COLIN BIGGERS & PAISLEY LAWYERS

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PLANNING GOVERNMENT INFRASTRUCTURE AND ENVIRONMENT GROUP

Trusted Partners, Strategic Thinkers, Legal and Policy Designers and Tacticians

COLIN BIGGERS & PAISLEY LAWYERS

Our Planning Government Infrastructure and Environment group

Colin Biggers & Paisley's Planning Government Infrastructure and Environment group is the trusted partner of public and private sector entities, for whom we are the legal and policy designers of strategic and tactical solutions to exceptionally challenging problems, in our chosen fields of planning, government, infrastructure and environment.

Our group has developed a longstanding reputation for continual and exceptional performance in the planning, designing and execution of legal and policy solutions for large development and infrastructure projects in Australia, including new cities, towns and communities.

We are passionate about planning, government, infrastructure and environment issues, and we pride ourselves on acting for both the private and public sectors, including private development corporations, listed development corporations, other non-public sector entities and a wide range of State and local government entities.

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Our Planning Government Infrastructure and Environment group is recognised for our specialist expertise and experience:

Planning – Strategic and tactical planning of development issues and processes for projects, in particular major residential communities, retail, commercial and industrial developments.

Government – In-depth understanding of government legislation, policy and processes.

Infrastructure – Specialist expertise and experience in infrastructure planning, funding and delivery.

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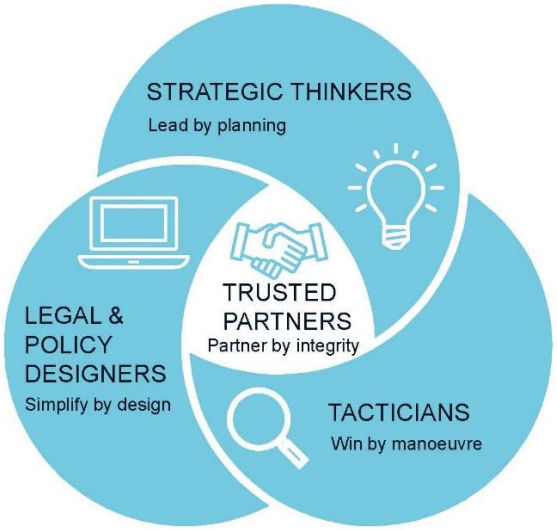

Lead, Simplify and Win with Integrity

Our Team of Teams and Credo

Our group practices collectively as an *East Coast Team of Teams*, which is known for its *Trusted Partners*, *Strategic Thinkers*, *Legal and Policy Designers* and *Tacticians*.

Our Credo is to *Lead, Simplify and Win with Integrity*, and we practice personally so as to *partner by integrity*, *lead by planning*, *simplify by design* and *win by manoeuvre*.

We believe that continual and exceptional performance is the foundation of success, and we apply our integrity and character, critical reasoning and technical process of strategy to ensure an unparalleled level of planning, design and manoeuvre to achieve that success.

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A review: Consideration of the increasing level of legislative and policy changes in Australia

Ian Wright

This article discusses legislative and policy reviews and their individual impacts

March 1994

Introduction

In past issues I have commented on the increasing level of legislative and policy review that is taking place in Australia. The extent of the review is so extensive that it is almost impossible to keep abreast of the changes let alone try to summarise the impacts of individual reviews. This month's issues attempt to do both. If any reader requires any additional information to that presented here please do not hesitate to contact me through the Editor. A discussion of the Planning and Development Discussion paper has been left to the next issue.

Economic instruments

Increasingly policy makers and governments will be looking towards market based instruments to create incentives for better management of the environment. This is one of the policy objectives underpinning the Nature Conservation Act and the proposed Environment Protection Legislation. An interesting use of such economic instruments is occurring at the international level where some developing countries have offered to preserve natural resources in exchange for the partial reduction of the large commercial commitments they accumulated with commercial banks during the 1970s. Known as debt for nature swaps the scheme not only allows the costs associated with environmental decay to be internalised but allows industrialised countries to contribute to the conservation of the ecosystem. For example, a private bank through the secondary market sells debt notes at a face value to an international non-government organisation that buys the debt at a discount with money acquired from donor countries. These notes are then transferred to a local institution that exchanges them at the Central Bank for domestic currency. The result is that the non-government organisation gets the resources and the government reduces its foreign indebtedness with a gain equivalent to a discount. Already twenty debt for nature swaps with a total face value of $160 million have been completed in Bolivia, Costa Rica, Ecuador, Brazil and Mexico.

Recent publications

Standards Australia has recently revised AS1940 the Australian Standard for the Storage and Handling of Flammable and Combustible Liquids (AS1940-1993). This standard is called up by the Flammable and Combustible Regulations made pursuant to the *Local Government Act 1993*. Copies of the new standard may be purchased from the office of Standards Australia.

The Victorian Environmental Protection Authority has also released the following publications:

- A Question of Trust - Accredited Licensee Concept: A Discussion Paper;
- Enforcement Policy;
- Waste Minimisation Assessment and Opportunities for Industry: A Practical Guide to Cleaner Production; and
- Waste Transport Guide: The Transport and Disposal of Empty Drums Which Have Contained Hazardous Compounds.

Contaminated Land Act review

The Department of Environment and Heritage is currently engaged in a review of the *Contaminated Land Act 1991*. Draft amendments to the Act have been distributed to particular stakeholder groups for discussion prior to release to the public for comment. It is hoped that the amendments will at least deal with some of the apparent inconsistencies that currently exist between the list of prescribed land specified in the Local Government (Planning and Environment) Regulations and the list of prescribed purposes under the Contaminated Land Regulations. The Department of Environment and Heritage should also examine the practical impact of the *Contaminated Land Act 1991* on the local authority planning approval processes particularly having regard to the draconian liability provisions in respect of local authorities that are currently contained in the legislation.

The Hazardous Materials Policy Coordinating Committee formed by the New South Wales Government and chaired by the Department of Planning has released a draft document entitled "*Guidelines for Contaminated Water Retention Treatment Systems*". The guidelines' main objective is to ensure that the likelihood of a significant adverse impact on the environment from contaminated water discharges is acceptably low. The guidelines' procedures include a risk assessment for contaminated water storage and treatment applying to

chemical and petrochemical manufacturers, contaminated sites, demolition and construction sites, food manufacturers, electro-plating works, service stations, waste storage, transfer and treatment facilities. The guidelines will be of interest to Queensland practitioners especially having regard to the review of the *Queensland Contaminated Land Act* which is currently under way.

National water quality strategy

Commonwealth, State and Territory governments are developing a national water quality management strategy. The policy, framework and guidelines are almost complete after more than 12 months of public consultation. The Marine and Terrestrial Water Quality Guidelines produced by the Australia and New Zealand Environment and Conservation Council in conjunction with the National Water Quality Management Strategy will be brought up in the new Environment Protection Policy to be proclaimed under the new Environment Protection Legislation when it passes sometime in 1994.

Management plans

Draft management plans have been prepared by the Department of Environment and Heritage and the Great Barrier Reef Marine Park Authority in respect of the Whitsunday National and Marine Parks. This complements the management plans already prepared by the Department of Environment and Heritage in respect of Moreton Bay and the Pumicestone Passage. The Whitsundays Management Plan proposes strategies for future management on matters such as access, visitor use and facilities, protection of natural and cultural values, control of introduced plants and animals, fire protection, fishing and collecting, pollution research and monitoring. A draft management plan has also been recently prepared by the Wet Tropics Management Authority in respect of the Wet Tropics area.

Brisbane River

The Queensland government has approved the creation of the Brisbane River Management Group which will consist of a five member policy council, a 10 member management committee, a community consultation and education working group, other temporary working groups and a full-time secretariat. The mission statement of the Brisbane River Management Group is to facilitate ecologically sustainable development in the Brisbane River catchment through coordinated management. A public discussion paper has been prepared for comment.

Water pricing

The Queensland government has initiated a review of the water pricing policy for water supplied from State owned infrastructure. An options paper entitled "*What Price ... Water*" has been produced. The six major issues identified for discussion include:

- determining a basis for settling water discharges;
- determining the level of water charges;
- variation of charges between users;
- determining the structure of water charges or tariffs;
- enhancing the transferability and security of water entitlements; and
- allocating uncommitted water.

Several policy options are presented for discussion in respect of each of these issues.

State Water Conservation Policy

The Queensland Department of Primary Industries has also recently released a discussion paper entitled "*State Water Conservation Strategy*". The Strategy sets out a framework and ongoing mechanism for planning, developing and managing Queensland's water resources. It examines the importance of water, the existing legislative framework, the available water resources, the condition of land, and water resources on a regional basis. Strategies have been spelled out in respect of sustainable water management, the management of infrastructure, the promotion of economic growth and social issues.

Commonwealth EIA review

The Commonwealth government's environmental impact assessment (**EIA**) processes are currently under review by the Commonwealth Environment Protection Agency (**CEPA**) and the Administrative Review Council (**ARC**). CEPA has released an initial discussion paper inviting input from all participants in EIA.

The paper entitled "*Public Review of the Commonwealth Impact Assessment Process*" aims to maximise the effectiveness and efficiency of the Commonwealth's EIA system. The ARC which is an independent body responsible for monitoring the Commonwealth administrative law system has released a discussion paper entitled "*Review of Commonwealth Environment Impact Assessment Decisions*". The discussion paper invites public comment on the ARC's principles for dealing with environmental decision making processes.

Cleaner production

The Commonwealth Environmental Protection Agency in association with the Department of Environment and Heritage is conducting a series of workshops to introduce companies to cleaner production concepts and to demonstrate how to review processes and identify opportunities. These workshops will be of particular interest to major local authorities.

Taxation incentives for heritage places

The Australian Heritage Commission and the Australian Cultural Development Office have been working on a new taxation incentive scheme which will encourage owners of heritage listed properties to carry out approved conservation works. Under the scheme to be capped at $1.9 million per year private owners of heritage listed properties will be able to apply through a competitive selection process for income tax rebates of 20 cents in the dollar. Conservation works must be valued at more than $10,000 and must relate to heritage places that are visible or are accessible to the community. The scheme is expected to generate approximately $9.5 million in heritage conservation works each year. Parliamentary approval will soon be sought for the scheme.

Codes of practice

The Division of Workplace Health and Safety has gazetted codes of practice in respect of the storage and use of chemicals at rural workplaces and the management of noise at workplaces. The former code stresses the importance of chemical labels and material safety data sheets, sets out a method for producers to identify the hazards, and assess the risks and explains the system for managing storage and exposure risks. The latter code was released in conjunction with an amendment of the Workplace Health and Safety Regulation which sets out new noise exposure standards. Under the noise exposure standards employers must ensure that employees are not exposed to noise which exceeds an average of 85dB(A) over an 8 hour period or a peak sound level of 140dB(lin). 85dB(A) is equivalent to heavy city traffic.

Councilnet

In October 1992 the Department of Environment Sport and Territories launched a national electronic communications and information exchange service known as Councilnet which enables local governments across Australia the opportunity to talk to each other about environmental and development issues. The principal objective of Councilnet is to promote ecologically sustainable development in local communities through information exchange. Anyone can join Councilnet including local authorities, individuals and professional associations.

Infrastructure funding

The findings of research conducted by the Urban Research Programme of the Research School of Social Science, Australian National University in relation to the funding of infrastructure have recently been released. The research is extremely timely having regard to the findings of the SEQ2001 study and the contents of the State government's recently released discussion paper on the planning and development system. The research concludes that:

- the main method of funding services should be user charges;
- high user charges are appropriate in times of peak demand for some services;
- developers should only be responsible for providing services within their subdivision and for the cost of connection to existing networks;
- access charges should only be used when user charges and developer charges do not fully cover taxes; and
- general taxes should only provide subsidies for physical infrastructure services when distributional objectives are pursued.

Australian Urban and Regional Development Review

The Australian Urban and Regional Development Review has released its first information paper. The Review which was recently established by the Prime Minister to operate during the life of this Parliament seeks to link urban and regional planning and management processes across all levels of government and over a range of key policy areas from employment to environment, transport and energy. The Review will build on the experience of the Building Better Cities Programme and will draw together recent research into the Australian urban system to provide comprehensive information and to map directions for strategic policy and programme development to be considered by government.

Brisbane City Council town plan amendments

On 23 November 1993 the council approved a package of amendments to the Town Plan. The amendments provide for the inclusion of a new objective in the Strategic Plan to ensure that waterways are taken into account when assessing development proposals, enable the creation of rear access allotments for detached dwellings in the residential B zone, impose siting and design controls on detached houses on allotments smaller than 450m^2 or having a frontage less than 15 metres in the inner residential zone, impose design controls on detached dwellings on allotments smaller that 450m^2 in group title developments, increase the plot ratio for residential

buildings to that allowed for non-residential buildings or composite residential/non-residential buildings on land zoned commercial or included in a commercial type precinct under a development control plan, and enable detached housing group titles subdivision in the future urban zone without requiring each house to be substantially commenced as a precursor to the title issuing. New local planning policies have also been introduced in respect of child care centres and carparking requirements for tenement buildings. Council's local planning policy in respect of environmental impact assessment has also been amended.

National pollutant inventory

The Commonwealth government is in the process of establishing an inventory of pollution emissions. The National Pollutant Inventory (**NPI**) will link with the National State of the Environment Reporting System, the first issue of which is shortly to be released. The purpose of these initiatives is to assist Commonwealth, State and Local governments in environmental decision making by collating the necessary regional information.

Transboundary movement of hazardous waste

The Commonwealth is currently examining the implications of the Basel Convention of the International Movement of Hazardous Wastes, particularly in relation to recyclable materials. This follows increasingly strong international pressure to prevent the export of some waste materials, which may have commercially recyclable resource content to developing countries. Australia has purported to implement the Basel Convention by means of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*. Under that Act, hazardous waste is that which is both hazardous and has no commercial value. Commodities such as commercially traded secondary raw materials are therefore not considered as hazardous, a position that is out of step with the policies of the OECD and other countries. Accordingly, the Commonwealth has commenced a review of its legislation to ensure that it conforms with the Basel Convention.

Contaminated site liability

The Australia and New Zealand Environment and Conservation Council (**ANZECC**) has released a discussion paper dealing with the financial liability associated with the remediation of contaminated sites. This discussion paper will be of interest to land owners and all local authorities as it is likely that the outcomes of this paper would ultimately be implemented by State and Territory governments.

Contributions for social infrastructure

The Commonwealth Office of the Local Government recently sponsored a two day workshop on the funding of local social infrastructure. The workshop raised several important issues including the need for improved overall financial planning by councils and a relationship between plans to justify developers' contributions and integrated local area planning. A report of the proceedings and outcomes of the workshop will soon be available through the Office of Local Government.

Waste repository site

The first phase of the Commonwealth government's Australia wide study to identify a suitable site for a national repository for Australia's low level and short lived intermediate level radioactive waste was completed in October last year with the release of a public discussion paper: The paper titled "*A Radioactive Waste Repository for Australia: Methods for Choosing the Right Site*" provides background information on radioactive waste management in Australia and outlines a methodology for identifying regions which might contain potentially suitable repository sites. Following the receipt of public comments the site selection methodology will be applied to identify broad areas of Australia likely to contain suitable repository sites. It is expected a report for public comment will be released in April of this year. Local authorities are recommended to monitor the outcomes of this study.

Coastal planning

The Western Australian Department of Planning and Urban Design and the City of Bunbury have recently released the Bunbury Coastal Plan. The Plan provides a detailed background on the need for a coastal study along with management plans and policies to guide the future use and conservation of the whole of the City of Bunbury's coast line. The Plan's process of formulation is recommended as a useful example for other local authorities contemplating major coastal management initiatives.

Local environment policy

The South Australian Department of Environment and Natural Resources has recently produced a handbook entitled "*Guidelines for the Development of Local Environment Policy for Local Government*". This report will be of interest to all local authority planning, development and environment departments as it sets out a methodology for the development and implementation of a local environment policy. The Western Australian Municipal Association has also produced a general and practical guide to environmental management entitled "*Environmental Management for Local Government - Reference Manual*". It targets both elected members and officers within the local government system and documents case studies and environmental strategies that have been put in place and can be directly applied towards improved environmental management practices in local government's sphere of responsibility.

Native Title Act 1993

The *Native Title Act 1993* was assented to on 24 December 1993. This Act represents the government's response to the decision of the High Court of Australia in *Mabo v Queensland*. The Act not only recognises and protects the Native Title as part of the common law of Australia as identified in the Mabo case but also declares that Native Title has had the force of law of the Commonwealth since 30 June 1993. The Act also provides that Native Title not be extinguished contrary to the provisions of the Act. The implications of these provisions is that any State law which attempts to extinguish Native Title will be in direct conflict with the Act and be rendered invalid by the operation of section 109 of the Constitution. The Act however does not seek to clarify what Native Title entails. It will be necessary to resort to the common law of Australia as established in the Mabo case to ascertain the rights and interests which are recognised as Native Title.

The Act validates certain past acts which are rendered invalid because of the existence of Native Title but which would have been valid if Native Title did not exist. In this context the term "*act*" includes the making of legislation, the grant of a licence or permit, the creation, renewal or variation of any interest in relation to land or orders and the exercise of any executive power of the Crown.

In relation to future dealings, the Act provides that "*permissible future acts*" are valid if the "*right to negotiate*" procedure is complied with where it is applicable. Registered Native Titles and registered claimants are given a special right to negotiate in respect to certain permissible future acts. These acts include the grant, variation, extension or renewal of a right to mine, compulsory acquisition of Native Title for the purpose of conferring rights on a third party and other acts approved by the Commonwealth Minister. If the process of negotiation does not result in an agreement, even after mediation, then any party can apply to the National Native Title Tribunal or a recognised State or Territory arbitral body to determine whether the act may be done and if so on what conditions.

Integrated environment protection legislation

Queensland is not the only State which has recently released Environment Protection Legislation. On 21 October 1993, the Minister for Environment, Land and Planning in the ACT invited the community to comment on a discussion paper entitled "*Proposals for Integrated Environment Protection Legislation*". The discussion paper outlines the ACT government's initiative to develop new integrated Environment Protection Legislation to replace existing Pollution Control Legislation relating to air, ozone, noise, water and pesticides. It is also intended to cover hazardous chemicals and their wastes and aspects of soil conservation. The new legislation would be consistent with the *Land (Planning and Environment) Act 1991* which provides for the approval for activities involving the use of land. The focus of the new legislation would be on the environmental management of approved activities that may have the potential to harm the environment. The approach put forward in the discussion paper presents a significant change from the way pollution control has been managed in the ACT. It takes a broad perspective which recognises the relationships between different parts of the environment as well as the links between environment protection and social and economic development. This broader approach is intended to consider environmental impacts in terms of the total activities that cause them instead of focusing solely on "*end of pipe*" controls. The proposal suggests one way of minimising harm to the environment would be that activities be managed consistently with clearly stated environmental objectives.

Tasmanian planning system

The Tasmanian Parliament recently considered and accepted in principle a series of bills which implement a new resource management and planning system for Tasmania. The relevant bills include the *State Policies and Projects Bill 1993*, the *Land Use Planning and Approvals Bill 1993*, the *Resource Management and Planning Appeal Tribunal Bill 1993* and the *Environmental Management and Pollution Control Bill 1993*.

The *State Policies and Projects Bill 1993* sets out environmental objectives such as sustainable development, processes and mechanisms for introducing State policies, the assessment of projects of State significance and the undertaking of state of the environment reporting by the Sustainable Development Advisory Council. The *Land Use Planning and Approvals Bill 1993* sets out a consolidated approval system for development applications to be administered by local government. The Bill is consistent with the Agreement on the Review of Roles and Functions of State and Local Governments which was signed between the Premier of Tasmania and the President of the Municipal Association of Tasmania on 6 August 1993.

The *Resource Management and Planning Appeal Tribunal Bill 1993* is intended to replace the *Environmental Protection Act 1993*. It provides for a Board of Management to replace the statutory Office of Director of Environmental Control and provides a new range of environmental management tools including legislatively established environmental impact assessment principles; environmental agreements which can provide for taxation and fee relief in recognition of good environmental practices; environmental audits to be carried out to establish the current environmental performance of an operation; requirements for notification provisions to obtain emergencies authorisation in relation to emergencies, accidents and malfunctions; provisions establishing performance guarantees and financial assurances to guarantee environmental performance; and mandatory environmental improvement programmes which involve public participation and appeal rights.

The Bill also includes new and more effective enforcement processes including powers to require information, environmental protection notices to require improved environmental performance, civil enforcement opportunities whereby members of the public can approach the Appeal Tribunal to seek an order requiring compliance with a law, new offences involving penalties up to a million dollars for causing serious environmental harm and an environmental infringement notice system for minor offences.

Another integral part of the land use planning and approvals package is the *Resource Management and Planning Appeal Tribunal Bill 1993* which provides for the establishment of the Resource Management and Planning Appeal Tribunal. This body is intended to hear appeals of decisions made under the *Land Use Planning and Approvals Bill 1993* and the *Environmental Management and Pollution Control Bill 1993*.

Bio-diversity convention

The Australia and New Zealand Environment Conservation Council Task Force on Biological Diversity are currently finalising a national strategy for the conservation of Australia's biological diversity. The task force has provided a final draft national strategy to ANZECC for its consideration. At its meeting on 15 October 1993, ANZECC agreed that the strategy would be forwarded to each State and Territory member requesting that they obtain whole of government clearance within their own jurisdiction by a specified date with a view to the ANZECC endorsed national strategy being available for consideration by Heads of Government in December 1993. It was recognised that it would be desirable to have the National Strategy in place when the Convention on Biological Diversity came into force on 29 December 1993 or very soon thereafter. In line with this timetable the Commonwealth government on 16 December 1993 approved the draft national strategy for the conservation of Australia's biological diversity. After approval by the States and Territories the strategy will be submitted to a Heads of Government meeting for adoption.

Eco-tourism

The Commonwealth government has released a draft National Eco-Tourism Strategy. The Strategy aims to establish a national framework to guide the planning, development and management of tourism in natural environments while maintaining the quality and integrity of those environments. The Strategy identifies the main issues in developing eco-tourism, some possible strategies for government and industry, and seeks broad consensus on ways to implement its recommendations. Possible strategies identified in the draft strategy include:

- facilitation of the application of ecologically sustainable principles and practices to tourism;
- encouragement of a complementary and compatible approach between eco-tourism activities and conservation of natural resources;
- development of a strategic approach to planning that includes ecologically sustainable development principles, priorities and actions; places eco-tourism on the list of priorities and topics; and is open to public scrutiny;
- encouragement of industry self-regulation of eco-tourism through the development of appropriate industry standards and accreditation that can be implemented through codes of practice;
- support for the use of carefully sited and constructed infrastructure to minimise visitor impacts on natural resources and to provide for environmental education;
- undertaking of further study of the impact of eco-tourism to improve the information base for planning and decision making;
- development and promotion of the sustainable delivery of eco-tourism products to meet visitor expectations and match levels of supply and demand;
- the establishment of an industry standard for eco-tourism accreditation systems based on industry self-regulation;
- improvement on the level of delivery of environmental education to the tourist, the media and the tourism industry;
- enhancement of the opportunities for self-determination, self-management and economic self-sufficiency in eco-tourism for Aboriginal and Torres Strait Islanders;
- examination of the business deeds of operators and the development of ways in which viability can be improved either individually or through collective ventures; and
- taking steps to ensure that opportunities for access to eco-tourism experiences are equitable and that eco-tourism activities benefit host communities and contribute to natural resource management.

Cultural Policy

The Commonwealth government is in the course of preparing a Cultural Policy which is due to be released shortly. Comments have been sought from a variety of interested stakeholders including the International Council on Monuments and Sites (Australia Icomos). The National Cultural Policy is expected to deal with amongst other things the conservation of cultural places and therefore will be of interest to heritage and land use planners.

Environmental impact statement review

In New South Wales the Department of Planning has released a discussion paper on the preparation of environmental impact statements (**EIS**) as part of its ongoing review of the New South Wales planning system. The Environmental Planning and Assessment Act currently requires an EIS to be prepared when certain kinds of designated developments such as mines or refineries, marinas and feedlots are proposed. The discussion paper suggests some changes to the list of designated developments, including the addition of developments involving contaminated lands and solid waste disposal. The paper also suggests changes to some of the definitions of designated development.

Guidelines for mining and extractive industries

The New South Wales government has recently released guidelines to explain the newly gazetted State Environmental Planning Policy No. 37 (**SEPP**) Continued Mines and Extractive Industries. SEPP 37 is intended to bring about environmentally responsible development of mines and extractive industries. Guidelines are intended to assist local councils and industry in New South Wales with the implementation of the policy. The policy will be of obvious relevance to Queensland local authorities in preparing local planning policies relating to mines and extractive industries.

