to carry out enforcement effectively. More positively, however, it should be noted that judgements such as these tend to raise public awareness of the issues involved and may therefore have the effect of increasing pressure on government to take a more active role in pollution prevention.

Making Effective Use of Economic Instruments

Agenda 21 requests implementation of concepts such as the 'polluter pays' and the more recent 'natural-resource-user-pays' principles.⁵⁸ These principles exist in theory in India, but approaches such as pollution charges and fees, as well as other economic instruments, have to date remained largely untried.⁵⁹ The legislation does provide for some such initiatives. For example the Water Cess Act, through its tax on polluting industries and consumption, provides an economic incentive that reflects the rationale behind the 'polluter pays' principle, whilst the EPA provides for 'Ecomarks' to denote products that are produced in an environmentally friendly manner. However, the impact these instruments are having on pollution control in India at present appears to be limited, given that two and a half decades after the enactment of both of these pieces of legislation, 90 percent of water in 241 large cities is polluted, 54 percent of the urban population and 97 of the rural population have *no* sanitation facilities,⁶⁰ and no products in India contain the 'Ecomark' label.⁶¹

The economic approach to pollution control, for example through the creation of new markets, holds great potential in complementing India's command and control regulatory regime, which appears to have been ineffective to date, due to inadequate penalties, bribes to regulatory authorities and government agency inaction. The economic approach is suggested by Agenda 21 as being essential in the achievement of sustainable development, and is seen by some commentators as India's best

chance at improving environmental conditions.⁶²

Conclusion

A study of India's legal regime demonstrates that, despite poor enforcement of legal standards and policy objectives, the regime has the potential to be highly effective, particularly given the level of public involvement permitted through the courts. It seems that both the judiciary and the public are more than ready to attack the causes of pollution that result in extreme devastation to human health and quality of life in India, however, as is most likely the case in many countries striving for economic advancement, the economic considerations of the State and Central governments at present override their commitment to the environmental objectives and principles they have created.

India's potential as a cleaner nation is great, however, due to its rapidly expanding population and current standard of living of its poor, the fear remains that if environmental degradation and the effects and causes of pollution are not addressed by the State simultaneously with its pursuit of economic goals, the country will be facing severe problems in the future, that far exceed those it faces today. In order to curb incidents of pollution and the resulting trend towards an increase in "environmental refugees", the governments of India clearly need to commit to the principle of sustainable development itself, to effectively implement "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."⁶³

ENDNOTES

¹ World Bank, Resettlement and Development 2/11 (1994). Cited in Divan S. and Rosencranz A, *Environmental Law and Policy in India*, 2nd ed., Oxford University Press, New Delhi, 2001 [hereinafter Divan and Rosencranz] at 51.

² This is a term that is gaining growing acceptance as describing those who are displaced due to unsatisfactory environmental conditions, or the

effects of large development projects, such as the Narmada Dam project in India: see, for example, Jeanhee Hong, "Refugees of the 21st Century: Environmental Injustice" 10 *Cornell J. L. & Pub. Pol'y* 323

³ No more than a quarter of those relocated in India were satisfactorily relocated: Divan and Rosencranz, *supra* note 2 at 51

⁴ Dr Vijay Chitnis, *Environmental Protection and the Law*, 1995, V. L. Gurav, Bombay, India at 9

⁵ See *Agenda 21*, A/CONF. 151/26 (1991) <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm> (accessed 13/11/03).

⁶ Article 51 of the Australian Constitution sets out the powers of the Commonwealth. Residual powers are held by the States.

⁷ Constitution of India, <http://parliamentofindia.nic.in/const/const.htm> (accessed 13/11/03) Adopted 26 November 1949 [hereinafter Constitution], Article 248.

⁸ *ibid*, Article 249.

⁹ *ibid*, Article 252.

¹⁰ *ibid*, the Union List (List 1) in the Seventh Schedule at Item 56. This item concerns the regulation and development of interstate rivers and river valleys to the extent that it is declared by the Parliament by law to be "expedient in the public interest."

¹¹ The United Nations Conference on the Human Environment, Stockholm 1972 (the Stockholm Conference).

¹² Constitution, *supra* note 8

¹³ These articles were incorporated into the Constitution by the *Constitution (Forty-Second Amendment) Act* of 1976.

¹⁴ Constitution, *supra* note 8 Article 37

¹⁵ Divan and Rosencranz, *supra* note 2 at 59.

¹⁶ See *Sachidanand Pandey v State of West Bengal* AIR 1987 SC 1109, 1114-15 where the court stated that "whenever a problem of ecology is brought before the Court, the Court is bound to bear in mind Art. 48A of the Constitution..."