Coastal planning

The New South Wales Department of Planning has prepared the "*North Coast Draft Urban Planning Strategy*" to manage the growth of the North Coast of New South Wales and assist with the region's long term planning. The draft strategy was on exhibition from August to December 1993. The final report is expected to be released in early 1994.

Building matters

The Management Energy Task Force of the Environment and New Zealand Minerals and Energy Council have produced a draft discussion paper in relation to the preparation of a Commercial Building Energy Code. The discussion paper is supported by a number of background papers including a National Stringency Analysis Report, a Code Structure Issues Analysis paper and a National Impact Study. The Code will also be complemented by the Nationwide House Energy Rating Scheme which has been undertaken as a co-operative venture by the Commonwealth and all State and Territory governments to develop for the first time a comprehensive rating system for all Australian housing.

The Department of Housing, Local Government and Planning has also issued building notes in relation to a number of matters including the approval of building products not registered under part 13 of the Standard Building By-laws, the requirements for wall wetting sprinklers, guidelines as to determining the distance above ground level as required by sections E1.7 and E4.9 of the Building Code of Australia, and requirements in respect of the resistance of ceilings to the incipient spread of fire.

The Standard Building By-laws were also amended on 17 December 1993. By virtue of the *Statute Law (Miscellaneous Provisions) Act (No. 2) 1993*, the Standard Building By-laws were removed from the Building Act to avoid the necessity of amendments to the by-laws having to be submitted to Parliament as a consequence of the *Legislative Standards Act 1992* which prohibited the Standard Building By-laws as part of the Building Act from being amended by subordinate legislation. As a result of these changes the manner in which the by-laws are referenced has altered from "*parts*" and "*by-laws*" to "*sections*" and "*sub-sections*". In addition, a number of standard amendments have been made including an expansion of the class 10 buildings which are deemed not to be building work for the purpose of the by-law, the insertion of the definition of AMCORD, the removal of the need for a certificate of classification in respect of class 1a buildings, the granting of concessions for class 10a buildings, and the amendment of siting requirements to enable residential small lot development and zero lot lines as described in AMCORD.

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The reuse of wastewater: A legal perspective

Ian Wright

This article discusses the approach of wastewater reuse and its legal implications due to the implementation of ecologically sustainable development in legal instruments

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Introduction

Community wastewater systems

To date wastewater management has been based primarily on centralised community systems of treatment and disposal. This has afforded significant cost savings to the community through high density development, consequential savings in water supply, power and transport services, the management of point source discharges rather than diffuse source discharges and economies of scale which are associated with large-scale treatment and disposal.

However, the centralised system of wastewater management is becoming unsustainable in both financial and environmental terms. The commitment to large scale treatment and disposal has meant that up to 85% of capital investment has been in low value added pipes and pumps and less than 15%-20% in wastewater treatment (ESD Working Group 1991: 122). In addition the continual flux of nutrients and toxic substances being transferred to land, water systems and food chains is not ecologically sustainable.

Ecologically sustainable development

The recognition that short-term cost savings to the community may be offset by long-term economic and ecological disbenefits has motivated Commonwealth, State and local governments to adopt ecologically sustainable development as the philosophical basis which will underpin future approaches to wastewater management.

The paradigm of ecologically sustainable development was embodied in the Intergovernmental Agreement on the Environment which was signed on 25 February 1992 by the Commonwealth, State and Territory governments and the Australian Local Government Association on behalf of all local governments. Ecologically sustainable development is defined in the agreement as "*development which meets the needs of the current generation without compromising the ability of future generations to meet their own needs*".

Implementation of the Intergovernmental Agreement on the Environment by all levels of Australian government will result in a new approach to wastewater management. Based on ecologically sustainable development this approach will include the following elements (Niemczyhowicz 1992):

- an integrated systems approach comprising both structural and non-structural elements as opposed to a narrow-minded technological approach;
- multi-disciplinary co-operation in order to solve complex problems;
- small scale as opposed to technological monumentalism;
- source control instead of end of pipe control;
- pollution prevention instead of reacting to damage;
- use of biological systems and ecological engineering in wetlands; and
- local disposal and reuse instead of exploitation and wastefulness.

The elements of this new ecologically sustainable approach to wastewater management is illustrated in Figure 1.

Wastewater reuse

An important component of that approach is the reuse of wastewater for a range of uses. In simple terms wastewater reuse involves the multiple reuse of wastewater prior to its return to the water cycle. It includes the following policy options:

- the recycling of greywater for toilet flushing and garden and lawn watering;
- the recycling of industrial wastewater for dust suppression, wash water and cooling water;
- the recycling of stormwater;
- the reuse of effluent for agroforestry, recreational facilities, groundwater recharge, non-potable uses and to prevent salt water intrusion;

- the reuse of biosolids (digested sludge) for landfill, mine reclamation, bricks and as compost for gardens, golf courses and agroforestry; and
- the reuse of biogas for energy.

Wastewater reuse offers substantial benefits. It helps to meet the increasing demand for water and to supplement supply from conventional water sources. It also reduces the quantity of effluent, sludge and biogas left for disposal. There is also community support for the principle of reuse with a recent survey concluding that 19% of Australians favour potable reuse of reclaimed water with a further 76% willing to consider potable reuse (Hamilton 1993: 7).

However wastewater reuse is not without its disadvantages. The cost of treatment and distribution of wastewater is often higher than conventional water systems. It also poses some risk to the environment as well as public health. Environmental risks associated with wastewater reuse include:

- land contamination from heavy metals;
- soil degradation from increased salinity;
- destroyed soil structure and a change to the water-table; and
- contamination of groundwater from nutrients and/or surface water from phosphorus run-off.

Public health risks associated with the reuse of wastewater include:

- sickness from pathogens;
- unacceptable levels of odour;
- concentration of residues in food and animals;
- mosquito infestation; and
- visual pollution.

The environmental and public health risks associated with wastewater reuse raise a variety of legal issues for owners and occupiers on whose land wastewater is reused and public authorities who are responsible for the treatment and distribution of wastewater.

The purpose of this paper is three-fold:

- to examine the legal and administrative instruments that regulate wastewater reuse;
- to examine the approvals process that would be required to establish a wastewater reuse scheme; and
- to examine the potential legal liability of owners, occupiers and public authorities for environmental and public health problems associated with wastewater reuse.

Legal instruments

The reuse of wastewater is regulated by a complex myriad of rules enunciated by the courts, the Parliament, the Executive, local authorities and statutory authorities. In essence these rules consist of:

- legal precedents enunciated by the courts (the so called "*common law*");
- legislation comprising statutes enacted by the Parliament and regulations and policies approved by the Executive (that is the Governor-in-Council) and local laws adopted by local authorities; and
- non-binding guidelines, policies and codes of practice adopted by decision makers to assist in the application of legislative requirements.

The common law

The common law provides a number of causes of action in tort to persons who have suffered loss or damage as a result of wastewater reuse. In simple terms a tort is a civil wrong (as opposed to a criminal wrong) other than a breach of contract which the law will address with damages or by the granting of an injunction.

Until recently the common law recognised 5 torts being negligence, nuisance, trespass, breach of statutory duty and the rule in *Rylands v Fletcher* [1868] UKHL 1. However on 23 March 1994 the High Court in the case of *Burnie Port Authority v General Jones Pty Ltd* [1994] HCA 13 essentially abolished the rule in *Rylands v Fletcher* [1868] UKHL 1 by holding that it had been absorbed by the principles of ordinary negligence. To appreciate the significance of this decision it is important to consider each of the common law torts.

- **Negligence** – This action arises where a person has suffered damage as a result of a breach of a duty of care owed to that person. To succeed in a negligence action a plaintiff must prove on the balance of probabilities four elements:
  - First the plaintiff must prove that the defendant owed the plaintiff a duty of care. To establish this the plaintiff must prove that the relationship between the plaintiff and the defendant was sufficiently close for the defendant to have reasonably contemplated that the negligent act would lead to the plaintiff's damage

and that it was reasonably foreseeable that damage was likely to occur to the plaintiff or a class of persons to which the plaintiff belongs. These are respectively known as the tests of proximity and reasonable foreseeability.

- Second the plaintiff must prove that the defendant has breached the duty of care owed to the plaintiff. To establish this the plaintiff must prove that the defendant failed to observe the standard of care that would have been observed by a reasonable person. In determining what a reasonable person would have done in the situation regard should be had to the magnitude of the risk, the degree of probability of the occurrence, the expense, difficulty and inconvenience of alleviating action and any other conflicting responsibility which the defendant may have had.
- Third the plaintiff must prove that it has suffered damage. To establish this the plaintiff must prove that it has suffered actual damage and that the damage was reasonably foreseeable as a consequence of the breach of the duty of care.
- Finally the plaintiff must prove that the damage was caused by a breach of the duty of care. Where the damage is caused by the interaction of several independent wrongful acts the defendant or defendants will be answerable for the whole of the damage although the plaintiff can only recover once. Where each of the defendants only caused part of the total damage and it is practical to split up the loss and attribute identifiable parts to each of the defendants, liability will be apportioned according to responsibility.

- **Nuisance** – This action arises where the use of land causes an unreasonable and substantial interference with a person's use or enjoyment of the land (private nuisance) or the right of the public at large to health, safety, property and equality of environment (public nuisance). To succeed in a nuisance claim a plaintiff must prove on the balance of probabilities that the defendant's interference or proposed interference caused or will cause damage and that the interference is substantial and unreasonable. Thirdly in relation to a public nuisance action the plaintiff must demonstrate that they have suffered special or particular damage over and above that suffered by the public as a whole. If such damage has not been suffered they may bring proceedings if the Attorney General consents to the taking of the action. It is a defence to both private and public nuisance actions if the nuisance was an inevitable consequence of the exercise of a statutory duty (*Allen v Gulf Oil Refinery Ltd* (1981) AC 1001). However this defence of statutory authority does not apply where a public authority is merely exercising a statutory power (*Department of Transport v The North-West Water Authority* (1983) 2 WLR 707).
- **Trespass** – This action arises where there has been a direct interference with a plaintiff's person, land or goods. To succeed in a trespass claim the plaintiff must prove that the interference with the plaintiff's person, land or goods was part of the defendant's act and not merely a consequence of it. An injury is direct where it follows so immediately upon the act of the defendant that it may be termed part of that act. On the other hand it is consequential when by reason of some obvious and visible intervening cause it can be regarded not as part of the defendant's act but merely as a consequence of it. This distinction is vividly illustrated by case law. For example it has been held that sewage deposited on a person's land from a sewerage works via the natural flow of a river is a trespass (*Jones v Llanrwst Urban Council* (1911) 1 Ch 393) but oil discharged from a tanker into an estuary and carried by the wind and tide onto a person's beach has been held not to be a trespass as the injury was consequential, not direct (*Southport Corporation v Esso Petroleum* (1954) 2 QB 182).
- **Breach of statutory duty** – This action arises where the plaintiff has suffered damage as a result of the breach of a statutory obligation imposed on the defendant and which was intended by the Parliament to give rise to a civil action for damages. To succeed in an action for breach of statutory duty the plaintiff must prove five elements, namely that:
  - the plaintiff is of a class of persons protected by the statute;
  - the breach of the statutory duty gives the plaintiff a civil action;
  - the defendant is subject to a statutory duty;
  - the defendant has breached the statutory duty; and
  - the plaintiff's injury has been caused by the defendant's breach of the statutory duty.

  To date no actions have been taken for breach of statutory duty in relation to any environmental or public health statute. Generally cases where a breach of statutory duty have been found to exist have involved industrial safety regulations.
- **The Rule** in *Rylands v Fletcher* [1868] UKHL 1 – Until the recent High Court case of *Burnie Port Authority v General Jones Pty Ltd* [1994] HCA 13 this action arose where a plaintiff's person, land or goods was damaged as the result of the escape from land of a dangerous substance which would not naturally be there. Unlike negligence and nuisance the reasonableness of a defendant's actions was not considered when determining liability. Accordingly the defendant would be held liable even where all due care and diligence was used to prevent the escape of the substance. In the Burnie Port Authority case the High Court recognised that it was difficult to envisage a situation giving rise to liability under the rule of *Rylands v Fletcher* [1868] UKHL 1 which would not also constitute an actionable negligence, nuisance or trespass. Accordingly the High Court held that the rule in *Rylands v Fletcher* [1868] UKHL 1 had been absorbed in the principles of negligence.

It can be seen that the common law is very much concerned with the maintenance of private property or interests. Apart from the doctrine of public nuisance, the common law does not take into account the wider public interest of fostering principles such as ecologically sustainable development. The application of the common law doctrine to so called toxic tort disputes, that is, cases involving the release of toxic chemicals into the environment, is also limited by the distinctive characteristics which distinguish a toxic tort from other types of injury associated with the law's traditional experience in the field of torts. For example:

- injury resulting from genetic or biochemical disruption may develop without identifiable prior traumatic events;
- the time between exposure to a toxic chemical and the expression of the injury may be long, sometimes up to 20 years or more, thereby giving rise to problems of commencing proceedings within the time limits imposed by the various State's Limitation of Actions Acts as well as the problem of tracing the etiology of the disease to exposure to a specific toxic chemical;
- injury resulting from chronic and repeated exposure to a chemical rather than acute exposure can only be established through epidemiological studies, the success of which is dependent on the nature of the available data; and
- proof that a chemical is harmful often requires scientific evidence associated with biological causation which is on the frontiers of science and which, in many cases, may only show that exposure to the chemical increases the risk that the plaintiff would contract the disease.

As a result of these difficulties, governments have played a major role in formulating policies and programmes in respect of wastewater and implementing these through legislative activity.

Legislation

Commonwealth, State and local governments have introduced legislation to control the reuse of wastewater. Unfortunately, no one piece of legislation deals specifically with wastewater reuse. Consequently, regard must be had to the myriad of statutes, regulations and local laws which regulate, amongst other things, various aspects of wastewater reuse.

Commonwealth legislation is generally of no practical significance as its application is limited to land or water over which the commonwealth has jurisdiction. This will be the case where an approval is required from the commonwealth such as an export or foreign investment approval, or where the wastewater scheme is to be established on land or water owned or under the control of the commonwealth. Commonwealth legislation which imposes requirements in respect of the disposal of wastewater include the:

- *Antarctic Treaty (Environmental Protection) Act 1980*, the *Antarctic (Environment Protection) Legislation Amendment Act 1992* and the *Antarctic Marine Living Resources Conservation Act 1981* which control the disposal and removal of wastes within Australian and Arctic territory.
- *Environment Protection (Sea Dumping) Act 1981* which controls marine pollution from dumping and incineration.
- *Great Barrier Reef Marine Park Act 1975* which controls the discharge of all wastes into the Great Barrier Reef Marine Park area.
- *Hazardous Waste (Regulation of Exports and Imports) Act 1989* which controls the transport, storage, export and import of hazardous substances as outlined in the Basel Convention of Hazardous Wastes.
- *Heard Island and McDonald Islands Act 1953* which controls the removal and storage of wastes from these islands.
- *Industrial Chemicals (Notification and Assessment) Act 1989* which controls the importation, storage, use, transportation and handling of chemical substances.
- *Murray Darling Basin Act 1983* which controls the pollution of rivers and other waterways in the Murray Darling River catchment area in accordance with the terms of the Intergovernmental Agreement between the Commonwealth and various States.
- *National Parks and Wildlife Conservation Act 1975* which controls the disposal of waste in a park or reserve declared under the Act.
- *Navigation Act 1912* which controls the discharge of sewage into the sea.
- *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* which controls the discharge of sewage from ships into the sea.

Unlike Commonwealth legislation, laws adopted by local authorities are of greater practical significance as they are generally applicable to all developments involving the reuse of wastewater. Relevant local laws include:

- local environmental plans and development control plans prepared pursuant to the *Environmental Planning and Assessment Act 1979* which control the development of land within a local authority area; and

- local laws prepared pursuant to the *Local Government Act 1993* which control the public health and environmental risks associated with development and other activities including wastewater reuse.

In all cases, it is necessary to consult the laws adopted by the local authority in which a wastewater reuse scheme is being proposed.

However, of greater practical significance is State legislation which imposes regulations in respect of the establishment and operation of wastewater reuse schemes. This legislation can be divided into the following categories:

- *Development* – this category encompasses the *Environmental Planning and Assessment Act 1979* and the various instruments made thereunder such as State environment planning policies, regional environment plans and local environment plans which control development and the *Local Government Act 1993* which, amongst other things, controls building, sewerage and water supply matters.
- *Pollution* – this category encompasses the *Clean Waters Act 1970* which controls water pollution, the *Clean Air Act 1961* which controls odour, and the *Environmentally Hazardous Chemicals Act 1985*, the *Unhealthy Buildings Act 1990* and the *Fertilisers Act 1985* which control land contamination.
- *Conservation* – this category encompasses the *Soil Conservation Act 1938* which controls soil degradation and the *Environmental Offences and Penalties Act 1989* which controls environmental harm.
- *Public Health* – this category encompasses the *Food Act 1989* which controls the sale of food, the *Pesticides Act 1978* which controls pesticide residues in foodstuffs, the *Stock (Chemical Residues) Act 1975* which controls chemical residues in stock and the *Public Health Act 1991* which controls the public health risks associated with sewage.

Policies

The application of legislation, whether it be Commonwealth, State or local for wastewater reuse schemes, is generally supported by various non-binding policies, codes of practice and guidelines.

The following guidelines have been prepared in New South Wales in respect of wastewater reuse and disposal:

- Water Conservation by Reuse – Guidelines for the Use of Recycled Water in New South Wales (Environmental Design Guide WP - 7), State Pollution Control Commission, 1987.
- Reuse of Treated Wastewater by Land Application (Environmental Design Guide WP 8), State Pollution Control Commission, 1988.
- Land Fill Disposal of Industrial Wastes (Environmental Guideline), State Pollution Control Commission, 1989.
- Guidelines for the Use of Sewage Sludge on Agricultural Land, New South Wales Agriculture, 1989.
- Guidelines for the Utilisation of Treated Wastewater on Land (Draft), Environment Protection Authority, 1992.
- Environmental Guidelines for the Discharge of Wastewater to Ocean Waters, Environment Protection Authority, 1993.
- New South Wales Guidelines for Urban and Residential Use of Reclaimed Water, New South Wales Recycled Water Co-ordination Committee, 1993.

Relevant guidelines have also been prepared at the national level:

- Guidelines for Drinking Water Quality in Australia, National Health and Medical Research Council, 1987.
- Guidelines for the reuse of Reclaimed Water in Australia, National Health and Medical Research Council, 1987.
- Australian Guidelines for Recreational Use of Water, National Health and Medical Research Council, 1989.
- Draft National Water Quality Guidelines, Australian and New Zealand Environment Council, 1990.
- Draft Guidelines for Sewerage Systems and Effluent Management, Australian and New Zealand Environment and Conservation Council and Australian Water Resources Council, 1992.
- Australian Water Quality Guidelines for Fresh and Marine Waters, Australian and New Zealand Environment and Conservation Council, 1992.

Guidelines have also been prepared in other Australian States:

- Guidelines for the Use of Treated Sewerage for Agricultural Irrigation and Recreational Areas and Impoundments, Water Quality Committee Queensland, 1977.
- Guidelines for Wastewater Irrigation, Environmental Protection Authority (Vic), 1991.
- Water Quality Guidelines for Fresh and Marine Waters (Draft), Environmental Protection Authority (WA), 1993.

These guidelines are of particular relevance in the licensing of wastewater reuse schemes by State government bodies. However, of greater relevance at the local authority level are the various policies and codes of practice which support each local authority's local environmental plan, development control plans and other local laws. Matters such as land contamination and sewage disposal may be the subject of such policies.

Approvals process

As indicated earlier the establishment and operation of wastewater reuse schemes is not regulated by one piece of legislation. Rather the approvals process involves the application of a large number of statutes and decision making bodies. In simple terms, a wastewater reuse scheme may require the approval of the relevant local authority, the Environment Protection Authority, the Departments of Health and Agriculture and the WorkCover Authority.

Local authority

The need for local authority approval may arise in one of three ways:

- The relevant local environmental plan, development control plan or regional environment plan may require a development consent to be obtained or modified pursuant to the *Environmental Planning and Assessment Act 1979.*
- Building, sewerage and water supply works will have to be approved pursuant to the *Local Government Act 1993.*
- A licence may also have to obtained in respect of the scheme pursuant to the applicable local law.

Where the wastewater reuse scheme is itself the primary purpose of the proposed development, the scheme will be a designated development. Under schedule 3 of the *Environmental Planning and Assessment Regulation 1980* waste works processing, recovering or disposing of liquid chemical, oil or petroleum waste products is a designated development. As a result an environmental impact statement must accompany the application for development consent for this type of development, public notice is required to be given, and members of the public are entitled to object and appeal to the Land and Environment Court if the public authority grants consent.

Environment Protection Authority

The requirement to obtain the approval of the Environment Protection Authority will arise in a number of ways:

- Premises to which waste (solid and liquid) is transported for treatment, storage and disposal must be registered pursuant to the *Waste Disposal Act 1970* (section 22(1)).
- The installation, construction or modification of any apparatus, equipment or works required for the storage, treatment or disposal of wastewater other than from a single household must be authorised by a pollution control approval under the *Clean Waters Act 1970* and the *Pollution Control Act 1970* (section 19).
- A reuse scheme which is or is likely to pollute any waters must be licensed pursuant to the *Clean Waters Act 1970* (section 16).

The requirement to obtain a licence under the *Clean Waters Act 1970* in respect of water pollution is very wide. Pollution is defined to include anything providing a change in the physical, chemical or biological addition to waters (section 5). Moreover the pollutant does not have to be discharged directly into the waters. It is sufficient for the pollutant to be put into a position from which it ends up in the water or is likely to do so (section 16(2)). The Land and Environment Court has held that pollution is likely to end up in the waters if there is a real possibility that this will occur (*State Pollution Control Commission v Blayney Abattoirs Pty Ltd* (1991) 72 LGRA 221). The environmental risks normally associated with reuse schemes such as infiltration of nutrients to groundwater or run-off of phosphorous to surface waters means that almost all reuse schemes will have to be licensed under the *Clean Waters Act 1970*.

Health Department

The approval of the Health Department will also be required in several circumstances:

- Where sewerage is being treated and reused, the *Public Health Act 1991* imposes requirements in respect of the preservation of public health from sewage.
- Where crops are being grown on land subject to wastewater reuse, the *Food Standards Code (Adoption) Regulation 1989* made under the *Food Act 1989* adopts the food standards code which provides for maximum pesticide residue limits at the point of sale.

Agriculture Department

The approval of the Agriculture Department will also be required in certain circumstances:

- Where sludge is proposed to be used as fertiliser, the *Fertilisers Act 1978* requires sludge from municipal sewerage and septic tanks intended to be used for soil improvement to be treated and where possible decontaminated.

- Where stock are to be grazed on land the subject of wastewater reuse, the *Stock (Chemical Residues) Act 1975* empowers the Minister to restrict or absolutely prohibit the grazing on residue affected land by stock.
- Where crops are being grown on land the subject of wastewater reuse, the *Pesticides Act 1978* provides that certain food items containing prohibited residues can be prevented from becoming available for sale.

WorkCover Authority

As with all other workplaces the approval of the WorkCover Authority will also have to be obtained. The Occupation Health and Safety Act requires employers to maintain as far as reasonably practical the place of work in a condition which is safe and without risk to health. There is also a general duty on employers to protect the health and safety of the general public who may be affected by work activities.

Potential legal liability

Land owners and public authorities may be exposed to potential legal liability as a result of the implementation of wastewater reuse schemes. This liability may arise under both legislation and the common law.

Legislation

The legislation discussed earlier imposes strict legal liabilities on land owners and public authorities in respect of a number of matters including:

- land contamination;
- soil degradation;
- water pollution;
- odour;
- chemical residue build up in plants and animals;
- public health matters associated with pathogens;
- general environmental harm; and
- the breach of approvals and licence conditions.

Generally speaking this liability is of a criminal nature with legislation imposing various offences and penalties in respect of various environmental and public health risks associated with wastewater reuse schemes.

- **Land contamination** – Where land is contaminated as a result of a wastewater reuse scheme the Environment Protection Authority can issue pursuant to the *Environmentally Hazardous Chemicals Act 1985*, a direction to the occupier to undertake remedial action (section 35) or undertake remedial action itself and recover the costs from those who caused the contamination (section 36).
- **Occupier** is defined as "*the person in occupation or control of the premises*" and will include the registered proprietor, tenant and mortgagee in possession and receiver and manager or liquidator. The remedial action prescribed in the direction may involve:
  - ascertaining the major extent of contamination;
  - preparing a remedial action plan for the premises and if required, a long term management plan;
  - removing the cause of contamination from the premises;
  - reducing the contamination of the premises;
  - eliminating or reducing any danger arising from the contamination of the premises; and
  - restoring the premises.

  Unfortunately the *Environmentally Hazardous Chemicals Act 1985* does not define the term "*contaminated*". Whilst the Environment Protection Authority intends to set criteria for contamination in a State environment policy for soil, this is yet to be proclaimed. Pending its proclamation the Environment Protection Authority uses the 1992 Australian and New Zealand Guidelines for Soil Assessment and Management of Contaminated Sites prepared by the Australian and New Zealand Environment and Conservation Council and the National Health and Medical Research Council to indicate potential problems and clean up requirements.

  In addition to the *Environmentally Hazardous Chemicals Act 1985*, the Environment Protection Authority also has power under the *Unhealthy Buildings Act 1990* to declare that particular land is unhealthy building land and should not be built upon until the specified measures have been taken. It should also be noted that liability may arise under the *Fertilisers Act 1985* which requires sludge from municipal sewerage and septic tanks which is to be used for soil improvements to be treated and decontaminated.
- **Soil degradation** – Where soil is eroded or degraded as a result of a wastewater reuse scheme the Soil Conservation Commission may direct, pursuant to the *Soil Conservation Act 1938*, that certain actions be taken or that certain things not be done. Failure to comply with a direction is an offence punishable by a fine of up to $50,000.

- **Water pollution** – Apart from land and soil degradation, wastewater reuse schemes may also result in contamination of waters by nutrients. In particular groundwater may be contaminated by nitrogen while surface waters may be contaminated by phosphorous run-off. The *Clean Waters Act 1970* forbids all activities which result or may be likely to result in water pollution except where they are carried out under the terms and conditions of a licence (section 16). The offences of polluting water without a licence or breaching the conditions of a licence may give rise to a penalty either as a tier one or a tier two offence under the *Environmental Offences and Penalties Act 1989*. Penalties range from $125,000 for corporations to $60,000 for individuals and substantial daily penalties can be imposed where the offence is a continual one.
- **Odour** – Wastewater reuse schemes may also give rise to undesirable odour problems particularly in the case of the disposal of treated effluent and sludge. If the premises the subject of the wastewater reuse scheme are scheduled premises under the *Clean Air Act 1961* the occupier is under an obligation to prevent the omission of odours. Failure to comply with this obligation is an offence punishable by a fine ranging from $1,500 to $30,000 under the *Environmental Offences and Penalties Act 1989*. Undesirable odour problems may also give rise to a breach of the statutory public nuisance provisions under the *Public Health Act 1991*.
- **Residues** – In addition to odour problems the reuse of wastewater may also result in the introduction of undesirable residues into the food chain. The *Food Standards Code (Adoption) Regulation 1989* made under the *Food Act 1989* prescribes maximum pesticide residue limits at the point of sale. The *Pesticides Regulation 1979* made under the *Pesticides Act 1978* also specifies maximum permissible concentrations in respect of substances. Both Acts empower the relevant Ministers to make orders spelling out how the foodstuffs should be dealt with including its destruction. Where chemical residues are detected in the body tissues of stock, the Minister for Agriculture may issue an order pursuant to the *Stock (Chemical Residues) Act 1975* preventing the movement of affected stock indefinitely.
- **Pathogens** – The major public health concern associated with wastewater reuse is the risk of the spread of human disease by micro-organisms from human excreta in the treated sludge or effluent. Wastewater may comprise viruses, bacteria, protozoans as well as human round worms, tape worms and liver flukes. The spread of pathogens from these sources are regulated by the *Public Health Act 1991* which imposes offences and penalties and enables the Minister to make wide-ranging orders.
- **Environmental harm** – The legal obligations imposed by media specific legislation such as the *Clean Air Act 1961* and *Clean Waters Act 1970* and substance specific legislation such as the *Environmentally Hazardous Chemical Acts 1985*, the *Food Act 1989* and the *Pesticides Act 1978* are complimented by the general obligations contained in the *Environmental Offences and Penalties Act 1989*. Under this act certain activities which harm or are likely to harm the environment are declared to be tier three offences which may give rise to fines of between $250,000 and $1,000,000. To be held liable, a person must be shown to have either caused the environmental harm wilfully (ie deliberately) or negligently (ie failure to achieve the standard which a reasonable person would have exhibited). A person will be guilty of an offence unless they can show that the commission was due to causes over which they had no control and they took reasonable precautions and exercised due diligence to prevent it occurring (section 7). This is generally referred to as the due diligence defence.

  The concept of environmental harm is defined widely. Environment includes not only land, waters, atmosphere, animals and plants but also the aesthetic surroundings of human beings including appearance. Harm includes any direct or indirect alteration of the environment that has the effect of degrading the environment and any act or omission that results in water or air pollution within the broad definition set out in the *Clean Air Act 1961* and *Clean Waters Act 1970*. Generally speaking most of the environmental and public health problems associated with wastewater reuse schemes would fall within this definition.
- **Breach of licence conditions** – It should also be noted that breaches of the specific legal obligations directed at the environmental and public health risks associated with wastewater reuse schemes may also constitute breach of the various land use planning, pollution control and public health licences and approvals authorising the operation of the scheme. This may not only constitute an offence punishable by penalty but it may also result in revocation of the relevant licences and approvals.

The common law

Environmental and public health problems that may arise from a wastewater reuse scheme will not only give rise to potential criminal liability under legislation but it may also give rise to civil liability under the common law - torts of negligence, nuisance, trespass and breach of statutory duty.

- **Negligence** –Where property or human health is damaged by a wastewater reuse scheme it is likely that a negligence action would be commenced. On the basis of the High Court decision in *Burnie Port Authority v General Jones Pty Ltd* [1994] HCA 13 it is likely that a duty of care would be held to exist. In that judgment the High Court stated that "*a person who takes advantage of his or her control of premises to introduce a dangerous substance, to carry on a dangerous activity or to allow another to do one of those things owes a duty of reasonable* care *to avoid a reasonably foreseeable risk of injury or damage to the personal property of another*".

  Further if the wastewater reuse scheme is established to have operated contrary to legislation, licence conditions or guidelines then it is likely that the court would hold that there has been a breach of the duty of care. However if there has been compliance of all the standards and requirements specified in the legislation,

licence conditions and guidelines, it is likely that a court would hold that the duty of care has not been breached. However, even if the breach of a duty of care can be established there may be, as discussed earlier, substantial procedural and evidential problems associated with proving that this breach has caused the damage.

If the exposure to toxic substances is very high and the impact on health is immediate and obvious, proof of causation is not an issue. However, if damage has resulted from chronic and repeated exposure over time to low concentrations of chemical substances often below background levels, proof of causation may be difficult if not impossible on the basis of available data.

- **Trespass** – Like negligence actions, the application of trespass and nuisance actions to a toxic chemical case is restricted by evidential and procedural problems. First, there are the problems of causation highlighted in respect of negligence actions. Second, the proof of direct interference with the plaintiff's personal property is often difficult in the environment where ecological systems are complex and interrelated. Third, the proof that the interference was intentional involves an examination of the subjective intent of the defendant. Finally, trespass is designed to protect a person's interest in themselves or their property and is of little use in considering protection of the environment generally.
- **Nuisance** – The applicability of private and public nuisance actions in toxic chemical cases is also restricted. First, there are the problems of causation. Second, proof of whether an interference with the use and enjoyment of land is substantial and unreasonable is determined by an objective standard rather than a subjective standard. Accordingly, the interference must be unreasonable to the ordinary person rather than unreasonable to the plaintiff who may have a particular sensitivity to chemicals. Third, in order to bring an action for public nuisance in respect of an interference with public health or the environment generally, the plaintiff must prove special or particular damage. This is often difficult or impossible in the case of pollution of areas used by the public generally such as public parks or public waters.
- **Breach of statutory duty** – The common law action of breach of statutory duty is also limited in its application in respect of toxic chemical cases. To succeed in such an action it must be proven that the duties imposed on public authorities or individuals by statute are intended to be owed to citizens as individuals.

However, most environmental legislation is intended to benefit the public as a whole such that the duties are owed to the public generally. Accordingly, no private action for breach of statutory duty would arise under legislation such as the *Clean Waters Act 1970*, the *Environmentally Hazardous Chemicals Act 1985* and other environmental legislation discussed in this paper.

Conclusions

Wastewater reuse schemes are a necessary part of the response to ecologically sustainable development. However, the implementation and operation of these schemes raises a number of important legal issues that need to be considered before any general policy of water reuse is embraced. First, the reuse of wastewater is regulated by a myriad of legislation, common law principles and policies. This regulatory system needs to be rationalised so that clear and consistent environmental and public health policies are articulated. Second, the approvals process to establish a wastewater reuse scheme is complex involving numerous pieces of legislation and multiple decision makers. The delay and inconsistencies associated with such a system will increase the cost of implementing reuse schemes. Accordingly an integrated approvals system needs to be introduced either specifically for wastewater reuse or as part of a more generalised reform of the development approvals process in New South Wales. Third, the environmental and public health problems that are associated with wastewater reuse schemes may give rise to a liability under various pieces of legislation and the common law. However, procedural and evidential difficulties associated with the enforcement of the legislative and common law actions means that potential legal liabilities are generally exaggerated and should not be used as a basis for prohibiting the implementation of wastewater reuse schemes.

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South Australia's review on the effectiveness of native vegetation clearance controls: The issues and their outcomes

Ian Wright

This article discusses the South Australian Department of Environment and Natural Resources review of legislation concerning the effectiveness of native vegetation clearance controls. This is due to the problems exemplified in the existing controls, particularly issues surrounding vegetation clearance for development, the interaction with State legislation and significant clearance of native vegetation

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South Australian clearing legislation

The South Australian Department of Environment and Natural Resources has commenced a review of legislation concerning the effectiveness of native vegetation clearance controls in urban and semi-urban areas. Existing clearance controls were first introduced in the 1980s through the Native Vegetation Act, Country Fires Act and planning legislation. Whilst these controls have been effective in protecting native vegetation in rural broadacre situations, concerns have been expressed in relation to vegetation clearance associated with subdivision and housing developments particularly in the Mount Lofty Ranges of South Australia. Under the existing legislation, legal exemptions allowed quite significant clearance of native vegetation on small allotments. In addition there are also concerns as to the way in which the clearance controls have interacted with other State legislation. The review is expected to concentrate on the following matters:

- the subdivision of blocks of significant native vegetation;
- housing development on native vegetation allotments and the location and design of housing for these allotments;
- legal and administrative difficulties associated with the handling of planning applications by government and local agencies; and
- difficulties associated with the interrelationship between the Native Vegetation Act and section 40 Notices issued under the Country Fires Act.

Threatened species in South Australia

The South Australian Department of Environment and Natural Resources has released a draft strategy for the conservation of threatened species and ecological communities. The draft strategy focuses on five key elements:

- the identification, management and monitoring of threatened species and ecological communities;
- the identification, management and monitoring of the processes that are threatening species in ecological communities;
- the integration of the needs of biological diversity in social, economic and planning decision making to remove or mitigate existing threats and ensure that no threats are inadvertently introduced;
- developing community awareness and involvement in the conservation of the State's biological diversity including threatened species and ecological communities; and
- the provision of a legislative and administrative framework to support the conservation of biological diversity including threatened species and ecological communities, incorporating emergency measures.

National strategy for roadside vegetation

The Australian Nature Conservation Agency is in the course of preparing a draft strategy in relation to the protection of roadside vegetation. Work on the project has just commenced; however a report is expected to be released in the first half of 1994.

Heritage laws in New South Wales

New South Wales local councils have been given increased powers to control the demolition of buildings in their area through changes to the *Local Government Act 1993* which came into effect on 1 July 1993. They have also been given specific directions on how to deal with proposals affecting heritage items.

Under the new Act councils are responsible for:

- approving the erection, change of use and demolition of buildings;
- ordering the repair and demolition of buildings; and
- ordering an owner not to demolish or cease demolishing a building.

Before issuing an order, councils must now consider its impact on the significance of identified heritage items. In the case of the items which are listed on the Register of National Estate, or covered by an order under the Heritage Act, councils must give notice of their intentions to the Heritage Council. They must also consider any submissions from the Heritage Council before proceeding. This referral procedure is not necessary for items listed in Local Environment Plans (**LEPs**). In determining an application for approval, councils must consider the protection of the environment, the protection of public health and safety, and any items of heritage significance which may be affected. Councils can prepare local policies (with appropriate consultation) to guide their approval and order procedures as long as the policies are not tougher than the Act itself. A report of the new provisions was discussed by the Heritage Council at its October meeting. The council with the assistance of the Department of Planning and the Department of Local Government and Cooperatives will develop guidelines which will assist local councils to effectively interpret the provisions of the Act.

Victorian Mineral Resources (Sustainable Development) Act 1990

The *Mineral Resources (Sustainable Development) Act 1990* has been amended by the *Mineral Resources Development (Amendment) Act 1993*. A new section has been included in the Act to provide that the minister may require the holder of an exploration licence who proposes to carry out road making or bulk sampling activities to submit a report assessing the impact of the proposed work on the environment. The new section also provides that the minister must forward a copy of the statement to the ministers administering the *Planning and Environment Act 1987*, the *Crown Lands (Reserves) Act 1978* and the *Forests Act 1958* and consider any comments of those ministers before deciding whether those activities may be carried out. Section 42 of the Act has also been amended to provide that mining is subject either to an environmental effects statement under the *Environment Effects Act 1978* or a planning permit under a planning scheme approved under the *Planning and Environment Act 1987*. It also provides power for the minister administering the *Planning and Environment Act 1987* to amend planning schemes. Section 43 of the Act has also been amended. This section has amended the right to impose planning restrictions in relation to exploration and provides power for the minister administering the *Planning and Environment Act 1987* to amend planning schemes. It also provides for a penalty where the holder of an exploration licence commences work before meeting certain criteria. A new section 43A has also been inserted. This section provides that non-compliance with the *Mineral Resources (Sustainable Development) Act 1990* does not constitute contravention of the *Planning and Environment Act 1987* or any planning scheme.

These amendments are intended to clarify the relationship between approvals granted under the *Mineral Resources (Sustainable Development) Act 1990* and planning permits granted under the *Planning and Environment Act 1987*. The effect of the amendments is to prohibit planning authorities from restricting exploration by means of planning schemes whilst requiring all mining works to be granted a planning permit under a planning scheme or an approval granted under the *Environment Effects Act 1978*.

National environment protection

The Intergovernmental Agreement on the Environment (**IGAE**) is a landmark agreement between Australia's three spheres of government which specifies their respective roles and responsibilities in relation to the environment. It is an attempt to build a more co-operative national approach to the environment which crosses all administrative and political boundaries. The IGAE which is reviewed every three years, was signed in May 1992 by each State premier, the prime minister, the chief minister of the territories and a local government representative. It means that the States, the Commonwealth, the territories and local government can work more effectively together as partners to protect and manage the environment.

Schedule 4 of IGAE defines National Environment Protection Measures (**NEPNs**) as being made up of any combination of the following:

- mandatory standards which are quantifiable characteristics of the environment against which environmental qualities can be assessed;
- goals which are desired environmental outcomes adopted to guide the formulation of strategies for the management of human activities which may affect the environment;
- non mandatory guidelines which provide guidance on possible means of meeting desired environmental outcomes; and
- protocols which are the description of a process to be followed in measuring environmental characteristics to determine whether a standard or goal is being achieved, or the extent of the differential between the measured characteristic and the standard or goal.

According to schedule 4 of the IGAE a National Environmental Protection Authority (**NEPA**) will be empowered to establish any NEPNs for ambient air quality; ambient marine, estuarine and fresh water quality; noise where variations and measures would affect national markets; assessment of site contamination; assessments of hazardous waste; motor vehicle emissions; and recycling and reuse of used materials.

The new Queensland environment protection legislation and the associated environment protection policies (**EPPs**) are intended to be the mechanisms by which schedule 4 of the IGAE is implemented. Practitioners seeking to understand the purpose and content of the proposed environment protection policies should consider the State environment protection policies (**SEPPs**) prepared by the Victorian Environmental Protection Authority (**EPA**). The EPA has produced SEPPs for the control of air, water and noise pollution and industrial waste management plans especially for waste minimisation. These policies provide the framework for works approvals, licences, regulations and other tools for minimising controlling and cleaning up pollution and waste discharges.

Once national standards for air and water environments are established by NEPA, these standards will be incorporated within existing SEPPs in Victoria and EPPs in Queensland. These SEPPs and EPPs identify the level of environmental quality wanted and guide the development of program strategies to achieve these objectives. They define the beneficial uses of the environment which need protection and establish the quality objectives required to provide the protection. In turn, these guide the development of a wide range of programmes including works approvals, new plant and licensing of significant industrial discharges which together seek to protect the beneficial uses and achieve the objectives in the SEPPs or EPPs. National environmental standards will be automatically adopted in the States and the Commonwealth over time for various segments and issues after they are established through a public process conducted by NEPA. The ministers for Commonwealth, State and territory governments will consider draft NEPA establishment legislation in earlier 1994 to give effect to schedule 4 of the IGAE. If the legislation is endorsed there will be a release for public discussion and consultation.

Classification of public land in New South Wales

The *Local Government Act 1993* has implemented a scheme for the management of public land which is vested in or under the control of councils. An important part of the scheme is the classification of public land. The classification process aims to clearly identify land which is to be kept for use by the general public (community) and that which is not for use by the public (operational). The Act sets out various methods of classification and re-classification of land with an important method being the use of Local Environment Plans (**LEPs**). The Act requires that community land (except certain land dedicated under section 94 of the Environmental Planning and Assessment Act) can only be re-classified by the making of a LEP. This process was chosen because it is publicly accountable and well-known. Re-classification under the Act does not automatically take place where land is rezoned. The Department of Planning has issued a circular to provide guidance on the use of LEPs to classify and re-classify public land.

ACT environment strategy

On 15 December 1993 the ACT Minister for Environment Land, and Planning issued a draft environment strategy for public comment. The draft strategy is designed to set the framework for environmental management in the ACT for the next thirty years. The goal of the draft strategy is to enhance the components of the regional environment and maintain their functional integrity through the maintenance of stable soils, biological diversity and high quality air and water. The draft strategy also provides for the implementation of appropriate restoration plans for areas that have been degraded as well as seeking to improve the amenity of the ACT. The draft strategy suggests desired environmental outcomes for the future and outlines actions that need to be taken to achieve these outcomes. The draft strategy outlines a number of government commitments including a comprehensive environment education strategy, an integrated environment protection legislation, a 50 year water supply strategy together with its implementation, sustainable rural practices through the new rural leases policy including development of property management agreements which address the results of environmental surveys conducted at the time of lease transfer, a solid waste management strategy, and an integrated bicycle strategy incorporating an on and off road network and implementation plan for the ACT.

Queensland water conservation strategy

The Queensland Department of Primary Industries has prepared a State Water Conservation Strategy. The strategy foreshadows a more commercial approach by the government, greater involvement of the private sector in water resources development, a pricing policy that encourages efficient water use and greater return on capital investment, and increased community awareness of water resource issues.

The purpose of the strategy is to provide a framework and ongoing mechanism for the planning, development and management of Queensland's water resources. It represents an overview of existing potential water needs and opportunities in the State. The strategy states that Queensland's water consumption for all purposes was 3.243 million megalitres in 1991/1992. Of this, 2.1 million megalitres or 65% was used for irrigation, and urban usage accounted for about 560 thousand megalitres or 17%. The conservation strategy says that potential water use is constrained by lack of available supply in many areas of the State. Potential water needs are estimated to exceed the total water use by approximately 500,000 megalitres per year. It also suggests that there is considerable scope to expand the area under irrigation if economically viable schemes could be developed. The strategy for water conservation addresses four broad areas - managing water resources, managing water infrastructure, promoting economic growth, and promoting and ensuring social equity. The specific strategies identified in the strategy include:

- a policy on environmental water requirements by 1995 in consultation with community and special interest groups;
- consideration of asset refurbishment and the current review of water pricing policies;

- policies on water pricing and allocations in consultation with water users to encourage higher value use of water to increase the return on the state's investment;
- a five year role in a capital development program providing the water needed for clients to capitalise on market opportunities;
- following the announcement by State cabinet in May 1993 that within three to four years the parts of the department responsible for operating and developing water resource projects will be corporatised, systems and processes will be developed to allow a smooth transition to a corporatised body;
- the involvement of the private sector in water resources development to the greatest extent possible; and
- minimisation for the impact of algae outbreaks through participation in the State water quality task force and national activities through the development of specific management strategies.

The strategy represents the initial phase in an ongoing planning process of investigation and analysis and review. It is envisaged that it will be subject to regular re-examination every three to five years to reflect current needs and opportunities and prevailing economic and social circumstances.

Victorian catchment and land protection legislation

The Victorian Department of Conservation and Natural Resources is currently in the process of preparing catchment and land protection legislation. Stage 1 of the proposed legislation process has concluded with over 400 submissions being received and a report being distributed to those having made submissions. The majority of the submissions related to the roles and responsibilities of the various water boards and councils in Victoria.

North Coast urban planning strategy

The New South Wales Department of Planning has produced a draft North Coast urban planning strategy. The strategy has been produced in response to the forecast 80% increase in population that is expected in the North Coast region over the next 25 years. It has been prepared as a result of extensive consultation with government departments, local councils, special interest groups and the community. The strategy outlines a vision for the future and aims to accommodate the expected growth in an efficient and sustainable manner. Since 1988 development on the North Coast has been guided by the North Coast Regional Environmental Plan (**REP**). The REP manages incremental change by providing guidelines to decide whether rezoning proposals and certain development applications are appropriate. It is intended to be complemented by the strategy. The strategy provides a long term plan for the North Coast by specifying a hierarchy and structure which provides a basis for development and land releases. It will also help to coordinate service provision and resource allocation at all government levels.

The strategy is represented diagrammatically and establishes a regional settlement pattern for the North Coast with each settlement being allowed capacity to accommodate growth. The result is a settlement pattern with a hierarchical structure of regional, sub-regional, district and local centres. Tweed Heads, Lismore, Coffs Harbour and Port Macquarie have been identified as regional Centres with Grafton as a sub-regional centre. These centres have the capacity to support major hospitals and specialist medical services, tertiary education centres, and regional entertainment and sporting facilities. The strategy will be implemented through a number of strategy actions allocated to various State government and local government agencies. They address a range of issues including the management of growth and change, urban development, physical services, human services, transport, natural environment, natural resources, cultural heritage, economic development and employment.

Australian historic themes discussion paper

The Australian Heritage Commission has recently released a discussion paper on Principal Australian Historic Themes. The aim of the discussion paper is to develop a practical framework of principal Australian historic themes for the purposes of further identifying, assessing, interpreting and managing heritage places.

Review of fishing legislation

The Victorian government has commenced a major review of its fisheries legislation and follows on from a commitment to develop a new Fisheries Act made in the coalition government's pre-election policy. At this stage it is intended that the draft bill will be introduced in parliament in the Spring of 1994 following an extensive consultation process. It is anticipated that the new Fisheries Act will look significantly different to the existing one due to the considerable changes in legislative philosophy, fisheries policy and other circumstances that have taken place since the passing of the existing Act in 1968. For example one option is that fisheries legislation should facilitate fisheries conservation and management rather than just fish harvesting and processing. This broader scope might include the protection of fisheries and fish habitats from threats such as introduced exotic species. An important issue is the scope of the proposed fisheries bill relative to other legislation such as the *Flora and Fauna Guarantee Act 1988* and the *National Parks Act 1975* particularly in respect of marine parks and reserves, scientific reference areas and other types of marine protected areas.

It should be noted that Queensland is also planning new fisheries legislation. The Department of Primary Industries released a discussion paper in August 1993 to which substantial public submissions were made. A draft bill has been prepared for submission to parliament and a second round of consultation is to be completed prior to the final bill being passed before July 1994. The updated legislation has been necessary to meet new

ecological sustainable development criteria and to allow more State government input into the management process. The new bill will also give managers more interpretive power which is designed to allow for faster and more flexible management decisions.

Coastal Zone report

In December 1993 the Resource Assessment Commission released its report into the Australian Coastal Zone. The report concluded that there was a need to raise the profile of the coastal zone in government policy, a need to exercise greater vision and a need for a national approach. In particular the enquiry concluded that:

- no single government can manage the zone alone;
- the issues are of national significance and of great public concern;
- the socio-economic development of the coastal zone is of profound importance to the nation; and
- Australia's international obligations in the zone necessitate coordination between the spheres of government.

The inquiry recommended a program of action comprising a set of nationally agreed coastal zone management arrangements, arrangements for managing the program, greater community and industry involvement, and use of innovative management mechanisms. The inquiry recommends that all spheres of government agree on national objectives and national principles for achieving these objectives. These would then be adapted by individual State and territory governments to their own needs and circumstances. In turn local councils would formulate their own objectives and principles consistent with the State and national policies. The inquiry also proposed the enactment of a Commonwealth Coastal Resource Management Act. The Act would incorporate the objectives and principles for coastal management agreed by the Commonwealth, States and local governments. It would link Commonwealth funding of activities in the coastal zone to activities consistent with nationally agreed objectives and principles. It would not dictate to State and local governments what actions were permissible. Rather, it would enshrine the agreement reached between all levels of government as to the objectives and principles that would dictate how Commonwealth funding was to proceed.