¹⁷ Compensation payouts under the PLIA are capped at Rs. 25,000 (about AU\$764) and Rs. 6000 (\$183) for injury/death and property damage respectively. Potential liability of an insurer is capped at Rs. 450 million

(\$13.7m). Payments received under this Act do not preclude further actions under another law, which most likely refers to claims brought under the *National Environment Tribunal Act* of 1995 which enables the Central government to establish a tribunal to consider applications for compensation resulting from hazardous substance accidents or 'handling' and imposes a bar on such claims being brought through any other civil court.

¹⁸ As of 2001, this amendment had not been adopted by the State of Gujarat: Divan and Rosencranz, *supra* note 8 at 61.

¹⁹ Information presented here on the Water Act, Water Cess Act and the Air Act was sourced from Divan and Rosencranz, *supra* note 8.

²⁰ Hunter D, Salzman J, Zaelke D, *International Environmental Law and Policy*, 2nd ed., Foundation Press, New York, 2002 at 1466

²¹ *Environment (Protection) Act* of 1986 [hereinafter the EPA], Sections 6 and 25. Section 6 relates more specifically to powers to make rules concerning pollution.

²² EPA, *ibid*, Section 24 states that the Act and its rules and order "shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act."

²³ *Ibid*, Section 3(1)

²⁴ Pollution is controlled by the Environment (Protection) Rules of 1986 and the Noise Pollution (Regulation and Control) Rules of 2000. Hazardous substances are controlled by the Hazardous Wastes (Management and Handling) Rules of 1989, the Manufacture, Storage and Import of Hazardous Chemicals Rules of 1989, the Central Motor Vehicle Rules of 1989, the Bio-Medical Waste (Management and Handling) Rules of 1998 and the Chemical Accidents (Emergency, Planning, Preparedness and Response) Rule of 1996.

²⁵ EPA, *supra* note 22 Section 5. These provisions also in the Air and Water Acts.

²⁶ EPA, *ibid* Section 15(1)

²⁷ EPA, *ibid* Section 15(2)

²⁸ EPA, *ibid* Section 16(1)

²⁹ EPA, *ibid* Section 16(1)

³⁰ *National Environment Appellate Authority Act* of 1997, Section 11.

³¹ *Constitution of India*, *supra* note 8, Article 21 states that "No person shall be deprived of his life or personal liberty except according to procedure established by law."

³² *Subhash Kumar v State of Bihar* AIR 1991 SC 420, 424; *M.C. Mehta v Union of India (Delhi Stone Crushing Case)* 1992 (3) SCC 256, 257; and *Virender Gaur v State of Haryana* 1995 (2) SCC 577, 581. Cited in Divan and Rosencranz, *supra* note 2 at 42.

³³ *Indian Council for Enviro-Legal Action v Union of India (Bichhri Case)* AIR 1996 SC 1446, 1446; *Vellore Citizens' Welfare Forum v Union of India*, AIR 1996 SC 2715, 2721; and *S. Jagannath v Union of India (Shrimp Culture Case)* AIR 1997 SC 811, 846, 850. Cited in Divan and Rosencranz at 42.

³⁴ *Vellore Citizens' Welfare Forum v Union of India* AIR 1996 SC 2715, 2721; *S. Jagannath v Union of India (Shrimp Culture Case)* AIR 1997 SC 811, 846; and *A.P. Pollution Control Board v Prof. M.V. Nayadu* AIR 1999 SC 812, 819. Cited in Divan and Rosencranz, *supra* note 2 at 42.

³⁵ *State of Himachal Pradesh v Ganesh Wood Products* AIR 1996 SC 149, 159, 163. Cited in Divan and Rosencranz, *supra* note 2 at 42.

³⁶ *M.C. Mehta v Kamal Nath (Span Motels Case)* 1997 (1) SCC 388; and *M.I. Builders v Radhey Shyam Sahu* AIR 1999 SC 2468, 2498. Cited in Divan and Rosencranz, *supra* note 2 at 42.

³⁷ *Indian Council for Enviro-Legal Action v Union of India (CRZ Notification Case)* 1996 (5) SCC 281, 294, 301.

³⁸ *Dr. B.L. Wadehra v Union of India (Delhi Garbage Case)* AIR 1996 SC 2969, 2976.

³⁹ *Indian Council for Enviro-Legal Action v Union of India*, 1996 (5) SCC 281

⁴⁰ See Divan and Rosencranz, *supra* note 2 at 37.

⁴¹ Allocations were cut from 1994 to 1999. Rosencranz, Pandian and Campbell, "Economic Approaches for a Green India", 1 (1999) in Divan and Rosencranz, *supra* note 2 at 38.

⁴² *Ibid*

⁴³ *Ibid*

⁴⁴ Divan and Rosencranz, *supra* note 2 at 134.

⁴⁵ See Sathe S. P., "Judicial Activism: The Indian Experience" 6 *Wash. U. J.L. & Pol'y* 29 (2001) for an in depth analysis of judicial activism in India.

⁴⁶ The state of emergency was declared under Article 352 of the Constitution, and rights to appeal to courts regarding fundamental rights were suspended under Article 359.