Development Act 1993

South Australia's *Development Act 1993* came into operation on 15 January 1994. It provides for planning and regulates and places controls on how and where development may be undertaken in the State. As a result, development may not be undertaken in South Australia unless it is approved under the *Development Act 1993*. An important innovation is that it requires the appropriate minister to apply and maintain a planning strategy which should be an expression of the government's policy for development in the State. It also requires that the development plan seek to promote the provisions of the planning strategy.

Flammable and combustible liquids

The *Building (Flammable and Combustible Liquids) Regulation 1994* has been approved by the Governor-in-Council on 24 March 1994 and published in the Government Gazette on 25 March 1994. Previously the power to regulate the storage and handling of flammable and combustible liquids was contained in section 49G of the *Local Government Act 1936* and the *Flammable and Combustible Liquids Regulations 1990*. Both these provisions expired on 26 March 1994. Accordingly the government has remade the regulations as the *Building (Flammable and Combustible Liquids) Regulation 1994* under the *Building Act 1975*. In general the new regulation is a redraft of the existing Flammable and Combustible Liquids Regulation except for minor adjustments to reflect new drafting practices and the fundamental legislative principles set out in the Legislative Standards Act. It is intended that the proposed new Planning and Development Act will combine the current Building Act and the Local Government (Planning and Environment) Act and associated regulations. Accordingly the requirements of the *Building (Flammable and Combustible Liquids) Regulation 1994* will be included in the new Planning and Development Act processes for integrated development approvals and dispute resolution. It should also be noted that a national code on the storage of dangerous goods is currently being prepared and will be incorporated in the new Planning and Development Act once that legislation is enacted.

Local Government Regulation 1994

The *Local Government Regulation 1994* was approved by the Governor-in-Council on 24 March 1994 and published in the Government Gazette on 25 March 1994. The regulation is intended to implement certain provisions of the new *Local Government Legislation Amendment Act 1994* which commenced on 26 March 1994. The regulation follows the structure of the Act, with each part of the regulation corresponding to a chapter in the Act, and deals with the following matters:

- a prescription of the persons who qualify as pensioners under the Local Government Act and are therefore entitled to concessions particularly to rating relief;
- nomination of the State office of the Department of Housing, Local Government and Planning as the place where all local laws, local law policies and the reports of the Local Government Commissioner must be available for inspection;
- the criteria to be applied by the Local Government Commissioner in determining the classification of a local government area;

- the principles and criteria to be applied by the Local Government Commissioner when reviewing the external boundaries of a local government area;
- the criteria to be applied in the disclosure and registration of financial and non-financial particulars of interest of counsellors, chief executive officers and other local government employees and related persons;
- the information that must be recorded in the register of delegations by a local government;
- the commercial activities which are exempt from limitations imposed under part 4 (enterprises) of chapter 6 of the Act;
- the information to be contained in the local government's register of local law policies;
- the information that must be kept in the register of roads in each local government area;
- the categories of land that are exempt from rating;
- the minimum information the local government must keep in its land records;
- the interest rate to be applied on overdue rates;
- the information that a local government must include in its notice of intention to sell land for overdue rates;
- the certificate of sale that must be given to the Registrar of Titles when a local government sells land for overdue rates;
- the information to be provided to an owner of land where land is to be acquired as valueless land by a local government; and
- the minimum amounts of public liability and professional indemnity insurance that must be held by local government.

Local Government (Transitional) Amendment Regulation (No. 2) 1994

The *Local Government (Transitional) Amendment Regulation (No. 2) 1994* was approved by the Governor-in-Council on 24 March 1994 and published in the Government Gazette on 25 March 1994. The regulation amends the *Local Government (Transitional) Regulation 1993* made on 23 December 1993 by including additional transitional matters. The regulations are intended to provide for the transition between the operation of certain provisions of the *Local Government Act 1936* and the *Local Government Act 1993* until other suitable arrangements are made by local government and/or the State government in accordance with the provisions of the *Local Government Act 1993*.

Solid waste management policy

The Tasmanian Department of Environment and Land Management has released a solid waste management policy. The goal of the policy is to promote environmentally and economically feasible waste minimisation and resource management and to protect the environment from effects arising from landfills receiving municipal and hazardous wastes. The policy sets out various strategies in respect of waste minimisation, recycling and reuse, energy recovery, waste disposal and rehabilitation and future use.

Amendments to the Local Government (Planning and Environment) Regulations

Amendments to the Local Government (Planning and Environment) Regulations have now been formalised and are expected to come into force in 1994. The amendments will provide for the following:

- rationalising the thresholds above which a State managed environmental impact statement is required under the Act;
- rationalising the circumstances in which a contaminated land report needs to be submitted with a planning application; and
- providing consistency between interim development control triggers and impact assessment triggers.

Rural Lands Protection Act

The Queensland Department of Lands has recently released a discussion paper on the Rural Lands Protection Act. The review of the Act has been prompted by a variety of matters, in particular the national strategy for ecologically sustainable development released in December 1992. That strategy includes an objective on the need to reduce and manage effectively the impact of pests, plants and animal species on Australia's agricultural areas. The purpose of the review is to develop a clear plain English statute which will be enabling rather than prescriptive and which draws together and consolidates a number of sections of the present Act which are fragmented and disjointed.

Queensland Valuation of Land Act

The Queensland Department of Lands has released a discussion paper on proposals for new valuation of land legislation. The discussion paper sets out the principles on which the system of land administration is to be based. These include equity, integrity, proper decision making, timeliness and public awareness.

This paper was published as a Planning Law Update in the Queensland Planner 34:2, 22-27, June 1994.

Environmental mediation

Ian Wright

This article discusses the concept of Environmental Mediation, its growth and use in Australia. It highlights that Environmental Mediation will reach its full potential if it is institutionalised within existing decision–making frameworks

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Summary

Environmental mediation is an innovative approach for resolving environmental conflicts. It employs a neutral third party mediator to assist disputing parties to reach a settlement of the issues in dispute. This paper focuses on the emerging use of mediation in Australia and overseas, the reasons for its growth and the conditions that are necessary for its operation. The paper concludes that environmental mediation will not reach its full potential for resolving environmental conflicts unless it is institutionalised within existing decision-making frameworks.

Introduction

Environmental and development interests have traditionally been locked in conflict. Industrial development and technological innovation are often viewed as a threat to the quality of the natural environment. Similarly attempts to protect or enhance environmental quality are often challenged by groups or individuals whose economic and political self-interest is threatened.

The 1987 report of the World Commission on the environment and development has changed the entire perception of the relationship between environment and development. Central to the report is the concept of a sustainable development which is defined simply as development that meets the needs of present generations without compromising the ability of future generations to meet their needs.[1]

The achievement of sustainable development will require all parties to make better informed value choices in respect of matters affecting the environment and to develop new procedures for avoiding and resolving environmental conflicts.

This paper focuses on one such process; namely environmental mediation. The paper begins with a brief analysis of the nature of environmental conflicts and environmental mediation. The emerging use of environmental mediation in Australia and overseas is then documented. This is followed by an analysis of the major factors affecting the application of mediation to environmental conflicts. The paper then discusses the various methods by which mediation can be formalised. Finally a series of recommendations are made about the future use of environmental mediation in Australia.

Concepts and definitions

The term "*environmental conflicts*" can be defined broadly to describe the site specific and public policy disputes which arise over the human use of physical and non-tangible resources.[2]

These conflicts comprise a complex changing interplay of technical and scientific facts, laws, values, perceptions, attitudes and emotions.

Environmental conflicts have unique qualities which make their resolution difficult:

- Ecological systems are different from other natural systems. Natural resources are limited as is the capacity of natural systems to receive and recycle wastes. Further, ecological changes are unpredictable and irreversible.
- It is also difficult to make precise, even general, determinations about costs, parties and issues.
- Environmental conflicts may also involve issues affecting the public interest such that one party sees itself as supporting the public interest rather than one of the competing interests of various publics. Environmental conflicts are therefore perceived as right against wrong rather than right against right.

1 World Commission on Environment and Development and The Commission for the Future. "*Our Common Future*", Oxford University Press, Melbourne 1990.

2 Sandford, R. "*Environmental Dispute Resolution in Tasmania: Alternatives for Appeals Systems*", Environmental and Planning Law Journal, March 1990, pp 19-29.

- The implementation of private agreements is also difficult. Unlike other types of disputes, the parties to environmental conflicts are not readily identifiable. Accordingly, there is a greater likelihood that an agreement will be challenged by a party not included in the process. In addition, environmental conflicts are not repeated in regular cycles and this makes it easier for either party to flout an agreement.[3]

Traditionally, environmental conflicts in Australia have been resolved through public adjudication. This is a process where parties present their case in an adversarial manner and a decision is imposed by a third party. This process is generally characteristic of courts, tribunals and public enquiries.

In recent years, however, attention has been turned to Alternative Dispute Resolution or **ADR**. This refers collectively to those processes which provide either a substitute for or an alternative to the public adjudication process. Where such processes are used to resolve environmental conflicts, the processes are referred to as Environmental Dispute Resolutions or **EDRs**. Although there are differences between individual EDR approaches, all are voluntary processes that involve some form of consensus building, joint problem solving or negotiation.

This paper focuses on one EDR process; namely environmental mediation. This is an approach which employs mediation to resolve environmental conflicts. Mediation is the voluntary intervention into a dispute or negotiation by an acceptable neutral third party mediator who has no authoritative decision-making power in order to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of the issues in dispute.[4]

The mediation process therefore has four fundamental characteristics:

- the process is voluntary in that the parties enter the process willingly and the mediator has no authority to impose a settlement;
- there is a confidential relationship between the mediator and the parties;
- the mediator is neutral and impartial; and
- the process has procedural flexibility.

Emergence of environmental mediation

The environmental mediation movement has its roots in similar developments in other fields. Urban planning has developed public participation techniques whilst law suits are frequently settled by negotiation. The role of the mediator is also well established in international affairs and labour management disputes.

The principal reason for the movement towards environmental mediation processes is increasing dissatisfaction with the traditional adversarial approaches to resolving environmental conflicts.[5] The following problems have been identified with traditional litigation based approaches:

- The adversarial ("*win/lose*", "*winner takes all*") approach means that parties are concerned with persuading the adjudicator that the other side is wrong rather than ascertaining the truth or the most reasonable solution. Experts are therefore used as hired guns to make the most persuasive case and advocates introduce only those facts which clearly support their client's case.
- Courts are also inappropriate for resolving the competing claims of the multiplicity of parties which often characterise environmental issues.
- Judges and lawyers who do not have interdisciplinary training are often unable to understand the technical and scientific issues involved in environmental conflicts.
- There are also problems with proving, according to the appropriate legal standard, factual errors and causal relationships.
- The rules of procedure also segment complex and related environmental problems into discreet legal actions, restrict the range of concerns to legally enforceable causes of actions and restrict the information available for consideration to the narrowed set of issues.
- Courts are also unsuited to making the public policy choices that are often inherent in environmental disputes.
- Litigation may also displace environmental interest group leaders as spokespersons for their interest groups replacing them with lawyers.
- The high cost of litigation may also result in reduced access, especially for local environmental groups who are poorly organised and have few financial resources.

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3 Susskind, LE. and Weinstein, A. "*Towards a Theory of Environmental Dispute Resolution*", Boston College Environmental Affairs Law Review Vol. 9, 1980, pp 311-357.

4 Moore, C.W. "*Decision Making and Conflict Management*", Centre for Dispute Resolution, Denver, 1986.

5 Amy, D.J. "*The Politics of Environmental Mediation*", Columbia University Press, New York, 1987.

- The delay associated with litigation may also result in substantial costs to developers through carrying costs, opportunity costs and the inflationary impact of rising materials and construction costs. The delay caused through litigation may also prevent the implementation of solutions that could reduce ecological damage.

These problems have contributed to a growing dissatisfaction with litigation based approaches and lead to the development of innovative conflict resolution techniques such as environmental mediation.

Development of environmental mediation in Australia and other jurisdictions

Although environmental dispute resolution processes such as environmental mediation have existed for centuries, the current movement only gathered momentum in the United States in the late 1960s and early 1970s.

In fact, the first environmental conflict to be resolved through mediation was in 1973 when a dispute over the damming of the Snoqualmie River in Washington State was successfully mediated.

Since that time, environmental dispute resolution processes have become institutionalised in the United States in statutes, administrative procedures, agency mandates and the judicial system.

The States of Massachusetts, Rhode Island, Texas, Virginia and Wisconsin have enacted legislation that requires an applicant for a solid or hazardous waste facility permit to negotiate an agreement with the host community. A Virginia statute also specifies procedures for the mediation of inter-governmental disputes that arise when a city moves to annex part of the adjoining county.

A number of Federal regulatory agencies such as the Department of Transportation, the Environmental Protection Agency (**EPA**) and the Occupational Safety and Health Administration have also incorporated mediation into their rule making processes. Known as regulatory negotiation or "*reg-neg*", this process has been used by the EPA in the clean-up of abandoned toxic waste sites under the Comprehensive Environmental Response Compensation and Liability Act (**CERCLA** or Superfund Act). The States of Massachusetts, New Jersey, Wisconsin, Minnesota and Alaska have also established mediation offices either within the executive or outside the government.

In the United States, mediators have been used in a variety of environmental conflicts concerning land use, natural resource management, water resources, energy, air quality and toxic clean up.[6]

In Australia, however, EDR techniques such as environmental mediation have not been employed in any formal way, apart from the pre-trial conferences ordered by the various courts and tribunals dealing with environmental planning conflicts.[7]

An example of a compulsory conference procedure is provided by Division 6A of the New South Wales Land Environment Court Rules which empowers the Registrar of the Land and Environment Court to refer proceedings to the Registrar or the Deputy Registrar for mediation or conciliation.

It should be noted, however, that this process has been criticised on the basis that mediation by court officers involving as it does, private discussions with each party is a threat to the independence and integrity of the court. It is therefore argued that pre-trial conferences should be conducted in an open court in the presence of both parties and that mediation services should be provided by persons independent of the court.

Apart from pre-trial conferences, the only other institution or body to contemplate environmental mediation is the Resource Assessment Commission (**RAC**). A consultant's report published in January 1991 has recommended the use of environmental mediation and other EDR processes in enquiries conducted by the RAC.[8]

Australia's more cautious approach to environmental mediation when compared to the United States can be attributed to decision makers' limited knowledge of the process and the availability of alternative avenues of resolving environmental conflicts in this country.

Unlike the United States, Australian governments have introduced merit appeal systems and have encouraged the use of extra legal strategies such as lobbying green bans and public meetings by dealing with environmental policy issues outside of existing regulatory and adjudicatory forums. As a result, parties to environmental conflicts in Australia are not just limited to the options of litigating or mediating as they are in the United States.

However, the adversarial nature of Australia's merit appeal systems and the confrontationist nature of these extra legal strategies means that greater attention will be focused on EDR processes such as environmental mediation in the future.

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6 Bingham, G. and Haygood, L.U. "*Environmental Dispute Resolution: The First Ten Years*", Arbitration Journal, Vol. 40, December 1986, pp 3-14.

7 Preston, B.J. "*Environmental Litigation*", The Law Book Company Limited, Sydney, 1989.

8 Boer, B.; Craig, D.; Handmer, J. and Ross, H. "*The Use of Mediation in the Resource Assessment Commission Inquiry Process*", Commonwealth Government Printer, Canberra, 1991.

Application of environmental mediation

The experience in the United States in the last two decades has clearly shown that environmental mediation works. However, it should not be seen as a panacea that can be relied upon to cure the ills of traditional dispute resolution approaches.

A review of the successes and failures of environmental mediation reveals that under a limited set of conditions, its use may be highly appropriate while in other situations its use should be avoided. Parties to a dispute should therefore make a critical assessment of the various elements of the dispute to determine whether or not mediation is appropriate.

It is clear that no single factor will necessarily result in success or failure. Factors act independently such that the combined positive effect of some factors offset potentially negative factors and vice versa. These factors can be organised into three categories: substance related factors; process and context related factors; and party related factors.

In relation to substance related factors, an environmental conflict is capable of being mediated if:

- the issues in dispute are concrete or factual (ie they do not involve procedural issues, policy issues, disputed opinions or matters of principle, ideology or philosophy);
- there are multiple issues in dispute which allow the parties to trade one issue against another;
- the issues involve distributive decisions rather than re-distributive decisions;
- the arena of conflict is confined to a small manageable area; and
- the issues do not have a discrete or polar character (ie they do not involve discrete yes/no, all or nothing, either/or, right or wrong decisions).

In relation to process related factors, environmental mediation is appropriate where:

- the conflict has reached a stalemate or impasse;
- the parties are willing and able to identify the interests that underlie another's position, accept the legitimacy of those interests and invent new alternatives that satisfy these interests;
- the parties are willing to make a good faith effort to reach agreement;
- the parties have some incentive to enter the mediation process, (ie the parties perceive that mediation will provide the least costly method of resolution and the highest joint benefit);
- the parties can agree on the scope of the issues in dispute, the disputed facts and the procedural rules governing the conduct of the mediation process prior to the commencement of the negotiations; and
- the parties are able to commit themselves and their constituencies to the support and implementation of any settlement reached.

Finally, in relation to party related factors, environmental mediation is appropriate where:

- the conflict is characterised by a small well defined group of participants;
- all interested parties can be identified and included in the process either personally or through appropriate representatives; and
- all parties having the authority to make and implement decisions such as government agencies and courts are parties to the mediation.

This analysis indicates that under a limited set of conditions, environmental mediation may be highly appropriate while in other situations, its use should be avoided.

Institutionalising environmental mediation

To date environmental mediation efforts have been ad hoc and voluntary. Parties have become aware of mediation as an option for resolving their conflict and have arranged for a mediator to facilitate the negotiations. However the success of these initial efforts has led to concerted calls for mediation to be institutionalised.

In order for environmental mediation to be used on more than an ad hoc basis, it is necessary to satisfy at least four conditions:

- government decision makers and their constituencies must have knowledge and an understanding of the process;
- all the parties must have the capability to participate in the process effectively;
- there must be institutionalised support within government agencies for pursuing such a process; and
- the institutional structure or process must exist to accommodate it.

It is suggested that these conditions will be satisfied if environmental mediation and other EDR processes are institutionalised in the following manner:

- EDR efforts should be documented in order to provide case histories and records of precedents. The public visibility of EDR processes should also be promoted through parliamentary committees, conferences and universities;
- upper and middle level government officials should receive training in and better information about conflict management. This could include training in conflict management skills and education about EDR processes and the costs and shortcomings of traditional adversarial approaches;
- high level authorisation and support for EDR processes must be solicited from cabinet;
- an independent State level office should be established to coordinate EDR services. The centre would provide qualified neutral interveners whose skills could be matched to the needs of the particular parties and the issues they confront. This office should be publicly funded by both State and federal governments. Services should be provided on a user pays basis and augmented by an adequate system of intervener funding;
- environmental legislation and administrative procedures should be revised to recognise and encourage the voluntary use of EDR processes subject to certain mandated procedures; and
- a case referral program should also be established within the courts responsible for hearing environmental conflicts.

The institutionalising of environmental mediation in this manner will contribute significantly to the environmental decision making process as well as the implementation of sustainable development strategies.

Conclusions

The World Commission on Environment and Development has called on the world's nations to implement sustainable development strategies. However, existing political and legal institutions in Australia have proven unsatisfactory in resolving environmental conflicts. As a result attention has been increasingly focused on new approaches that offer some means in addition to traditional legal or political devices for resolving these conflicts.

Collectively referred to as environmental dispute resolution processes, these approaches share a critical element: the voluntary resolution of environmental disputes through some form of consensus building, joint problem solving or negotiation rather than through adversarial legal procedures. This paper has focused on one such process, the negotiated settlement of environmental conflicts with the assistance of mediators.

Called environmental mediation, this process has been extensively used in the United States since the mid-1970s to resolve a variety of scientific and policy related environmental conflicts. To date, however, its use in Australia has been limited to pre-trial conferences, although there has been recent efforts to institutionalise these processes.

Experience in the last two decades has shown that environmental mediation works. However it should not be seen as a panacea that can be relied upon to cure the ills of traditional adjudicatory processes. Each dispute needs to be considered individually to determine which method or sequence of methods is most likely to resolve the dispute.

Although mediation does provide some important advantages over traditional adjudicatory processes, there is the danger, as in any process, of it being abused by unethical participants or unethical or unskilled mediators. However, given the demonstrated success of the process, environmental mediation dearly merits serious consideration by policy makers.

In comparison to adjudicatory processes, the use of mediation in Australia has been circumscribed. This can be related to decision makers' limited knowledge of the process and the fact that there is no institutionalised system of making mediation services available.

Therefore, if mediation is to reach its full potential for resolving environmental conflicts, some form of governmental commitment will be required. This commitment, at the very least, should involve an education program for government officials and the establishment of case histories and records of precedents. This should also be complemented, if possible, by the establishment of an independent State level office to coordinate EDR services and a case referral program within the existing environmental planning courts and tribunals. In addition, environmental legislation and administrative procedures should be revised to recognise and encourage the voluntary use of EDR processes subject to certain mandated procedures.

In the absence of institutionalisation however, the importance of environmental mediation should not be overstated. There is still more the promise of an idea than its realisation. We are currently witnessing the beginning of something that is likely to become a new mode of dispute resolution but we are just at the starting line. To grow, the process will require resources, understanding, research, nurturing, dissemination and institutional building. With the appropriate commitment, environmental mediation will be available to deal with the most complex intractable and global environmental problems of the 1990s and beyond. The future of environmental mediation is therefore very much in the future, not in the past.

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Wastewater reuse and disposal in Queensland

Ian Wright

This article discusses the approach of wastewater reuse and disposal in Queensland. This article highlights the principle of ecologically sustainable development and discusses how it impacts wastewater reuse and disposal, particularly the legal implications it may pose

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Introduction

Community wastewater systems

To date wastewater management has been based primarily on centralised community systems of treatment and disposal. This has afforded significant cost savings to the community through high density development, consequential savings in water supply, power and transport services, the management of point source discharges rather than diffuse source discharges and economies of scale which are associated with large-scale treatment and disposal.

However, the centralised system of wastewater management is becoming unsustainable in both financial and environmental terms. The commitment to large scale treatment and disposal has meant that up to 85% of capital investment has been in low value added pipes and pumps and less than 15%-20% in wastewater treatment (ESD Working Group 1991: 122). In addition the continual flux of nutrients and toxic substances being transferred to land, water systems and food chains is not ecologically sustainable.

Ecologically sustainable development

The recognition that short-term cost savings to the community may be offset by long-term economic and ecological disbenefits has motivated Commonwealth, State and local governments to adopt ecologically sustainable development as the philosophical basis which will underpin future approaches to wastewater management.

The paradigm of ecologically sustainable development was embodied in the Intergovernmental Agreement on the Environment which was signed on 25 February 1992 by the Commonwealth, State and territory governments and the Australian Local Government Association on behalf of all local governments. Ecologically sustainable development is defined in the agreement as "*development which meets the needs of the current generation without compromising the ability of future generations to meet their own needs*".

Implementation of the Intergovernmental Agreement on the Environment by all levels of Australian government will result in a new approach to wastewater management. Based on ecologically sustainable development this approach will include the following elements (Niemczyhowicz 1992):

- An integrated systems approach comprising both structural and non-structural elements as opposed to a narrow-minded technological approach.
- However wastewater reuse is not without its disadvantages. The cost of treatment and distribution of wastewater is often higher than conventional water systems. It also poses some risk to the environment as well as public health.
- Environmental risks associated with wastewater reuse include:
  - land contamination from heavy metals;
  - soil degradation from increased salinity;
  - destroyed soil structure and a change to the water-table; and
  - contamination of groundwater from nutrients and/or surface water from phosphorus run-off.
- Public health risks associated with the reuse of wastewater include:
  - sickness from pathogens;
  - unacceptable levels of odour;
  - concentration of residues in food and animals;
  - mosquito infestation; and
  - visual pollution.

The environmental and public health risks associated with wastewater reuse raise a variety of legal issues for owners and occupiers on whose land wastewater is reused and public authorities who are responsible for the treatment and distribution of wastewater.

The purpose of this paper is three-fold:

- to examine the legal and administrative instruments that regulate wastewater reuse;
- to examine the approvals process that would be required to establish a wastewater reuse scheme; and
- to examine the potential legal liability of owners, occupiers and public authorities for environmental and public health problems associated with wastewater reuse.