⁴⁷ This term was developed by Cunningham, Public Interest Litigation In Indian Supreme Court: A Study in the Light of American Experience, 29 *J.I.L.I.* 494 (1987) at 498. Cited in Divan and Rosencranz, *supra* note 2 at 135-136. See also Quincho R., *Watching the Trees Grow: New Perspectives on Standing to Sue*, IUCN CEL Philippine Group, 1995 in Craig *et al* at 687.

⁴⁸ For example, standing in Australia is expanded in environmental public interest cases, however, is not as wide as the 'representative standing' provisions of the Indian judicial system.

⁴⁹ The principle of citizen standing was formally recognised in *S.P. Gupta v Union of India (Judges' Transfer Case)* AIR 1982 SC 149, 194 per Justice Bhagwati.

⁵⁰ Divan and Rosencranz, at 142. See for example *Rural Litigation and Entitlement Kendra, Dehra Dun v State of Uttar Pradesh (Dahradun Quarrying Case)* AIR 1988 SC 2187.

⁵¹ Nandini Dasgupta, "Environmental Enforcement and Small Industries in India: Reworking the Problem in the Poverty Context" 28(5) *World Development* 945 at 955-957.

⁵² Divan and Rosencranz, *supra* note 2 at 140.

⁵³ Divan and Rosencranz, *ibid* at 144. Cases in which this has occurred include *Vellore Citizens' Welfare Forum v Union of India*, AIR 1996 SC 2715 and *M.C. Mehta v Union of India (Taj Trapezium Case)* AIR 1997 SC 734.

⁵⁴ U. Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 29 *The Review (International Commission of Jurists)* 37, 42 (December 1982). Cited in Divan and Rosencranz, *ibid* at 147.

⁵⁵ *Vellore Citizens' Welfare Forum v Union of India* AIR 1996 SC 2715. See

Shanmuganathan D. and Warren L. M., "Status of Sustainable Development as a Principle of National and International Law: The Indian Approach. *Vellore Citizens' Forum v Union of India & others (Supreme Court of India, 28 August 1996)*" 2 *Journal of Environmental Law* 387 (1997) for a comprehensive discussion of the issues raised in this case.

⁵⁶ *M.C. Mehta v Union of India* (July 28, 1998) (No. 13029/1985), available at <http://www.elaw.org/resources/text.asp?ID=1051> Discussed in Armin Rosencranz and Michael Jackson, "The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power" 28 *Colum. J. Envtl. L.* 223 (2003).

⁵⁷ Sathe *supra* note 55 at 43. S.P. Sathe is currently the director of the Institute of Advanced Legal Studies, Pune, India.

⁵⁸ Agenda 21, *supra* note 6 para 8.28

⁵⁹ Divan and Rosencranz *supra* note 2 at 40.

⁶⁰ Rosencranz, Pandian and Campbell, "Economic Approaches for a Green India", 1 (1999) in Divan and Rosencranz, *supra* note 2 at 38.

⁶¹ Divan and Rosencranz, *ibid* at 71.

⁶² Divan and Rosencranz, *ibid* at 71.

⁶³ World Commission on Environment and Development (WCED) (1987), *Our Common Future*, Oxford University Press, Oxford at 43

EDO Network News

EDO North Queensland

EDO North Queensland farewells solicitor Stephen Hall. Steve has decided to return to his home state of Tasmania.

EDO North Queensland will miss Steve and his expertise in environmental litigation. We wish him all the best in his new endeavours.

EDO Queensland

Nathan Dam Appeal

On 19 May 2004 the Full Federal Court in Brisbane heard the appeal by the Commonwealth Minister for the Environment and Heritage against the decision of Justice Susan Kiefel in the Nathan Dam case.

The Minister's Appeal Notice argues that the test for the breadth of environmental assessment under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) should be when adverse impacts are "inherently or inextricably involved" in a proposed action, rather than, as Justice Kiefel held, that the enquiry should be "wide ranging" and "consider the whole, cumulated and continuing effect" of the proposed action (i.e. including taking in account the actions of others). In other words,

the Minister is arguing for a narrower interpretation of the Act.

Prior to the decision by Justice Kiefel last year, the State of Queensland was informed of the case but chose not to participate, leaving the Commonwealth Minister to oppose the case brought by the Queensland Conservation Council and WWF Australia. However, the State of Queensland was granted leave to intervene in the appeal and also presented its arguments at the hearing.

The decision by the State of Queensland to intervene in this case underlines the precedent value of the case for interpretation of environmental impact assessment legislation at both Commonwealth and State levels.

EDO Western Australia

EDO Western Australia is pleased to announce the appointment of Katrina Strong as Coordinator (Special Projects and Promotions).

Katrina has a background in information technology and film production. She will be responsible for promoting the EDO, organising events and fundraising.

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