Legal instruments

The reuse of wastewater is regulated by a complex myriad of rules enunciated by the courts, the Parliament, the Executive, local authorities and statutory authorities. In essence these rules consist of:

- legal precedents enunciated by the courts (the so called "*common law*");
- legislation comprising statutes enacted by the Parliament and regulations and policies approved by the Executive (that is the Governor-in-Council) and local laws adopted by local authorities; and
- non-binding guidelines, policies and codes of practice adopted by decision makers to assist in the application of legislative requirements.

The common law

The common law provides a number of causes of action in tort to persons who have suffered loss or damage as a result of wastewater reuse. In simple terms a tort is a civil wrong (as opposed to a criminal wrong) other than a breach of contract which the law will address with damages or by the granting of an injunction.

Until recently the common law recognised 5 torts being negligence, nuisance, trespass, breach of statutory duty and the rule in *Rylands v Fletcher* [1868] UKHL 1. However on 23 March 1994 the High Court in the case of *Burnie Port Authority v General Jones Pty Ltd* [1994] HCA 13 essentially abolished the rule in *Rylands v Fletcher* [1868] UKHL 1 by holding that it had been absorbed by the principles of ordinary negligence. To appreciate the significance of this decision it is important to consider each of the common law torts.

- **Negligence** – This action arises where a person has suffered damage as a result of a breach of a duty of care owed to that person. To succeed in a negligence action a plaintiff must prove on the balance of probabilities four elements:
  - First the plaintiff must prove that the defendant owed the plaintiff a duty of care. To establish this the plaintiff must prove that the relationship between the plaintiff and the defendant was sufficiently close for the defendant to have reasonably contemplated that the negligent act would lead to the plaintiff's damage and that it was reasonably foreseeable that damage was likely to occur to the plaintiff or a class of persons to which the plaintiff belongs. These are respectively known as the tests of proximity and reasonable foreseeability.
  - Second the plaintiff must prove that the defendant has breached the duty of care owed to the plaintiff. To establish this the plaintiff must prove that the defendant failed to observe the standard of care that would have been observed by a reasonable person. In determining what a reasonable person would have done in the situation regard should be had to the magnitude of the risk, the degree of probability of the occurrence, the expense, difficulty and inconvenience of alleviating action and any other conflicting responsibility which the defendant may have had.
  - Third the plaintiff must prove that it has suffered damage. To establish this the plaintiff must prove that it has suffered actual damage and that the damage was reasonably foreseeable as a consequence of the breach of the duty of care.
  - Finally the plaintiff must prove that the damage was caused by a breach of the duty of care. Where the damage is caused by the interaction of several independent wrongful acts the defendant or defendants will be answerable for the whole of the damage although the plaintiff can only recover once. Where each of the defendants only caused part of the total damage and it is practical to split up the loss and attribute identifiable parts to each of the defendants, liability will be apportioned according to responsibility.
- **Nuisance** – This action arises where the use of land causes an unreasonable and substantial interference with a person's use or enjoyment of the land (private nuisance) or the right of the public at large to health, safety, property and equality of environment (public nuisance). To succeed in a nuisance claim a plaintiff must prove on the balance of probabilities that the defendant's interference or proposed interference caused or will cause damage and that the interference is substantial and unreasonable. Thirdly in relation to a public nuisance action the plaintiff must demonstrate that they have suffered special or particular damage over and above that suffered by the public as a whole. If such damage has not been suffered they may bring proceedings if the Attorney General consents to the taking of the action. It is a defence to both private and public nuisance actions if the nuisance was an inevitable consequence of the exercise of a statutory duty

(*Allen v Gulf Oil Refinery Ltd* (1981) AC 1001). However this defence of statutory authority does not apply where a public authority is merely exercising a statutory power (*Department of Transport v The North-West Water Authority* (1983) 2 WLR 707).

- **The Rule** in *Rylands v Fletcher* [1868] UKHL 1 – Until the recent High Court case of *Burnie Port Authority v General Jones Pty Ltd* [1994] HCA 13 this action arose where a plaintiff's person, land or goods was damaged as the result of the escape from land of a dangerous substance which would not naturally be there. Unlike negligence and nuisance the reasonableness of a defendant's actions was not considered when determining liability. Accordingly the defendant would be held liable even where all due care and diligence was used to prevent the escape of the substance. In the Burnie Port Authority case the High Court recognised that it was difficult to envisage a situation giving rise to liability under the rule of *Rylands v Fletcher* [1868] UKHL 1 which would not also constitute an actionable negligence, nuisance or trespass. Accordingly the High Court held that the rule in *Rylands v Fletcher* [1868] UKHL 1 had been absorbed in the principles of negligence.

It can be seen that the common law is very much concerned with the maintenance of private property or interests. Apart from the doctrine of public nuisance, the common law does not take into account the wider public interest of fostering principles such as ecologically sustainable development. The application of the common law doctrine to so called toxic tort disputes, that is, cases involving the release of toxic chemicals into the environment, is also limited by the distinctive characteristics which distinguish a toxic tort from other types of injury associated with the law's traditional experience in the field of torts. For example:

- Injury resulting from genetic or biochemical disruption may develop without identifiable prior traumatic events.
- The time between exposure to a toxic chemical and the expression of the injury may be long, sometimes up to 20 years or more, thereby giving rise to problems of commencing proceedings within the time limits imposed by the various State's Limitation of Actions Acts as well as the problem of tracing the aetiology of the disease to exposure to a specific toxic chemical.
- Injury resulting from chronic and repeated exposure to a chemical rather than acute exposure can only be established through epidemiological studies, the success of which is dependent on the nature of the available data.
- Proof that a chemical is harmful often requires scientific evidence associated with biological causation which is on the frontiers of science and which, in many cases, may only show that exposure to the chemical increases the risk that the plaintiff would contract the disease.
- The *Murray Darling Basin Act 1983* which controls the pollution of rivers and other waterways in the Murray Darling River catchment area in accordance with the terms of the Intergovernmental Agreement between the commonwealth and various States.
- The *National Parks and Wildlife Conservation Act 1975* which controls the disposal of waste in a park or reserve declared under the Act.
- The *Navigation Act 1912* which controls the discharge of sewage into the sea.
- The *Protection of the Sea (*Prevention *of Pollution from Ships) Act 1983* which controls the discharge of sewage from ships into the sea.

Unlike Commonwealth legislation, laws adopted by local governments are of greater practical significance as they are generally applicable to all developments involving the reuse of wastewater. Relevant local laws include:

- planning schemes and local planning policies prepared pursuant to the *Local Government (Planning and Environment) Act 1990* which control the development of land within a local government area; and
- local laws prepared pursuant to the *Local Government Act 1993* which control the public health and environmental risks associated with development and other activities including wastewater reuse.

In all cases, it is necessary to consult the laws adopted by the local authority in which a wastewater reuse scheme is being proposed.

However, of greater practical significance is State legislation which imposes regulations in respect of the establishment and operation of wastewater reuse schemes. This legislation can be divided into the following categories:

- Development - this category encompasses the *Local Government (Planning and Environment) Act 1990* and the various planning instruments made thereunder such as State planning policies which control development, the *Building Act 1975* which controls building works and the Water Supply and Sewerage Act which control sewerage and water supply matters:
  - Draft Guidelines for Sewerage Systems and Effluent Management, Australian and New Zealand Environment and Conservation Council and Australian Water Resources Council, 1992: and
  - Australian Water Quality Guidelines for Fresh and Marine Waters, Australian and New Zealand Environment and Conservation Council, 1992.

Guidelines have also been prepared in other Australian States:

- Water Conservation by Reuse – Guidelines for the Use of Recycled Water in New South Wales (Environmental Design Guide WP - 7), State Pollution Control Commission 1987.
- Reuse of Treated Wastewater by Land Application (Environmental Design Guide WP - 8), State Pollution Control Commission, 1988.
- Land Fill Disposal of Industrial Wastes (Environmental Guideline), State Pollution Control Commission, 1989.
- Guidelines for the Use of Sewage Sludge on Agricultural Land, New South Wales Agriculture, 1989.
- Guidelines for the Utilisation of Treated Wastewater on Land (Draft), Environment Protection Authority, 1992.
- Environmental Guidelines for the Discharge of Wastewater to Ocean Waters, Environment Protection Authority 1993.
- New South Wales Guidelines for Urban and Residential Use of Reclaimed Water, New South Wales Recycled Water Co-ordination Committee, 1993.
- Guidelines for Wastewater Irrigation, Environmental Protection Authority (Vic), 1991.
- Water Quality Guidelines for Fresh and Marine Waters (Draft), Environmental Protection Authority (WA), 1993.

Department of Environment and Heritage

The requirement to obtain the approval of the Department of Environment and Heritage will arise in a number of ways:

- Premises to which contaminated soil or a hazardous substance is transported for disposal must be approved by the Director of the Department pursuant to the *Contaminated Land Act 1991* (section 14).
- A reuse scheme which involves the discharge of waste directly or indirectly to any waters must be licensed pursuant to the *Clean Waters Act 1971* (section 23).

In addition to the licence requirements, an occupier of premises is required to conduct, operate or control any premises, trade, industry, process, works or equipment so as to avoid water pollution or the discharge of waste to any waters (section 31). Water pollution is defined to mean any change in the properties of the water which causes a nuisance or renders waters harmful to human or environmental health (section 8). The environmental risks normally associated with reuse schemes such as infiltration of nutrients to groundwater or run-off of phosphorous to surface waters means that almost all reuse schemes will have to be licensed under the *Clean Waters Act 1971*.

Department of Health

The approval of the Department of Health will also be required in several circumstances:

- where sewerage is being treated and reused, the *Health Act 1937* imposes requirements in respect of the preservation of public health from sewage; and
- where crops are being grown on land subject to wastewater reuse, the *Food Standard (Adoption of Food Standards Code and General) Regulation 1987* made under the *Food Act 1981* adopts the food standards code which provides for maximum pesticide residue limits at the point of sale.

Department of Primary Industries

The approval of the Department of Primary Industries will also be required in certain circumstances:

- general environmental harm; and
- the breach of approvals and licence conditions.

Generally speaking this liability is of a criminal nature with legislation imposing various offences and penalties in respect of various environmental and public health risks associated with wastewater reuse schemes.

- **Land contamination** – Where land is contaminated as a result of a wastewater reuse scheme the Department of Environment and Heritage can issue pursuant to the *Contaminated Land Act 1991* a direction to the polluter, owner or local government to undertake an assessment or remediation of the site (sections 19 and 20) or undertake the assessment or remediation itself and recover the costs from the polluter, owner or local government (sections 19 and 21).

  Owner is defined as "*the person who has the freehold estate in the land or is entitled to possession of the land*" and includes the registered proprietor, mortgagee in possession, receiver and manager and liquidator. The level of assessment or remediation prescribed in the direction may involve:

  - ascertaining the major extent of contamination;
  - preparing a remedial action plan for the premises and if required, a long term management plan;
  - removing the cause of contamination from the premises;

- reducing the contamination of the premises;
- eliminating or reducing any danger arising from the contamination of the premises; and
- restoring the premises.

Contaminated land is defined by the *Contaminated Land Act 1991* to mean land which in the opinion of the Director is affected by a hazardous substance so that it causes a hazard to human health or the environment. A hazardous substance is considered to be hazardous to human health or the environment when the levels of contaminants specified in the Guidelines for the Assessment of Contaminated Land in Queensland prepared by the Department are exceeded.

- **Environmental harm** – The specific legal obligations currently imposed by media specific legislation such as the *Clean Air Act 1963* and *Clean Waters Act 1971* will be replaced by the general obligations contained in the Environment Protection Legislation when it is enacted later this year. Under this legislation a corporation may be liable for fines ranging from $250,000 for environmental nuisance to $500,000 for material environmental harm and $1,250,000 for serious environmental harm. To be held liable, a person must be shown to have either caused the environmental harm wilfully (ie deliberately) or unlawfully (ie contrary to an environmental protection policy, environmental management program, environmental protection order, licence or direction). Conduct engaged in for a corporation by a corporate officer is taken to have been engaged in by the corporation unless the corporation establishes that it took reasonable precautions and exercised proper diligence to avoid the conduct. Corporate officers will be guilty of an offence unless they can show that the commission occurred without their knowledge or consent and they took all reasonable steps to ensure the company complied with the Act. This is generally referred to as the due diligence defence.

  The concept of environmental harm is defined widely to mean any adverse effect or potential adverse effect on an environmental value. Environmental harm is material if it causes damage to property or costs of between $5,000 and $50,000 and serious if the damage or costs exceed $50,000. Environmental harm which unreasonably interferes with the enjoyment of an area by persons is known as environmental nuisance. Generally speaking most of the environmental and public health problems associated with wastewater reuse schemes would fall within the scope of environmental harm or environmental nuisance.

- **Breach of licence conditions** – It should also be noted that breaches of the specific legal obligations directed at the environmental and public health risks associated with wastewater reuse schemes may also constitute breaches of the various land use planning, pollution control and public health licences and approvals authorising the operation of the scheme. This may not only constitute an offence punishable by penalty but it may also result in revocation of the relevant licences and approvals.

The common law

Environmental and public health problems that may arise from a wastewater reuse scheme will not only give rise to potential criminal liability under legislation but it may also give rise to civil liability under the common law - torts of negligence, nuisance, trespass and breach of statutory duty.

- **Nuisance** – The applicability of private and public nuisance actions in toxic chemical cases is also restricted. First, there are the problems of causation. Second, proof of whether an interference with the use and enjoyment of land is substantial and unreasonable is determined by an objective standard rather than a subjective standard. Accordingly, the interference must be unreasonable to the ordinary person rather than unreasonable to the plaintiff who may have a particular sensitivity to chemicals. Third, in order to bring an action for public nuisance in respect of an interference with public health or the environment generally, the plaintiff must prove special or particular damage. This is often difficult or impossible in the case of pollution of areas used by the public generally such as public parks or public waters.
- **Breach of statutory duty** – The common law action of breach of statutory duty is also limited in its application in respect of toxic chemical cases. To succeed in such an action it must be proven that the duties imposed on public authorities or individuals by statute are intended to be owed to citizens as individuals.

However, most environmental legislation is intended to benefit the public as a whole such that the duties are owed to the public generally. Accordingly, no private action for breach of statutory duty would arise under legislation such as the *Clean Waters Act 1971*, the proposed Environmental Protection Legislation and other environmental legislation discussed in this paper.

Conclusions

Wastewater reuse schemes are a necessary part of the response to ecologically sustainable development. However, the implementation and operation of these schemes raises a number of important legal issues that need to be considered before any general policy of wastewater reuse is embraced. First, the reuse of wastewater is regulated by a myriad of legislation, common law principles and policies. This regulatory system needs to be rationalised so that clear and consistent environmental and public health policies are articulated. Second, the approvals process to establish a wastewater reuse scheme is complex involving numerous pieces of legislation and multiple decision makers. The delay and inconsistencies associated with such a system will increase the cost of implementing reuse schemes. Accordingly an integrated approvals system needs to be introduced either specifically for wastewater reuse or as part of a broader systems review of development approvals processes.

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Law and the environment

Ian Wright

This article discusses the protection of the environment through environmental law

July 1994

Legal system

Introduction

Australia was a colony of Britain and as such its legal system was authorised by Britain. At the time of colonisation the major institutions of government in Britain were the Crown, the Parliament, the Executive (Ministers of the Crown and Government Departments) and the courts.

Under British constitutional law the British Parliament had sovereign or unlimited power to make laws. This power was used to make laws for the colonies and established governments in those colonies.

The Crown also had power to deal with colonies by establishing representatives (Governors or Governor-Generals) and conferring executive powers on them called prerogatives. However, the power of the Crown was subject to that of the Parliament.

This background has two consequences for Australia's legal system:

- all constitutional power is derived from Britain; and
- institutions of government are modelled on Britain in that we have the Crown, Parliaments, the Executive and courts.

However, our system also varies from that of Britain in that Australia has a federal system of government. Australia was originally established as six colonies. In 1900 these colonies enacted a new national government called the Commonwealth government. Under this federal arrangement the Commonwealth government has power to deal with matters across the whole of Australia whilst colonies retain their separate identity as states and have general but limited powers to regulate matters within their own boundaries.

Government

Governments have three major functions:

- *Legislative* – creation of laws.
- *Administrative (executive)* – the application and enforcement of laws.
- *Adjudication (judicial)* – resolution of disputes involving the application and enforcement of laws.

These functions are performed by the four major institutions of government:

- *Crown* – today the Crown is largely a figurehead but centuries ago it exercised all legislative administrative and judicial power.
- *Parliaments* – make laws called acts or statutes.
- *Executive Government* – administers those laws and exercises those powers conferred on it by statute. These powers may include the making of delegated legislation such as regulations or the exercise of discretions.
- *Courts* – adjudicates disputes between parties. The courts also make law in two ways. First, they interpret statutes in the sense that they define statute law or delegated legislation. Secondly, where no statute law or delegated legislation exists, they make and interpret laws called the common law. This consists of principles of law formulated by judges to resolve disputes.

Crown

Formerly the legislative, executive and judicial functions of government were exercised by Britain. Today they are exercised by the Parliament, the Executive and the courts.

In modem times the Crown is regarded as a neutral repository of power and as a symbol of national unity. Whether the Crown is a valid symbol of national unity is at the very centre of the current republican debate.

From my perspective the Crown's wealth, its position as head of the Anglican Church and its reserve powers means that it cannot be a neutral Head of State which transcends partisan feelings.

The Crown's reserve powers are an important exception to its neutrality. Generally the Crown must act according to the advice of its Ministers. However in some areas the Crown has a residual discretion to act contrary to or without the advice of its Ministers. An example of this was when Sir John Kerr, the Governor-General of the Commonwealth of Australia dismissed the Whitlam Government on 11 November 1975 even though that Government maintained the majority in the House of Representatives.

In Australia, the Crown is represented by the Governor General in the case of the Commonwealth of Australia and the Governors in the case of each of the Australian States. The functions of the Governor-General and the Governor are similar to those of the Queen in Britain:

- formal Head of State;
- exercise executive powers deriving from a grant of some prerogative power from the Queen or from statute;
- assent to statutes passed by the Parliament:
- exercise law making powers delegated to them by statute; and
- commission Judges of the courts.

Except in the case of the reserve powers, all these powers are exercised on the advice of the Executive, that is the elected members of the Parliament who are Ministers of the Crown.

Parliament

The Parliament in the United Kingdom is composed of the Crown, the House of Lords (Upper House) and the House of Commons (the Lower House). Parliaments in Australia were closely modelled on the United Kingdom Parliament. Accordingly, Australian Parliaments comprise the Crown (as represented by the Governor-General or the Governor) and Upper House and a Lower House. The only exception is Queensland where the Upper House was abolished in 1922.

For the Commonwealth Parliament the Upper House is the Senate which is comprised of 12 Senators from each of the six States and two each from the Australian Capital Territory and the Northern Territory. The Lower House is the House of Representatives.

In the States the Upper House is the Legislative Council which was also the name of Queensland's Upper House before it was abolished. Lower Houses are called the Legislative Assembly in New South Wales, Queensland, Victoria and Western Australia and the House of Assembly in South Australia and Tasmania.

The Parliament has two principle functions:

- *Legislation* – this involves passing statutes or acts and supervising the making of delegated legislation. To become law a proposed statute called a Bill is passed by each house of the Parliament and then receives the royal assent from the Governor or Governor-General.
- *Supervision of the Executive* – this function is tied to the concept of responsible government which grew out of the recognition that the Parliament consists not of individuals but of parties and groups. This doctrine requires that following the election the party or coalition holding the majority of seats in the Lower House forms the government. From its ranks comes Ministers of the Crown who are in charge of the various government departments. Collectively, Ministers or an inner group of them constitute the cabinet which makes major policy decisions. Because the government has both executive power and the control of the Lower House, it can implement its policies by executive action subject to the response of the Upper House by legislation. However, should a government lose an election then by convention it must resign and permit the opposition to form a government. This convention is the basis of the concept of responsible government.

In Australia, legislative power is federally divided between the Commonwealth and State Parliaments. This federal division of power is affected by an act of the United Kingdom Parliament known as the Commonwealth of Australia Constitution Act passed in 1900.

The Commonwealth Constitution defines the Commonwealth's legislative powers in two ways. Firstly, by the conferment of express powers and secondly, by the imposition of prohibitions. Most of the powers and prohibitions are contained in the express terms of the Constitution. However, some powers and prohibitions are implied by the Constitution and others are contained in other legislation such as the *Statute of Westminster 1931* passed by the United Kingdom Parliament and the *Australia Act 1986* passed by the Commonwealth Parliament.

In the Commonwealth Constitution a number of sections confer power. However the most important is section 51. It has 40 subsections which are sometimes referred to as placita or heads of power. Some of these have acquired popular names such as the trade and commerce power in section 51(i) and the taxation power in section 51(ii).

Implied powers also arise from the Constitution on the basis that by implication or necessity the Commonwealth Parliament must have certain powers. For example, the Commonwealth has powers to legislate for matters essential to the operation of the Commonwealth government. It also has certain implied powers to regulate the economy.

The Constitution also contains prohibitions. The most famous of these is section 92 which was intended to protect the freedom of interstate trade. Its operative words are as follows:

> *Trade commerce and intercourse among the States whether by means of internal carriage or ocean navigation shall be absolutely free.*

There are also implied prohibitions in the Constitution. An important example is the concept of inter-governmental immunities which restricts the exercise of Commonwealth and State powers. Put broadly the doctrine prohibits State Governments from interfering with the essential functions of the Commonwealth government and prohibits the Commonwealth from interfering with the functions of the States.

Unlike the Commonwealth Parliament which has most of its powers conferred by a number of sections of the Constitution, powers of State Parliaments are contained in a single section. The relevant Constitutional Acts of the States provide that the State Parliaments have the power to make laws for the "peace, welfare and good government of the state in all cases whatsoever".

The legislative powers of the State and Commonwealth generally fall within four categories:

- exclusive powers of the Commonwealth – these powers which are set out in the Commonwealth Constitution are only exercised by the Commonwealth and cannot be exercised by the States;
- exclusive powers of the States – these are powers which fall within the powers of the State and not the Commonwealth;
- powers of both the State and the Commonwealth – these powers can be exercised by both the Commonwealth and the States concurrently. Section 109 of the Constitution resolves any inconsistency between concurrent legislative actions by providing that the Commonwealth law is to prevail and the State law is invalid to the extent of any inconsistency; and
- powers not exercised by either the Commonwealth or the State – this refers to those powers which were not granted to either the Commonwealth or the States in the first place or because power is denied by a prohibition in the Commonwealth Constitution affecting both the Commonwealth and the States. An important example of this is section 92 of the Constitution which forbids both the Commonwealth and the States from legislating in a way which impedes the freedom of interstate trade, commerce and intercourse.

Executive

The Executive comprises the government and statutory bodies and offices.

At the head of the responsible government is the Crown which by convention must act on the government's advice. In its executive capacity the government comprises the cabinet and the Executive Council. The cabinet which comprises some or all of the members of the Crown make the political decisions. The Executive Council which comprises the members of the cabinet and the Governor-in-Council implement those decisions. The Ministers of the Crown are responsible for one or more of the government departments.

The other strand of the Executive are statutory bodies and offices. Statutory offices are of high trust that are created to insulate the officer holders from the day to day pressures of government. Statutory bodies on the other hand are created by statute to perform a task free from the public service.

The Executive may exercise executive power such as described above, legislative power such as when it makes delegated legislation and judicial power such as when administrative tribunals perform judicial or quasi judicial functions.

Courts

The basic functions of courts is to adjudicate disputes arising under law. This involves a three stage process:

- First, courts find the facts of the dispute. If the facts are in dispute the courts have to decide what is the correct or most plausible version of the facts.
- Second, the courts have to find the law by interpreting statutes, delegated legislation and the common law.
- Third, the courts having found the facts and the law have to apply the relevant law to the facts to come to a decision.

When the courts decide for one party or another in a dispute, they are articulating a principle of more general application on which the decision rests. Its technical name is ratio decidendi (reason for the decision). Once a principle has been firmly established it will normally be followed and apply in later cases. This is known as the doctrine of precedent or in latin stare decisis (to stand by what has been decided).

Central to the operation of courts is the concept of jurisdiction. Jurisdiction is the power or the extent of the power of a court to hear cases. It can be defined by a number of factors such as the type of law involved in a case (for example civil, criminal or planning matters), the amount of money in dispute, the place of residence of the parties or the location of the subject of the dispute.

One of the most important divisions of jurisdiction is original and appellate. As the term suggests, original jurisdiction is that which is exercised when a dispute first comes before a court. If there is an appeal from that court to another, the second court exercises appellate jurisdiction.

Courts are arranged in a hierarchy. Although there are differences between each of the Australian jurisdictions, there is some common pattern about the courts in each jurisdiction which can be described in the following way:

- First, there is a principal and superior court having a wide range of civil and criminal jurisdiction at first instance. In Australia this is the Federal Court in the Commonwealth (although it does not have general criminal jurisdiction) and the Supreme Courts in the States and Territories.
- Second, above the superior court of first instance there is a court of appeal which has a variety of names in the jurisdictions. In Queensland, it is called the Court of Appeal.
- Third, there is a final appeal to the highest court in the hierarchy being the High Court in Australia.
- Fourth, beneath the superior courts are intermediate and inferior courts which deal with less serious matters. In Queensland these are the Magistrates Courts and the District Court.
- Fifth, there are courts and tribunals having specialised jurisdiction. Examples of these are the Planning and Environment Court, the Mining Wardens Court and the courts and tribunals dealing with industrial matters. Whilst these courts and tribunals are initially outside the mainstream courts, they are often brought within that system by provisions for review by or an appeal to the higher courts.

Growth of environmental law

Reasons for growth

The environmental movement has become a worldwide phenomena. It is politically organised, financially secure and continues to grow in size. More importantly, it has gained credibility and recognition amongst the general public. This can be attributed to at least three factors:

- the recognition that the environment is a non-renewable resource, that there are definable limits to growth and that we owe an obligation to future generations to protect the environment;
- increased income, mobility and recreational time has increased participation levels in recreational opportunities; and
- the medium of television has increased public awareness of environmentally related issued.

Scale of environmental conflicts

The environmental movement ranks as one of the great social and political revolutions of this century. It is a fact of political life in the 1990s that environmental issues can determine elections at all levels of government. Some recent illustrations include:

- *Commonwealth government* – disputes involving the Gordon below Franklin Dam, the Southern Lemonthyme Forests, uranium mining at Ranger in the Northern Territory and Roxby Downs in South Australia, the wet tropics rainforests and Coronation Hill.
- *State government* – disputes involving Fraser Island, North Stradbroke Island and Cape York.
- *Local government* – the world's tallest building in Brisbane, the Leismarket proposal on the Noosa northshore and the election of anti-development councils in many local authorities.

In addition, environmental issues have been researched and debated by all the great multi-national assemblies and many internationally agreed measures have been translated into domestic legislation to fulfil international obligations such as those relating to world heritage, ozone depletion and transport of hazardous substances between countries.

Role of environmental law

Environmental law has a key role in meeting the global challenge to protect the environment. It has this key role for the following reasons:

- Environmental law establishes the rights of individuals and governments and in particular establishes rights to clean air, clean water and sound land use. Environmental law is at the forefront of establishing public as opposed to private rights that is rights which reflect on an individual's societal interests rather than his proprietorial interests.
- Environmental law has commenced the difficult task of applying rights to other living creatures and inanimate objects. In doing so it reflects the shift from an anthropocentric world view to a holistic ecological view. The attaching of rights to other species reflects a legal acceptance of the philosophy expressed by Aldo Leopold of a land ethic and approach resting upon the premise "that the individual is a member of a community of independent parts" and a land ethic that "enlarges the boundaries of the community to include soils, waters, plants and animals or collectively, the land".
- Environmental law establishes the framework, the processes and the mechanisms to ensure that actions meet the standards and objectives of environmental protection. As such environmental law is the fundamental implementation mechanism of all environmental policies and strategies.

- Environmental law provides the capacity to enforce environmental policies and strategies by the application of sanctions and remedies to repair and make good any harm and to punish those whose actions do not comply with policies and strategies.

Growth of environmental law in Australia

Modem environmental law has developed at an uneven pace in different jurisdictions. Modem environmental law was developed in the United States and Europe during the 1960s but did not commence in Australia until the 1970s. Since that time environmental law has developed in three distinct phases:

- The first phase commenced in the 1970s and involved the establishment of basic pollution control legislation to control emissions of air, water and noise pollution and environmentally hazardous chemicals. This legislation was concerned with the control of point source pollution and the waste products of industrial processes. As such it addressed the symptoms rather than the causes of environmental degradation.
- The second phase commenced in the 1980s and involved the incorporation of environmental factors into the project planning process through environmental impact assessment and town planning laws.
- The third phase commenced in the mid 1980s and intensified during the 1990s. It involved the development of a national perspective to environmental management. Up until this period environmental management decisions were largely the responsibilities of the State and local governments rather than the Commonwealth government. This resulted from the distribution of powers contained in the Commonwealth Constitution which gave the Commonwealth no express powers to legislate in respect of the environment. However the increasing internationalisation of issues during the latter part of the 1980s resulted in many issues becoming the subject of international treaties. This enabled the Commonwealth to use its external affairs powers under the constitution to introduce domestic environmental legislation in respect of issues which were previously the domain of the States.

Environmental law

Definition

Defined simply, environmental law refers to the rules or regulations which govern human conduct which is likely to affect the environment.

Categories

Uncertainty over the meaning of the word environment has meant that the boundaries of environmental law have yet to be precisely defined. However, it is suggested that environmental law can be divided into three categories:

- *Natural Resources Law* – this is concerned with the impact on the environment of the development and exploitation of natural resources such as land and minerals.
- *Law of the Natural Environment* – this is concerned with the conservation and protection of the natural environment.
- *Law of the Cultural Environment* – this is concerned with the preservation of the built, cultural and heritage environment.

Sources

Environmental laws are derived from four sources:

- the common law;
- legislation including delegated legislation;
- decisions of statutory tribunals; and
- informal policies.

Common law

The common law is the body of principles that have been established by courts over the centuries in order to resolve disputes between parties. The courts have applied three broad categories of principles to resolve the conflicts between development and environmental interests:

- *Law of Civil Wrongs or Torts* – these principles include those of negligence, nuisance, trespass and the doctrine in *Rylands v Fletcher*.
- *Administrative Law* – remedies are available where a statutory authority has refused to carry out its functions or has made a decision contrary to law.
- *Criminal Law* – a breach of statute may give rise to criminal sanctions.

Legislation including delegated legislation

Environmental legislation can be divided into five broad categories:

- *Development* – this legislation provides primarily for the development of natural resources and includes "fast track" legislation, public development indenture and franchise agreements.

- *Allocation* – this legislation is concerned with the exploitation or use of natural resources such as minerals, fisheries, water, land, energy, soil and forests.
- *Conservation* – this legislation introduces an element of conservation into the development of these resources and includes the conservation of the soil, protection of land from soil erosion, beach protection, pasture protection, marine conservation and wildlife conservation.
- *Protection* – this legislation deals with the protection of particular elements of the environment from identifiable harm and includes pollution control in general, the promotion of clean air and clean water, waste disposal, control of noxious plants and animals and the regulation and use of radioactive and other potentially harmful substances such as pesticides and fertilisers.
- *Preservation* – this legislation provides for the preservation of the cultural and artificial environment and includes such matters as protection of the Aboriginal heritage of Australia.

Unfortunately, this legislation has been introduced in an ad hoc and piecemeal fashion such that most Australian states have a plethora of environmental legislation. For instance, in Queensland, environmental issues are regulated by over 35 different pieces of legislation. These are categorised in Figure 1.

Figure 1 Environmental legislation

Conservation		
Conservation of the natural environment	**Preservation of cultural and heritage development**	**Protection of environmental elements**
1. Reserves (Public, Recreation, Environmental), Land Act, Local Government Act, Transport Infrastructure (Roads) Act 2. State Forest – Forestry Act 3. Marine Parks – Marine Parks Act 4. National Parks – National Parks and Wildlife Act (Nature Conservation Act) 5. Beaches – Beach Protection Act (Coastal Management Act) 6. Animals – Fauna Conservation Act (Nature Conservation Act) 7. Plants – Native Plants Protection Act, (Nature Conservation Act), Stock Routes and Rural Lands Protection Act and Local Government Act 8. Soil – Soil Conservation Act 9. Water – Water Resources Act, Irrigation Act and River Improvement Trust Act NB: Acts in brackets represent new legislation that has yet to be proclaimed	1. Queensland Heritage Act, National Trust of Queensland Act, Queensland Museums Act	1. Air – Agricultural Chemicals Distribution Control Act, Clean Air Act (Environment Protection Legislation) 2. Noise – Noise Abatement Act (Environment Protection Legislation) 3. Solid Wastes – Health Act, Litter Act, Sewerage and Water Supply Act 4. Waters: (a) Non-tidal – Clean Waters Act, (Environment Protection Legislation), Pollution of Waters by Oil Act, Sewerage and Water Supply Act, River Improvement Trust Act, Water Resources Administration Act, Various Water Boards (Brisbane, Cairns, Gladstone, Townsville, Thursday Island, Tully Falls, Wivenhoe) (b) Tidal – Petroleum (Submerged Lands) Act, Pollution of Waters by Oil Act, Sewerage and Water Supply Act 5. Toxic and Hazardous Wastes – Agricultural Chemicals Distribution Control Act, Agricultural Standards Act, Health Act and Radioactive Substances Act, Contaminated Land Act

Conservation		
Conservation of the natural environment	**Preservation of cultural and heritage development**	**Protection of environmental elements**
		6. General legislation: (a) Community – Local Government Act (b) Building – Building Act (c) Waterways – Queensland Marine Act, Harbours Act, (Coastal Management Act), Port of Brisbane Authority Act (d) Motor vehicles – Traffic Act, Motor Vehicles Safety Act, Motor Vehicles Control Act, Carriage of Dangerous Goods by Road Act (e) Extractive Industry – Mines Regulation Act, Explosives Act, Coal Mining Act, Mineral Resources Act (f) Licenced Premises – Liquor Act (g) Planning – State Development and Public Works Organisation Act (h) Transport – Transport Infrastructure (Roads) Act, Transport Infrastructure (Railways) Act (i) Occupational health and safety – Workplace Health and Safety Act

Development	
Development legislation	**Resource allocation legislation**
1. State Development Public Works Organisation Act – Infrastructure plans for prescribed developments 2. Industry Development Act – Industrial developments on Crown Land 3. Franchise Agreements – Commonwealth Aluminium Corporation Pty Ltd Agreement Act 1957, Aurukun Associates Agreement Act 1975, Thiess Peabody Coal Pty Ltd Agreement Act 1962, Amoco Australia Pty Ltd Agreement Act 1961, The Rundle Oil Shale Agreement Act 1980	1. Minerals — Mineral Resources Act 2. Land: (a) Private Land: (i) Developmental Approval – Local Government (Planning and Environment) Act (ii) Subdivisional Approval – Local Government (Planning and Environment) Act, Building Units Group Titles Act, Beach Protection Act, Irrigation Act, Mixed Use Development Act, Water Resources Act, Integrated Resort Development Act (iii) Building Approval – Building Act

Development	
Development legislation	**Resource allocation legislation**
	(b) Crown Land: (i) Land under water – Harbours Act (Tidal Waters), (Coastal Management Act), Water Resources Act (Non–tidal) (ii) Other land – Land Act 3. Soil, sand, gravel, rock, clay, earth, stone – Water Resources Act (extraction from a watercourse), Forestry Act (extraction from areas other than a watercourse) 4. Water: (a) Non–tidal water courses – Water Resources Act (b) Tidal waters – Harbours Act and Canals Act, (Coastal Management Act) (c) Natural Lakes – Local Government (Planning and Environment) Act (d) Water supply, drainage, irrigation – Irrigation Act (e) Domestic drainage and plumbing – Sewerage and Water Supply Act 5. Forestry – Forestry Act 6. Fisheries – Fisheries Act, Fishing Industry Organisation and Marketing Act. 7. Energy – Electricity Act

Decisions of statutory courts and tribunals

In Queensland. statutory bodies are of two basic types:

- There are those statutory bodies which are vested with administrative power to determine applications. An example is the Mining Warden's Court established under the Mineral Resources Act which is given power to approve applications for mining tenements and to attach environmental conditions to these tenements.
- There are those statutory bodies which are vested with jurisdiction to consider albeit afresh, by way of appeal, the decision of an administrative body. An example is the Planning and Environment Court which is given power to consider afresh the land use planning decisions of local authorities.

Generally, every person is given a right to object to an application to an administrative body. This right of objection usually gives rise to a right of appeal. In the case of an applicant for a licence or consent, a right of appeal is always made available so that an applicant may challenge any of the conditions attaching to the licence or consent.

Informal policies

Administrative bodies are guided by memoranda, guidelines, procedures and directives aimed at implementing policies which have their legal base in powers conferred by statute. These informal rules and procedures are not legally binding and are therefore of uncertain legal status should it be alleged in an action that there has been a disregard for the procedures contained therein.

Common law principles applicable to environmental law

Law of torts

By far the most important area of the common law relevant to the environment is the law of torts. In simple terms a tort is a civil wrong (as opposed to a criminal wrong) other than a breach of contract which the law will address with damages or by the granting of an injunction.

Until recently the common law recognised five torts being negligence, nuisance, trespass, breach of statutory duty and the rule in *Rylands v Fletcher*. However on 23 March 1994 the High Court in the case of *Burnie Port Authority v General Jones Pty Ltd* essentially abolished the rule in *Rylands v Fletcher* by holding that it had been absorbed by the principles of ordinary negligence. To appreciate the significance of this decision it is important to consider each of the common law torts.

Negligence

A negligence action arises where a person has suffered damage as a result of a breach of a duty of care owed to that person. To succeed in a negligence action a plaintiff must prove on the balance of probabilities four elements.

- First the plaintiff must prove that the defendant owed the plaintiff a duty of care. To establish this the plaintiff must prove that the relationship between the plaintiff and the defendant was sufficiently close for the defendant to have reasonably contemplated that the negligent act would lead to the plaintiff's damage and that it was reasonably foreseeable that damage was likely to occur to the plaintiff or a class of persons to which the plaintiff belongs. These are respectively known as the tests of proximity and reasonable foreseeability.
- Second the plaintiff must prove that the defendant has breached the duty of care owed to the plaintiff. To establish this the plaintiff must prove that the defendant failed to observe the standard of care that would have been observed by a reasonable person. In determining what a reasonable person would have done in the situation regard should be had to the magnitude of the risk, the degree of probability of the occurrence, the expense, difficulty and inconvenience of alleviating action and any other conflicting responsibility which the defendant may have had.
- Third the plaintiff must prove that it has suffered damage. To establish this the plaintiff must prove that it has suffered actual damage and that the damage was reasonably foreseeable as a consequence of the breach of the duty of care.
- Finally the plaintiff must prove that the damage was caused by a breach of the duty of care. Where the damage is caused by the interaction of several independent wrongful acts the defendant or defendants will be answerable for the whole of the damage although the plaintiff can only recover once. Where each of the defendants only caused part of the total damage and it is practical to split up the loss and attribute identifiable parts to each of the defendants, liability will be apportioned according to responsibility.

Nuisance

A nuisance action arises where the use of land causes an unreasonable and substantial interference with a person's use or enjoyment of the land (private nuisance) or the right of the public at large to health, safety, property and equality of environment (public nuisance). To succeed in a nuisance claim a plaintiff must prove on the balance of probabilities that the defendant's interference or proposed interference caused or will cause damage and that the interference is substantial and unreasonable. Furthermore in relation to a public nuisance action the plaintiff must demonstrate that they have suffered special or particular damage over and above that suffered by the public as a whole. If such damage has not been suffered they may bring proceedings if the Attorney General consents to the taking of the action. It a defence to both private and public nuisance actions if the nuisance was an inevitable consequence of the exercise of a statutory duty (*Allen v Gulf Oil Refinery Ltd* (1981) AC 1001). However this defence of statutory authority does not apply where a public authority is merely exercising a statutory power (*Department of Transport v The North-West Water Authority* (1983) 2 WLR 707).

Trespass

A trespass action arises where there has been a direct interference with a plaintiff's person, land or goods. To succeed in a trespass claim the plaintiff must prove that the interference with the plaintiff's person, land or goods was part of the defendant's act and not merely a consequence of it. An injury is direct where it follows so immediately upon the act of the defendant that it may be termed part of that act. On the other hand it is consequential when by reason of some obvious and visible intervening cause it can be regarded not as part of the defendant's act but merely as a consequence of it. This distinction is vividly illustrated by case law. For example it has been held that sewage deposited on a person's land from a sewerage works via the natural flow of a river is a trespass (*Jones v Llanrwst Urban Council* (1911) 1 Ch 393) but oil discharged from a tanker into an estuary and carried by the wind and tide onto a person's beach has been held not to be a trespass as the injury was consequential. not direct (*Southport Corporation v Esso Petroleum* (1954) 2 QB 182).

Breach of statutory duty

A breach of statutory duty action arises where the plaintiff has suffered damage as a result of the breach of a statutory obligation imposed on the defendant and which was intended by the Parliament to give rise to a civil action for damages. To succeed in an action for breach of statutory duty the plaintiff must prove five elements, namely that:

- the plaintiff is of a class of persons protected by the statute;
- the breach of the statutory duty gives the plaintiff a civil action;
- the defendant is subject to a statutory duty;
- the defendant has breached the statutory duty; and

- the plaintiff's injury has been caused by the defendant's breach of the statutory duty.

To date no actions have been taken for breach of statutory duty in relation to any environmental or public health statute. Generally cases where a breach of statutory duty have been found to exist have involved industrial safety regulations.

Rylands v Fletcher

Until the recent High Court case of *Burnie Port Authority v General Jones Pty Ltd*, an action based on the case of *Rylands v Fletcher* arose where a plaintiff's person, land or goods was damaged as the result of the escape from land of a dangerous substance which would not naturally be there. Unlike negligence and nuisance, the reasonableness of a defendant's actions was not considered when determining liability. Accordingly the defendant would be held liable even where all due care and diligence was used to prevent the escape of the substance. In the *Burnie Port Authority* case, the High Court recognised that it was difficult to envisage a situation giving rise to liability under the rule of *Rylands v Fletcher* which would not also constitute an actionable, negligence, nuisance or trespass. Accordingly the High Court held that the rule in *Rylands v Fletcher* had been absorbed in the principles of negligence.

Limitations of the common law

It can be seen that the common law is very much concerned with the maintenance of private property or interests. Apart from the doctrine of public nuisance, the common law does not take into account the wider public interest of fostering principles such as ecologically sustainable development. The application of the common law doctrine to so called toxic tort disputes, that is cases involving the release of toxic chemicals into the environment, is also limited by the distinctive characteristics which distinguish a toxic tort from other types of injury associated with the law's traditional experience in the field of torts. For example:

- injury resulting from genetic or biochemical disruption may develop without identifiable prior traumatic events;
- the time between exposure to a toxic chemical and the expression of the injury may be long, sometimes up to 20 years or more, thereby giving rise to problems of commencing proceedings within the time limits imposed by the various State's Limitation of Actions Acts as well as the problem of tracing the etiology of the disease to exposure to a specific toxic chemical;
- injury resulting from chronic and repeated exposure to a chemical rather than acute exposure can only be established through epidemiological studies, the success of which is dependent on the nature of the available data; and
- proof that a chemical is harmful often requires scientific evidence associated with biological causation which is on the frontiers of science and which, in many cases, may only show that exposure to the chemical increases the risk that the plaintiff would contract the disease.

As a result of these difficulties, Parliaments have played a major role in formulating policies and programmes in respect of environmental matters and implementing these through statutes.

Future directions of environmental law

General directions

Since the 1970s, Australia has witnessed a flurry of environmental legislation of growing sophistication. However this has only been a warm up for what is likely to lie ahead.

Therefore where is environmental law heading during the 1990s? Are there any discernible trends or consistent directions?

Whilst the task of forecasting is made difficult by the fluid and roughly changing nature environmental issues it is suggested that the following emerging trends will dominate the growth and development of environmental law in the 1990s.

International focus

Environmental law will increasingly adopt an international focus as transnational environmental laws provide much of the driving force for domestic environmental laws.

The origins of transnational environmental law can be traced to the United Nations conference on the human environment held in Stockholm in 1972. The Stockholm conference adopted a declaration on the human environment embodying 26 principles and an action plan composed of 120 recommendations to be supervised by the United Nations Environment Programme (**UNEP**).

The declaration's principles demanded that the earth's natural resources be safeguarded for the benefit of present and future generations through better planning and management, education research and international corporation. This represented the first coherent expression of the concept of sustainable development in transnational environmental policy. This concept has been defined simply as "development that meets the needs· of present generations without compromising the ability of future generations to meet their needs".

The emphasis on sustainable development policies was subsequently elaborated by several other transnational environmental policy documents including the 1972 report of the Club of Rome titled *The Limits to Growth*, the 1980 report of the Independent Commission on International Development Issues entitled *North-South: A Programme for Survival*, the World Conservation Strategy prepared by UNEP in 1980 and the World Charter for Nature adopted by the United Nations General Assembly in 1982.

The 1972 Stockholm declaration was reviewed 10 years later at a conference held at Nairobi in 1982. The declaration of the Nairobi conference re-affirmed the principles of a sustainable development and emphasised amongst other things the need to develop greater international corporation to deal with deforestation, ozone layer depletion and the greenhouse effect.

In 1983 the United Nations established the World Commission on environment and development under the chairmanship of the Swedish Prime Minister Gro Bruntland. The Bruntland Commission as it became known was charged with defining common international environmental concerns and the proposed long-term strategies for responding to these concerns in a manner that facilitated sustainable economic growth.

The Bruntland Commission released its report in 1987. Titled *Our Common Future*, the Bruntland report argued that sustainable development of the global commons, could only be achieved through management regimes established by international agreement. The report also proposed that the United Nations General Assembly prepare an international convention on environment protection and sustainable development.

As a result of the World Commission's report, a United Nations Conference on Environment and Development (**UNCED**) was scheduled for Rio de Janeiro in June 1992. The major achievements of this conference known as the Earth Summit involved the adoption of:

- international treaties on climate change and biological diversity;
- a declaration known as the Rio Declaration or Earth-Charter which sets out the principles to be observed by nations in order to achieve sustainable development; and
- an action plan known as Agenda 21 which surveys the major global issues relating to the environment and development, proposes strategies for dealing with them in a sustainable manner and identifies the technical, financial and legal requirements that are necessary to give effect to the plan.

Developments such as these in the international arena over the last 20 years has resulted in international law becoming increasingly important. The most familiar form of international law is international treaties or conventions. These treaties may be bilateral, regional or multi-lateral and once signed ratified or acceded to are binding on the parties. Examples of regional and multi-lateral treaties relating to the environment to which Australia has become a party are set out in Figure 2.

Figure 2 Regional and multi-lateral agreements

	Conventions, treaties and protocols
General environment	Antarctic Treaty (signed by Australia 23.06.61) Convention concerning the Protection of the World Cultural and Natural Heritage (17.12.75) Convention on the Conservation of Nature in the South Pacific (28.03.90) Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (07.09.84) Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (18.08.90) South Pacific Nuclear Free Zone Treaty (11.12.86)
Coastal/marine resources	Indo-Pacific Fishery Commission Convention International Convention for the Regulation of Whaling (Amendment to the International Whaling Convention) (10.11.48) Convention on the Inter-Governmental Maritime Consultative Organisation (17.10.74) South Pacific Forum Fisheries Agencies Convention (12.10.79) Convention on Fishing and Conservation of the Living Resources of the High Seas (20.03.66) United Nations Convention on the Law of the Sea (10.12.82) Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America (02.04.87) Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific (24.11.89) Convention on the Continental Shelf of Australia (10.06.64)

	Conventions, treaties and protocols
Toxic and hazardous wastes	Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil (05.02.84) South Pacific Nuclear Free Zone Treaty (11.12.86) Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (23.10.87) Convention on Early Notification of a Nuclear Accident (23.10.87) Treaty Banning Nuclear Weapons Testing in the Atmosphere in Outer Space and Under Water (12.11.63) Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof (23.01.73) Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction (05.10.77) Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships (14.01.88) Amendment to the International Convention for the Prevention of Pollution of the Sea by Oil (13.11.81) International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (05.02.84) International Convention on Civil Liability for Oil Pollution Damage (05.02.84) Convention on the Prevention of Marie Pollution by Dumping of Wastes and Other Matter (London Dumping Convention) (20.09.85) Protocol for the Prevention of Pollution of the South Pacific Region by Dumping (18.09.90) Protocol Concerning Co-operation in Combatting Pollution Emergencies in the South Pacific Region (18.09.90) Convention on the Physical Protection of Nuclear Material (22.10.87)
Biological diversity	Convention on Wetlands of International Importance (RAMSAR) (12.12.75) Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (27.10.76) International Plant Protection Convention (27.08.52) Convention for the Conservation of Antarctic Seals (31.07.87) Plant Protection Agreement for the South-East Asia and Pacific Region (02.07.56) Convention on the Conservation of Antarctic Marine Living Resources (07.04.82) Japan-Australia Migratory Birds Agreement (1974) China-Australia Migratory Birds Agreement (1986) Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention) (1991) (22.10.87)
Air quality	Vienna Convention for the Protection of the Ozone Layer (17.08.89) Montreal Protocol on Substances that Deplete the Ozone Layer (22.09.90)
Biotechnology	International Convention for the Protection of New Varieties of Plants (03.89)
Forest resources	International Tropical Timber Agreement (16.02.88)

Source: DASETT 1991:236:238

Multi-lateral agreements to which Australia has recently become a party include the Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol, the Convention on the Conservation of Migratory Species of Wild Animals (the Bonn Convention) and the conventions recently signed in Rio on climate change and the conservation of biological diversity.

In addition to international treaties there are general practices or customs which are accepted by States as obligatory. These are referred to as the rules of customary international law. These rules may be derived from a variety of sources such as the statements of government officials, treaties, the writings of international jurists and the decisions of national and international courts and tribunals.

The primary example of a rule of customary international law relating to transboundary pollution is that derived from the Trail Smelter case in 1938. In that case the United Nations Arbitration Tribunal held Canada liable for the damage that a private smelting operation in British Columbia Canada had caused to property in the United States. Amongst other things the tribunal stated:

> *Under the principle of international law ... no State has the right to use or permit the use of its territory in such a manner as to cause injuries ... in or to the territory of another or the properties of the persons therein, when the case is of serious consequence and the injuries established by clear and convincing evidence.*

This principle of customary international law is now codified as principle 21 of the 1972 Stockholm Declaration on the Human Environment. This declaration in part provides that States "have responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction".

It would therefore appear to be a rule of customary international law that a State cannot use or permit others to use its territory without due consideration being given to the rights and interests of other States. However this rule only prohibits transboundary pollution in cases of serious consequences and as such its operation in a legal sense is extremely limited.

International customary law is therefore considered inadequate to address the complexities of transboundary pollution. Accordingly, law making treaties which lay down rules of general application and creates certainty have been increasingly looked upon by the international community as necessary to address transboundary pollution issues. There is no doubt that the number and complexity of international treaties will increase as nations seek to implement the concept of sustainable development.

Centralisation of power

Developments in international law will have a significant impact on the distribution of powers in our federal system.

Under the Commonwealth Constitution, the Federal Government has no explicit power to legislate in respect of environmental matters and as such, these matters have been traditionally reserved to the States.

However, since it is the Commonwealth and not State and local governments which will be held internationally accountable for Australia's actions, the Commonwealth must ensure the Australia acts in accordance with its international environmental law obligations.

The issue of the Commonwealth's constitutional powers to enact legislation covering environmental matters has been considered by the High Court in a number of cases including *The Commonwealth v The State of Tasmania* (1983) 158 CIRI (Tasmanian Dams case), *Richardson v The Forestry Commission* (1988) 164 CLR 261 (Lemonthyme and Southern Forests case) and *Queensland v The Commonwealth* (1989) 167 CLR 234 (Wet Tropics case).

These cases clearly establish that the Commonwealth has extensive powers to give effect to international environmental laws. These include the trade and commerce power (section 51(i)), corporations power (section 51(xx)), federal financial power (section 51(ii) and 96), the race power (section 51(xx)(vi)), the territories power (section 122) and the external affairs power (section 51(xx)(ix)).

In relation to the external affairs power, the High Court has held that the Commonwealth has power to legislate with respect to matters that are geographically external to Australia or are inherently or intrinsically of international concern as well as to give effect to Australia's international obligations whether they arise under treaties or customary international law.

This broad view of the external affairs power has enabled the Commonwealth to legislate in respect of matters that have traditionally been the preserve of the States. This has often lead to the criticism that the external affairs power has been used as a covert means of amending the Australian Constitution.

However, with the advent of regionalism and internationalism and vast improvements in transport and communication, various issues are now dealt with on an international basis rather than on a local basis. As a result, many environmental matters which would have been treated as purely domestic, are now part of Australia's relations with other countries and as such, clearly fall within the jurisdiction of the Commonwealth government.

The Federal government, however, has resolved not to exercise its legislative powers so as to introduce comprehensive environmental legislation. Instead, it has signed an Inter-governmental Agreement on the Environment with the various State and Territory governments as well as the Local Government Association of Australia.

The agreement, which was signed in February 1992, acknowledges the important role of the State and local governments in relation to the environment and the contribution they can make in the development of national and international policies for which the Commonwealth has responsibilities.

This agreement provides for the establishment of a ministerial council known as the National Environmental Protection Council (**NEPC**). This body will be responsible for establishing national ambient environmental standards and guidelines. The agreement also provides for the rationalisation of existing environmental decision-making processes to ensure a consistent approach to environmental issues across Australia.

Movement away from anthropocentric bias

Environmental law will move away from its anthropocentric bias as legal rights are accorded to species to exist and to the wealth of ecological processes.

Currently, most environmental laws have an anthropocentric bias in that they are based upon a human-centred ethical approach. This anthropocentric bias is a particular characteristic of the western intellectual tradition but is not universally held in other value systems such as that of the muslims or indigenous peoples generally. In the future, the environment will possess its own intrinsic value rather than possessing the riveted values dependent upon human desires and needs. It is argued that the value systems and indigenous customary laws of Aboriginal people will provide guideposts in moving away from anthropocentric values.

Clear evidence of this trend is provided by the recent High Court decision in the land rights case of *Eddie Mabo v The State of Queensland*. The decision, which was handed down in June 1992, is significant for it recognised that the common law of Australia includes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants. In the course of his judgment, Mr Justice Brennan (with whom Chief Justice Mason and Mr Justice McHugh agreed) stated:

> *Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and indiscriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisations of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional land.*

It is therefore clear that Australian courts will be taking a less anthropocentric view of the common law in the future.

Integrated legal frameworks

Environmental laws will increasingly require environmental considerations to be integrated into institutional and legal frameworks rather than being considered as an additional requirement.

Generally speaking, institutions in Australia have tended to be independent, fragmented and working to relatively narrow mandates of closed decision processes. Those responsible for the economy are institutionally separate from those responsible for managing natural resources and protecting the environment.

The Bruntland Report stated that environmental protection and sustainable development should be an integral part of the mandates of all government agencies and that economic and ecological policies should be integrated within broadly based institutions.

The Commonwealth government has committed itself to an integrated approach to conservation and development. This policy was announced in the 1989 Prime Ministerial statement on the environment *Our Country Our Future* and was reinforced in the Commonwealth discussion paper on ecologically sustained development in 1990. The policy recognises the scope for multiple and sequential land use but acknowledges that there will be occasions when governments will have to make difficult choices between incompatible uses. In these cases the choice will be clear if they are based on the best available information and assessments of the full cost and benefits of alternative courses of action. As a result the Commonwealth government established the Resource Assessment Commission and many public inquiries to address these issues. A recent example was the Shoalwater Bay Inquiry.

A degree of integration between resource management and environmental protection agencies has also been attempted at state level. Examples include Western Australia's Department of Conservation and Land Management and Victoria's Department of Conservation, Forest and Lands. In addition at least one State, New South Wales, has attempted to integrate conservation into the land use planning system. The New South Wales *Environmental Planning and Assessment Act 1979* provides for an integrated system of planning and environmental protection that is a model for other jurisdictions.

The Bruntland Commission also proposed that sustainable development objectives should be incorporated in the terms of reference of cabinet and legislative committees dealing with national economic policies as well as key central international policies. The Commonwealth government has adopted this proposal by making the Environment Minister a member of the Cabinet Structural Adjustment Committee and by requiring environmental impacts to be addressed in cabinet submissions. A special cabinet sub-committee on Sustainable Development has also been established to oversee the Commonwealth's role in formulating a sustainable development strategy. The Commonwealth also released a strategy paper on ecologically sustainable development in 1993.

Alternative dispute resolution

Approaches other than litigation will be increasingly used in environmental law to resolve disputes; To date much of the environmental law is focussed on litigation the resolution of disputes by adjudication and adversarial proceedings. The court challenges have been used to delay development projects in the hope that rising costs will prevent construction. Prolonged court actions have also delayed the creation and implementation of environmental legislation designed to prevent the irreversible loss of habitats and other resources.

As a result there will be an increasing need to develop fairer and more efficient means of settling environmental disputes. This need was also recognised by the Bruntland Commission which proposed that new forms of environmental dispute resolution be developed.

Programmes have been initiated particularly in North America to find alternatives to judicial decision-making. These programmes are usually referred to as alternative dispute resolution or ADR processes. Typically these processes involve some form of consensus building, joint problem solving or negotiation.

Whilst ADR processes should not be viewed as a panacea, it is clear that they do produce outcomes that are more effective, equitable and stable than court processes. It is therefore likely that Commonwealth and State governments will take action to institutionalise these processes within environmental and planning courts and tribunals in the near future.

Impact on business

Environmental protection and sustainable development will increasingly be incorporated into the policies and business plans of corporations, banks and other financial institutions.

In its discussion paper on Ecologically Sustained Development, the Commonwealth government stated that scientific research will assist in the implementation of sustainable development by providing information on environmental problems, increasing the efficiency of resource providers and identifying technology alternatives. The Senate Select Committee for Industry Science and Technology has also recognised that research and development in respect of environmental technology could help address the domestic trade deficit through the development of pollution control technology for application locally and for export overseas.

There would also appear to be an increasing movement for corporations to adopt formal environmental policies. The evidence for implementation of this policy has come both from industry itself as well as from environmental advocacy organisations. Environmental policies have been increasingly viewed by corporations as good management practice, good public relations and a mechanism to avoid the imposition of significant penalties. Environmental advocacy organisations have also called upon corporations to adopt environmental policies. For example after the Exxon Valdez oil spill off the Alaskan coast, a group called the Coalition for Environment and Responsible Economies adopted a set of guidelines called the Valdez principles for adoption by corporations. The principles include:

- the protection of the biosphere;
- sustainable use of natural resources;
- reduction and disposal of wastes;
- wise use of energy;
- risk reduction;
- marketing of safe products and services;
- damage compensation;
- disclosure;
- environmental directors and managers; and
- assessment and annual audits.

Best practice means

New environmental laws will shift from being based on environmental quality management to best practical means.

The traditional approach to environmental protection in Australia is based on environmental quality management. This approach permits pollution where it is within the overall capacity of the environment to absorb, disperse and render the pollutant harmless. The assimilative capacity of the environment is generally prescribed by emission/effluent standards or ambient environmental quality standards.

Whilst this approach is preferred by business it does not ensure sustainability. Experience over the last 20 years has shown that science cannot detect some cause and effect relationships until after irreversible changes have occurred. The long term effects of CFCs on the ozone layer and the impact of low level radiation waste are obvious examples.

In addition, the environmental quality management approach has promoted the use of technologies which allow the dumping of a continuous stream of pollutants over time rather than fostering the development of clean technologies which reduce emissions through process changes and recycling.

These problems have led to a call for a basic shift in regulation from environmental quality management to an approach based on preventative action or what is often referred to as the best practical means approach.

This approach focusses on the reduction and prevention of discharges through the analysis and design of entire industrial processes. The adoption of this approach will necessitate the redesign of institutional frameworks so as to control industrial pollution on a preventative basis. A variety of legislative changes can therefore be anticipated. For instance:

- Discharge permits may be made contingent on the prior acceptance of the results of an audit that will lead to changes such as product reformulation, process modification, input substitution, closed loop recycling, the development of clean technologies and so on. The primary objective would be the development of clean production.
- Statutory obligations to "reduce, minimise and control" discharges may be replaced by obligations to "reduce and prevent" such discharges and to adopt new processing technologies as specified by the appropriate regulatory authority.
- Requirements to undertake monitoring, scientific analysis, consultation and impact assessment may also be redirected towards reducing disposal, developing alternative disposal technologies in the short term and redesigning industrial processes to avoid any disposal over the longer term.
- Obligations may also be imposed to implement waste minimisation, recycling and reuse, cradle to grave management of chemicals and hazardous substances as well as reduced consumption.
- Maximum levels of pollution entering the environment may also be prescribed. This "no net increase" policy would, by restraining new discharges, set the groundwork for the progressive elimination of discharges from existing sources. This would be achieved by a requirement to use the best available technology on new installations, combined with a requirement to set phase-in timetables for the reduction of pollution from existing sources (by justification procedures which could, for example, review existing waste streams). It is acknowledged that this change could be controversial in so far as it would constrain future economic growth within existing pollution levels.

A shift in the environmental protection system from environmental quality management to the best practical means approach will also be accompanied by a shift from traditional or regulatory (command and control) requirements to economic instruments that provide incentives to reduce pollution.

A variety of price based mechanisms can be utilised to provide an incentive to manage resources sustainably over the longer term. For example, subsidies can be used to internalise the benefits of reducing pollution. A recent example is the 1990 amendments to the United States Clean Air Act which set up a system of allowances for sulphur dioxide emissions by utilities. The allowances are to be issued by the Environmental Protection Agency and each allowance will permit the emission of one tonne per year of sulphur dioxide. Allowances not used through emissions may be banked or sold.

Similarly taxes and charges on materials such as carbon, landfill and pollution can be imposed to internalise the cost of pollution to the polluter so as to ensure its consideration in the making of production decisions. Other measures that may be considered include the valuation and pricing of resources to properly account for their environmental value, charging for the use of the environment to receive wastes. the development of property rights concepts for the environment, the development of markets for tradeable effluent permits, the introduction of bonds for environmental performance and the use of pilot or demonstration programs involving economic instruments.

Accountability of Government agencies

New environmental laws will tend to make government agencies increasingly responsible and accountable for ensuring that their policies, programmes and budgets support sustainable development.

Environmental legislation will increasingly be binding on the Crown and the roles of regulatory authorities will be continually reviewed by government. Private corporations which hold pollution licences will also be required to undertake self monitoring of all aspects of their operations to ensure compliance with pollution regulations and licence requirements.

In relation to the requirement for monitoring there is an increasing trend to adopt ecological monitoring techniques in preference to mathematical computer models. The need to incorporate assumptions in mathematical models means that the predictive output of these models may not agree with another model developed for a similar purpose or indeed with changes that occur in the real world. Ecological monitoring on the other hand measures change over time between affected sites and control sites and in appropriate circumstances provides a low cost, low input means of ensuring that a resource is being used in a sustainable manner.

Increased enforcement

New environment legislation will be characterised by increased enforcement mechanisms.

Enforcement mechanisms will be introduced to deal with breaches of environmental laws. For instance:

- Statutory offences may be of strict or absolute liability such that proof of fault or intention is not required.
- Statutory defences on the other hand, may require the defendant to demonstrate that positive steps have been taken to prevent or mitigate the pollution.
- The onus of proof may be reversed such that the onus is on the defendant to prove that an element of culpability is not present rather than on the plaintiff to prove that the element is present.
- The privilege against self incrimination may also be abrogated such that persons may be required to answer questions or produce documents that may result in the imposition of a civil penalty or the conviction for a crime.
- Penalties may also include substantial fines and prison terms for offences. Jail terms are particularly favoured in the United States as it is one cost of doing business that cannot be passed on to the consumer.
- Affected persons may also be permitted to sue violators of environmental laws and to obtain injunctive relief and/or penalties in respect of breaches of those laws.
- Liability may also be imposed on directors and employees of offending corporations whose only defence may be that they have used all due diligence to prevent the commission of the offence by the corporation.

Public participation

Environmental laws will increasingly either encourage or direct greater public participation. Increased public participation will be achieved in a number of ways:

- rights of notification, objection and appeal may be imposed in respect of development proposals;
- access to information may also be provided through freedom of information legislation or independently;
- rights to legal remedies and redress may also be given where human health or the environment has been or may be seriously affected; and
- financial and technical assistance may also be provided to facilitate participation.

Full project life cycle

New environmental laws will shift from traditional development controls focused upon the planning stages of a site specific development to full project life cycle environmental management, resources management and sustainable development.

Historically environmental regulation has been achieved by development controls through land use zoning, the environmental assessment process and emission control requirements. These environmental regulations focus upon the planning stage of industrial development.

We are now seeing a trend away from historical development controls. This trend is manifesting itself in three ways.

Firstly, the geographical scale at which development projects are to be assessed has been increased. As a result, development controls which focus on site specific issues are being complemented by mechanisms which focus on regional issues. For instance land use zoning is being complemented by regional planning, environmental assessment is being complemented by resource assessment and emission control is being complemented by the management of airsheds and watersheds.

Secondly, the temporal scale at which development projects are to be assessed is also being increased. As a result development projects which focus on the planning stages of the development of an industrial development are being complemented by measures which focus on the whole life cycle of the project. This is being achieved through environmental audits. There are three main types of environmental audits:

- *Audit of environmental impact* – this audit is undertaken as part of the commissioning to ensure that the commitments made in the environmental statement have been implemented.

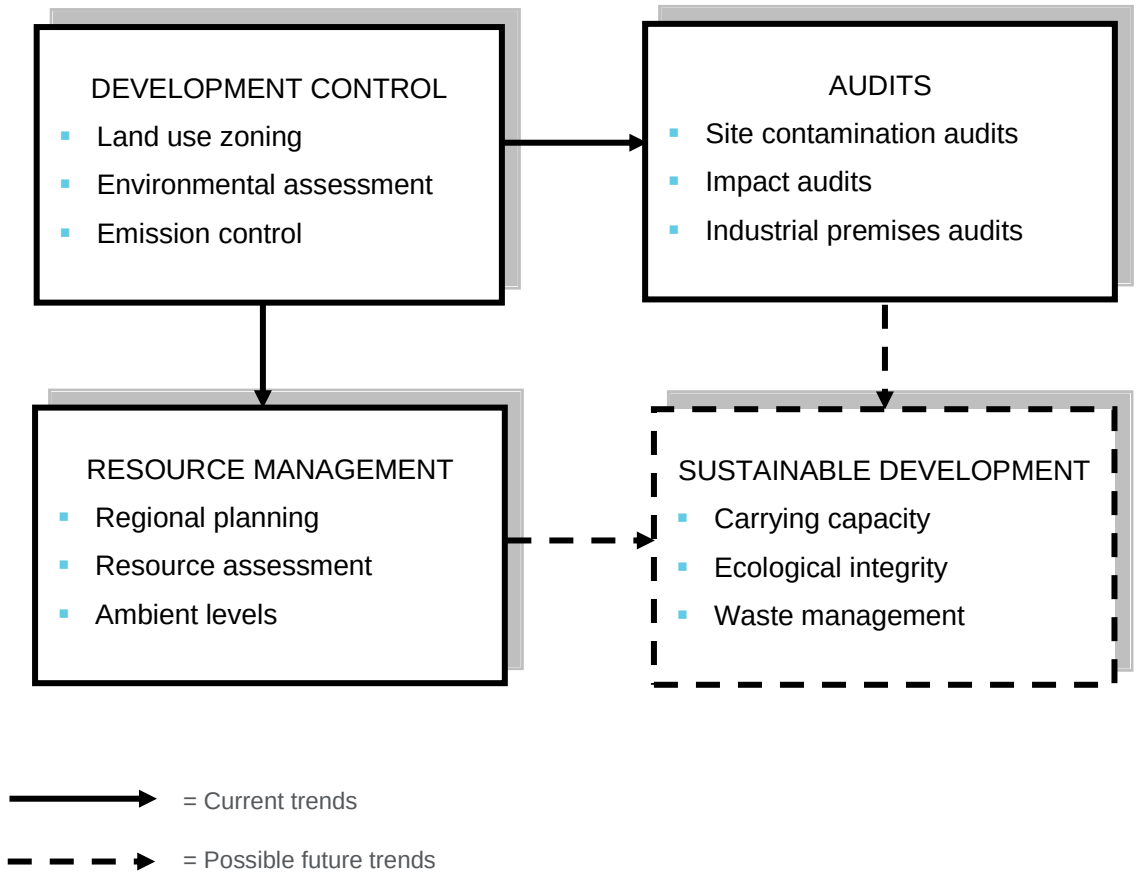
- *Audits of industrial premises* – this audit focuses upon the operation of a project to assess how well the project complies with emission standards, licence conditions and legislative requirement.
- *Site contamination audit* – this audit is undertaken as part of project decommissioning to assess whether there is any residual contamination of the site and to determine what site remediation is needed.

Thirdly, the tests to be applied by decision-makers in assessing whether development projects should be approved are also changing as a result of the adoption of the concept of sustainable development. For instance:

- Land use and regional planning issues will be increasingly based on carrying capacity which can be defined as the maximum rate of resource consumption and waste discharge that can be sustained indefinitely without progressively impairing bioproductivity and ecological integrity.
- Environmental and resource assessment which to date has involved a trade off between a level of environmental impact with a level of resource use will in the future be based on the maintenance of ecological integrity while using resources.
- Emission controls will be increasingly seen in terms of waste management such that emissions are recycled and re-used and possibly even reborn for another life.

These trends are illustrated in Figure 3.

Figure 3 Summary of current and possible future trends



Impact assessment law

Ian Wright

This article discusses the administrative framework that governs the environmental assessment process

July 1994

Introduction

Definition

Environmental assessment is the process whereby the potential environmental effects of a development proposal are identified and evaluated (Greenway, M. 1991 Queensland Environmental Law Association Conference Proceedings).

Functions

The broad functions of environmental assessment include (Greenway, M. 1991):

- provision of baseline environmental resource inventory;
- identification of significant environmental issues;
- identification of potential environmental opportunities and constraints;
- assessment of potential environmental impacts;
- assessment of alternative options;
- provision of opportunities for project modification or redesign;
- provision of opportunities for public involvement including relevant Government Departments, Local Authorities, community groups and members of the public;
- recommendations for environmental safeguards and environmental controls; and
- establishment of environmental management programmes including environmental monitoring.

Process

The general pattern of impact assessment for a major proposal has been summarised as follows (Porter, C. 1985 Environmental Impact Assessment, University of Queensland Press):

- Firstly is the preparation of a generally brief statement of the developer's intention, with an estimation of the most significant environmental impacts adequate for a decision to be made on whether the full procedures should be applied.
- Secondly is a decision by the assessing agency on the level of assessment. This may be confined to a simple set of recommendations or the preparation of a report (often called a Public Environmental Report) which is made public and on which comments are sought or a requirement for a detailed environmental impact statement (**EIS**).
- Thirdly, assuming a full EIS is required, is the preparation of guidelines by the assessing agency on the aspects to be covered and the amount of detail considered necessary for each. This step is described as scoping. These guidelines are usually developed at a series of meetings with the developer or his agent, and possibly involve other regulatory agencies and public interest groups.
- Fourthly is the preparation of the EIS by the developer, often requiring technical input from a range of specialist consultants, followed by its publication and availability for a period of public review.
- Fifthly is the assessment by the environmental agency or decision making authority, based both on the original EIS and the comments received from other agencies and the public. These assessment reports are generally issued by the Environment Minister and made public. However, they are not necessarily binding on other decision making authorities.

Components

Environmental assessment essentially consists of two components:

- the techniques and methodologies that are employed in the environmental assessment process; and
- the procedural framework which governs the operation of the process.

The techniques and methodologies that are employed in environmental assessment have been discussed in another lecture. The focus of this lecture is the administrative framework that governs the environmental assessment process.

Origins of environmental assessment legislation

NEPA

The development of environmental assessment legislation in Australia can be traced to the United States *Environmental Policy Act 1969* (**NEPA**). The Bill was passed through both the Senate and the House of Representatives in a great hurry before Christmas 1970. Full of generalisations and lacking any teeth few people foresaw the tremendous impact the legislation would have.

The relevant provision is section 1.02(2)(c) which requires all federal agencies to prepare a detailed statement on all actions which significantly affect the quality of the human environment. It was thought by many that the generality of this section deprived it of any real effectiveness. For instance NEPA did not specify what criteria should be adopted to decide if an EIS is needed, who should prepare it or who should assess it. However beginning in the early 1970s, courts in the United States interpreted this section very broadly and clarified many of the matters left unsaid in the section. As a result the scope and impact of NEPA expanded greatly. For instance it was initially thought that NEPA only applied to activities undertaken by the federal agencies such as the construction of public works and other similar activities. However the courts subsequently held that federal agencies were also bound by NEPA when permitting private activities.

Background to NEPA

A number of points should be made about the evolution of the environmental assessment requirements in NEPA (Fowler, R. 1982 Environmental Impact Assessment Planning and Pollution Measures in Australia, Australian Government Publishing Service).

- Firstly, the process emerged at the federal level in the United States and as a consequence did not overlap directly with the extensive land use controls operative at State and local government levels.
- Secondly, it was directed at government agencies, particularly those responsible for the undertaking of development activities of potential environmental significance rather than private developers.
- Thirdly, the application of section 102(2)(c) to major federal actions significantly affecting the environment emphasised that the process was only intended to be directed at the more seriously adverse actions.

Consequences of NEPA

However these limitations were largely ignored when individual State governments in the United States attempted to implement NEPA. As a result environmental assessment legislation was introduced:

- as a tack on to existing land use planning controls without any real effort to merge the assessment procedures into an overall system of planning policies and development controls;
- which applied to government agencies as well as private developers; and
- which applied to all actions which might affect the environment irrespective of whether they were significant or not.

This had significant effects on the actions of both the public and private sectors. For example it was estimated in 1974 that the introduction of environmental assessment legislation in California in 1970 based on NEPA had resulted in the preparation of an estimated 6,000 impact statements each year (Council Environmental Quality Fifth Annual Report 1974: 404).

Development of environmental assessment legislation in Australia

Australian Environment Council

Following the enactment of NEPA, the Australian Environment Council (a Ministerial Council comprising the Environment Ministers of the Commonwealth, State and Territory governments) established a Working Party on environmental impact assessment procedures.

The Working Party presented its report to the Australian Environment Council at its meeting in Hobart on 30 November 1973. The Working Party report rejected the feasibility of a uniform national approach to environmental assessment. It noted areas of difference between the States and divergence of attitudes concerning some aspects of the environmental assessment process, in particular about the appropriate degree of public participation. Although it could not recommend detailed procedures or guidelines, the Working Party did set out 10 broad principles which were considered appropriate to the environmental assessment process.

The Working Party also considered the draft environmental assessment guidelines proposed by the Commonwealth and recommended a number of amendments relating to consultation with the States. These were subsequently agreed by the Commonwealth and incorporated into the guidelines.

The Australian Environment Council adopted the principles outlined by the Working Party. However these were too general to have a substantial influence on the form of environmental assessment procedures adopted by the States or the Commonwealth. As a result each State subsequently pursued an independent course in respect of environmental assessment procedures thereby resulting in considerable variation in approach between the States.

Lack of national approach

The environmental assessment process is therefore operative at both Federal and State levels throughout Australia. The following table lists the sources of the various environmental assessment requirements currently existing in Australia.

Jurisdiction	Source	Date
Commonwealth	▪ *Environment Protection (Impact of Proposals) Act 1974*	December 1974
	▪ Order approving administrative procedures under the Act	June 1975
Victoria	▪ *Environment Effects Act 1978*	May 1978
	▪ Guidelines for Environmental Impact Assessment and *Environment Effects Act 1978*	November 1978 Revised Edition January 1980 May 1988
New South Wales	▪ *Environmental Planning and Assessment Act 1979*	November 1979
Tasmania	▪ *Environmental Management and Pollution Control Bill 1994* (replacing *Environment Protection Act 1973*)	Autumn 1994
	▪ Guidelines and Procedures for Environmental Impact Studies	Updated (published 1975)
Western Australia	▪ *Environmental Protection Act 1986*	1986
	▪ A Guide to Environmental Impact Assessment in Western Australia 1993	1993
	▪ Environmental Reviews Guidelines for Proponents	1993
Queensland	▪ *State Development Public Works Organisation Act 1971*	1978
	▪ *Local Government (Planning and Environment) Act 1990*	April 1991
	▪ Impact Assessment in Qld: Policies and Administrative Arrangements Co-Ordinator-General, Premiers Department	January 1987
Northern Territory	▪ *Environmental Assessment Act 1982*	1982
	▪ A Guide to The Environmental Assessment Process in the Northern Territory	June 1984
South Australia	▪ *Planning and Development Act 1993*	1993

Commonwealth environmental assessment legislation

Introduction

The Commonwealth government has formalised environmental assessment procedures in the *Environment Protection (Impact of Proposals) Act 1974* (**Impact Act**). The Act is fashioned on NEPA but is designed to avoid the judicial involvement which followed the introduction of NEPA. This was achieved by specifying detailed legislative and administrative requirements thereby avoiding the general obligations in NEPA that gave rise to much litigation in the United States.

The Act was introduced into Parliament in November 1974 and was assented to on 17 December 1974. The Act was further implemented by the issue of an order on 29 June 1975 approving administrative procedures which set out the detailed workings of the Commonwealth process (**Administrative Procedures**). The Commonwealth Minister for Environment is responsible for the administration of the Impact Act and the administrative procedures.

The Impact Act has been held to be constitutionally valid by the High Court in *Murphyores Incorporated Pty Ltd v The Commonwealth* (1976) 9 ALR 199.

Impact Act

The objective of the Impact Act is set out in section 5(1) which provides that the Commonwealth government and its authorities shall ensure to the greatest extent that it is practical that matters affecting the environment to a significant extent a.re fully examined and taken into account in relation to:

- the formulation of proposals;
- the carrying out of works and other projects;
- the negotiation, operation and enforcement of agreements and arrangements (including agreements and arrangements with the States and with authorities of the States);
- the making of, or the participation in the making of, decisions and recommendations; and
- the incurring of expenditure.

Section 5(2) provides that the matters referred to in section 5(1) extend to matters of those kinds arising in relation to direct financial assistance granted or proposed to be granted to the States.

The effect of section 5 is that all projects undertaken by the Commonwealth government (departments or institutions) or which acquire the approval or finance of the Commonwealth government are subject to the requirements of the Impact Act and the administrative procedures. The only limitation to this is that expressed in section 5(2) namely that the Impact Act only applies to direct financial assistance that is grants made to the States for a specific purpose and not to grants made for general purposes where the use to which the moneys to be put is not known at the date of the grant.

An example of the operation of the Impact Act was provided by *Murphyores Incorporated Pty Ltd v The Commonwealth* (1976) 136 CLR 1. In that case an application had been made for a licence under the *Customs Act 1901* to export mineral sands mined on Fraser Island. The Commonwealth Environment Minister relied upon the Impact Act to order an environmental assessment and public inquiry into the mining of mineral sands on Fraser Island. The Commonwealth subsequently refused the licence and the applicant commenced proceedings in the High Court arguing that provisions of the Impact Act and the Customs Act were unconstitutional. The High Court upheld the validity of both the Impact Act and the Customs Act.

Administrative procedures

Section 6(1) of the Impact Act empowers the Governor-General to approve procedures which will assist in determining whether an environmental assessment will be required and if so what information it must contain. The Administrative Procedures were published in 1975 and replaced in 1987.

Section 6 of the Impact Act also provides that the administrative procedures should be "consistent with relevant laws as affected by regulations under the Act". The meaning of these words was considered in *Canberra Labour Club v Hodgman* (1982) 47 ALR 781 where it was held that the Administrative Procedures were not to be applied to the activities of the National Capital Development Commission (**NCDC**) because it was not consistent with the *National Capital Development Commission Act 1975* that proposals of the NCDC (the body responsible for the planning of Canberra) should be the subject of consideration or inquiry under the Impact Act.

The reason for this was that section 11 of the NCDC Act empowered the NCDC to do all necessary or convenient things in the exercise of its powers with respect to the planning and development of the National Capital. Therefore wherever the Impact Act and administrative procedures apply to a particular statutory authority of the Commonwealth such as the Civil Aviation Authority, the Federal Airports Corporation, Telecom or the Commonwealth Bank will depend on the statutory interpretation of the intent of the legislation setting up that statutory authority.

The Administrative Procedures set out a staged process for environmental assessment. The various steps in the process are set out in Figure 1 and can be summarised as follows:

Designation of proponent

The Minister whose department is responsible for the proposed action (called the "Action Minister") must designate a person or department as the proponent of the. proposed action and shall inform the Commonwealth Environment Protection Agency (**CEPA**). A proposed action is defined as one of the matters referred to in section S(1) of the Impact Act (see earlier).

Therefore in practice the Impact Act will not be invoked if the Action Minister does not consider that the proposed action should be referred to the Environment Minister. As a result a number of government reviews have recommended that the Environment Minister should be empowered to recommend to the Action Minister that the Impact Act be invoked. (House of Representatives Standing Committee on Environment and Conservation 1979 Australian Government Publishing Service). The Commonwealth is yet to implement this recommendation.

Provision information

As soon as possible after CEPA has been informed of a proposed action by the Action Minister the proponent must supply information about. the project in the form of a Notice of Intention (**NOI**). An NOI consists of:

- a summary of the proposal;
- a description of any prudent or feasible alternative to the proposal;
- a description of the environment that is likely to be effected by the proposal;
- an assessment of the potential impact on the environment beneficial as well as adverse;
- safeguards to protect the environment;
- investigations to be made concerning the possible impact; and
- such information as is required by CEPA.

Determination by CEPA and Minister

On the basis of the NOI, CEPA must decide whether further assessment action under the Act is warranted. In determining this, CEPA may consult with any Commonwealth, State or Territory department or authority or any other person or body. CEPA is also required to take into account a number of matters including:

- any substantial environmental effect on communities or the eco-systems of an area;
- any significant diminution of aesthetic, recreational, scientific or other environmental values;
- any adverse effect on historical, cultural, scientific or other special values for present or future generations;
- endangering of any species of fauna or flora;
- important long term effects on the environment;
- degradation of environmental quality;
- curtailment of any beneficial uses;
- pollution and waste disposal; and
- any increased demands on natural resources which are likely to be in short supply

CEPA is also required to consider any environmental assessment action directly taken at a State or Territory level. Accordingly, CEPA consults with State and Territory governments in cases where both Commonwealth and State or Territory legislation might be invoked to avoid the duplication of assessment procedures. Generally where a project will undergo a public assessment process under State or Territory legislation, CEPA will not require any specific assessment action under the Impact Act.

Where CEPA determines that no specific assessment under the Impact Act is required, the proponent is free to proceed with the project in the ordinary course of events. However, if CEPA is of the view that further investigation of environmental impacts is warranted, it must refer to the Environment Minister the question of whether an Environmental Impact Statement (**EIS**) or a Public Environment Report (**PER**) should be prepared or whether a public inquiry should be held.

In deciding whether any assessment action is required, the Minister may consult with any person or department and must have regard to the same factors as had CEPA. The Environment Minister is prohibited from requiring an EIS or PER in circumstances where it would be contrary to the public interest.

Generally speaking a PER would be required where it is considered that the public should be made aware of the environmental significance of a proposal but where the issues or impacts are likely to be limited and consequently the preparation of a full EIS is not warranted. A PER thus enables the particular issues of importance to be focused upon in consideration of the proposal.

An EIS would be expected where the issues are more wide ranging, the impact is potentially great, and the issues themselves perhaps require clarification. A PER is a more flexible, intermediate level of environmental assessment. Although it would normally be carried out at the beginning of a project, it has the capacity to begin at any time during the life of the project or even after completion of the proposed activity should the effectiveness of environmental safeguards become a matter of concern (Bates, G. 1992 Environmental Law in Australia, Butterworths).

If the Environment Minister decides that neither a PER or an EIS needs to be prepared no further environmental assessment action is required under the Act. However, if the environmental significance of the proposed action changes or increases prior to it being completed, the project may be required to be refereed to CEPA. The Minister is also obliged to give reasons why it has been decided that no environmental study is required at least within three months of being requested in writing to do so with the exception of such material of commercial significance, having security implications or providing confidential advice to the Minister as would be exempt from disclosure under the *Freedom of Information Act 1982*.

Alternatively, the Minister may decide that the preparation of either an EIS or PER is necessary. Typically, the number of EISs and PERs is not great. For example, during the 1992 - 1993 financial year only three EISs and one PER were either ordered or released for public review (CEPA).

The Minister may also grant exemptions from all or any of the requirements of the administrative procedures. In considering such an action, the Minister shall take into account whether the application of the administrative procedures would:

- affect national security or the interests of Australia including commercial or other interests; or
- be contrary to the public interest.

The Minister is also required to take into account the views of the department, Minister or authority requesting the exemption. The Minister is however directed to have regard to the general principle that is desirable in the national interest that the requirements of the Administrative Procedures should as far as reasonably possible apply to all proposed actions. Any exemptions made must be notified to the public with reasons unless this would be also contrary to the public interest.

The Environment Minister may also revoke a direction requiring the preparation of an EIS or PER. However, notice must be published in the gazette and the reasons for revocation made available to the public.

Notification to proponent

Where the Minister determines that any EIS or PER is required CEPA is required to inform the proponent that an EIS or PER is required to be prepared. Details of the decision are then made public through an advertisement in the Government Gazette.

Content of EIS or PER

The Administrative Procedures specify the matters that are to be contained in an EIS or PER.

An EIS must as appropriate:

- state the objectives of the proposal;
- analyse the need for it and the reasons for adopting it;
- indicate the consequences of not taking the proposed action;
- describe the proposal and include adequate data to enable a careful environmental assessment to be made;
- examine any feasible and prudent alternatives;
- describe the environment likely to be affected by the proposal and any alternatives;
- assess the environmental impact of these including in particular the primary, secondary, short term, long term, adverse and beneficial affects on the environment;
- assess the effectiveness of any proposed safeguards including monitoring arrangements; and
- outline sources of information relied upon.

A PER must:

- summarise the proposed action and reasons for adopting it and indicate any feasible and prudent alternatives;
- describe the environment likely to be affected by the proposal and alternatives and potential impacts, in particular those aspects which may have a substantial or important effect on the environment;
- assess the effectiveness of any safeguards intended to be adopted; and
- indicate whether any further studies are to be made of possible impacts and any monitoring which may be undertaken.

However, the extent to which matters are dealt with by an EIS or PER must be agreed between the proponent and CEPA with the Environment Minister making the final determination if necessary. Therefore, in practice the actual content of an EIS or PER is determined by negotiation between the proponent and CEPA. The proponent must then prepare the PER or draft EIS in accordance with the agreement.

Public participation

A draft EIS or PER is then made available for public comment. However, the proponent may request and CEPA may agree that any part of it not to be made public. If there is a dispute the final determination is made by the Environment Minister who is required to consult with the Action Minister or the Responsible Authority as appropriate.

Public notice is given in a newspaper or in the Government Gazette that the draft PER or EIS is available for inspection and purchase and that representations may be forwarded to a specific address within a period not less than 28 days (or in the case of an EIS, such longer period as the Minister directs) after publication of a notice in the Commonwealth Government Gazette.

Written comments may be sought from any person, body, government or local authority by the proponent or the Department or the Minister may actually require the proponent to seek such comments. Within 7 days of the 28 day period expiring, both the proponent and the Department must be furnished with copies of the submissions and within 28 days thereafter the Minister may direct the Department to hold discussions with the proponent and the public on the proposed action. Within 28 days after completion of such discussions, the Department must prepare a report on those discussions.

Public inquiry

The Minister may, after consultation with the Action Minister or the responsible authority, order an inquiry at any time before the proposed action is completed. In deciding whether to order an inquiry, the Minister must take into account:

- the significance of the environmental aspects of the proposal;
- any views expressed by the Action Minister or responsible authority; and
- whether the environmental aspects have been or will be considered by an inquiry instituted otherwise then under the Act.

If a draft EIS or PER has been prepared, the proponent must provide the Commission of Inquiry with a copy and a copy of the EIS or PER and any written comments received. If an EIS or PER has been prepared but no public notice has been given, the Commission of Inquiry may give such notice. The Minister must give a copy of the Commission's report to the proponent together with the Minister's comments.

Only four inquiries have been initiated under the Act. These concern sand mining on Fraser Island, uranium mining at Ranger, Northern Territory, a transmission station at Uladulla, New South Wales and sand mining in the Shoal Water Bay area in Queensland.

Revision of EIS

If the proponent intends to continue with the proposed action, the drat EIS shall be revised to take account of:

- written comments received and summarised or repeated as appropriate from the public;
- any report prepared by the Department; and
- the report of the inquiry and any comments made by the Minister.

Examination of EIS or PER

CEPA then examines the final EIS or the PER (and written comments received from the public during the consultation process) and prepares a report (known as an EIS Report or PER Report) to the Environment Minister, the Action Minister and the public. The report must be prepared within 42 days after receiving the final EIS or 28 days after receiving the PER. However, if the Minister requests further information from the proponent (which request must be made within 21 days of receiving the final reports), CEPA must submit a report to the Environment Minister in respect of that information within the respective 42 or 28 day time period or such longer period as is agreed between the proponent and CEPA.

Recommendation of Environment Minister

The Environment Minister must then provide a copy of the EIS Report or PER Report to the Action Minister and may include comments, suggestions or recommendations concerning the proposed action. This may include conditions which it is considered should be applied to the project. In making the recommendations, suggestions or comments, the Minister is not constrained by the report prepared by the Department. The Minister's comments must be made available to the public with the exception of confidential information that is exempt from the disclosure under the *Freedom of Information Act 1982*.

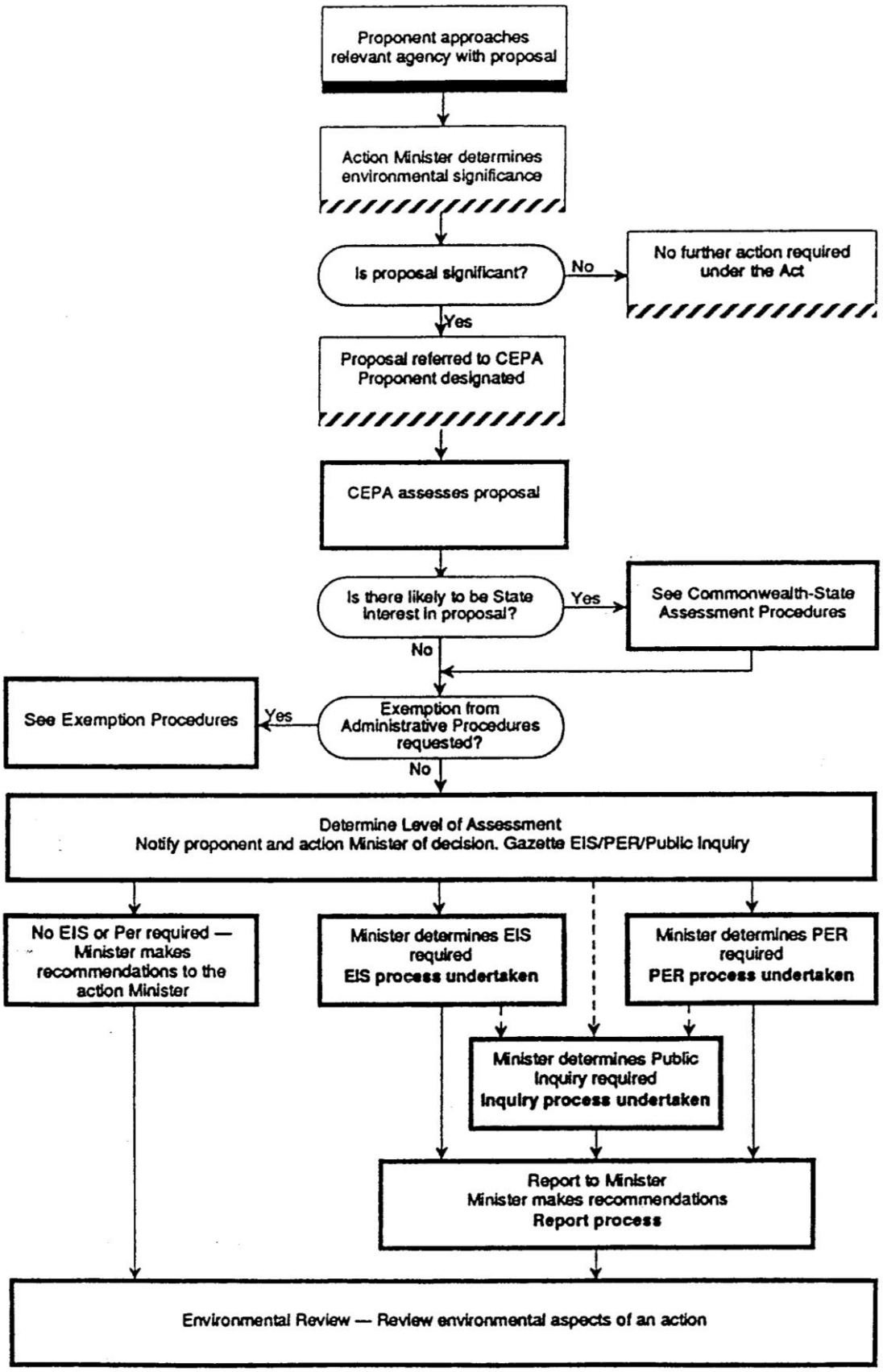
Decision of Action Minister

The Action Minister is not bound by the EIS Report or the PER Report or the Environment Minister's suggestions or recommendations. However, the Action Minister must do all things that can be done to ensure that the EIS Report or PER Report and the Environment Minister's recommendations or suggestions are taken in to account in making the decision in respect of the proposed action.

Monitoring of Project

If the Action Minister approves the proposed action, the proponent may proceed. Where the project is required to be monitored, CEPA is required to report to the Environment Minister who is required to inform the Proponent and the Action Minister of the results of the review and any action that may be taken to minimise the impacts. CEPA's report and the Environment Minister's response are available to the public. The Minister may order after a consultation with the Action Minister the preparation of a further PER to address the environmental aspects of concern.

Figure 1 Commonwealth EIA process



Source: Commonwealth Environment Protection Agency. Taken from draft Operational Manual for Commonwealth environmental impact assessment

Queensland environmental assessment legislation

Sources

The general legislative framework for environmental assessment in Queensland is provided by section 29(2) of the *State Development Public Works Organisation Act 1971* (**Public Works Act**). The general obligation imposed by section 29(2) of the Public Works Act is complimented by specific provisions in other legislation which are intended to bring environmental assessment obligations to the attention of the particular authority which normally uses that legislation. The main examples are:

- *Clean Waters Act 1971*;
- *Local Government (Planning and Environment) Act 1990* (which replace section 32A of the *Local Government Act 1936*);
- *Electricity Act 1976*;
- *Canals Act 1958*;
- *Water Resources Act 1989*;
- *Integrated Resource Development Act*;
- *Mineral Resources Act 1989*;
- *Contaminated Land Act 1991*; and.
- *Building Act 1975*.

In practice the most important provisions are section 29 of the Public Works Act and section 8.2 of the *Local Government (Planning and Environment) Act 1990* which replaced section 32A of the *Local Government Act 1936*.

Public Works Act

Section 29(2) of the Public Works Act was introduced in 1978. The amendment was designed to ensure that environmental considerations are integrated with other considerations pertinent to decision making. The political basis for this amendment lay in the Whitlam Labor Government's decision to hold a public inquiry under the Environmental Protection (Impact Proposals) Act in respect of sand mining on Fraser Island which subsequently resulted in the refusal of export licences. The then National Party Government considered that the separation of environmental considerations from overall feasibility studies had resulted in confusion and undue influence being accorded to environmental issues. In that Government's opinion the decision to ban sand mining on Fraser Island, a project it supported, was evidence of undue emphasis being placed on environmental considerations to the detriment of the livelihood of the people in the area.

Section 29(2) of the Public Works Act provides that in considering an application made to it for the granting of approval for a development or in considering undertaking of works it is the responsibility of:

- any department of the government of the State;
- any Crown, corporation or instrumentality or other person or body representing the Crown;
- any local body; and
- any board, body, authority or corporation constituted or incorporated by or under any statute and authorised by a statute to perform public functions or carry on a public undertaking,

when it appears that the undertaking of such development or works is likely to have major environmental effects, to take such environmental effects into account and in doing so to have due regard to such policies or administrative arrangements as may be approved from time to time by the Minister to the extent that the same are compatible with legislation for the time being in force in the State.

This section has the effect of imposing a substantive duty on all departments, government authorities and local bodies to take environmental effects into account in the course of their decision making on development or public work proposals. The provision also requires the authorities to have due regard to the current procedures which have been adopted as policies and administrative arrangements by the Minister. In March 1979 the Minister approved pursuant to section 29(2) administrative arrangements entitled "Impact Assessment of Development Projects in Queensland". These were subsequently replaced in January 1987 by a publication entitled "Impact Assessment in Queensland: Policies and Administrative Arrangements".

Whilst the procedures set out in the 1987 publication are policies and administrative arrangements for the purposes of section 29(2) of the Public Works Act, they do not have legal status accorded to the Commonwealth's administrative procedures under the Environmental Protection (Impact of Proposals) Act. Rather they should merely be considered to be administrative guidelines. This is confirmed by the fact that the administrative procedures to be followed must be "compatible with other legislation". The significance of these words in section 29(2) of the Public Works Act is that where other legislation such as the *Local Government (Planning and Environment) Act 1990* prescribes environmental assessment procedures then those procedures must be followed in lieu of the section 29(2) of the Public Works Act arrangements.

The Administrative Procedures adopted pursuant to section 29(2) of the Public Works Act sets out a stage process which can be summarised as follows:

Initial advice statement

A person undertaking a development (developer) must submit an initial advice statement to the body empowered to consider the application for the granting of approval for the development proposal (responsible authority).

Such a statement may consist of a standard application form, for example a lease application to the Department of Lands or a town planning application to a local authority supplemented by appropriate additional information where appropriate.

The initial advice statement should provide details of the existing situation, the proposed development and the anticipated effects of the development.

Assessment of environmental effects

The responsible authority is required to consider the initial advice statement and make a preliminary assessment of the locally environmental effects of the development.

Where no initial advice statement is lodged but the responsible authority is considering undertaking public works, it should make a preliminary assessment of the likely effects of the works and take account of such effects in the planning and undertaking of the works.

Reference to advisory bodies

Where in the opinion of the responsible authority an impact assessment study appears to be warranted, the responsible authority should refer the details of the proposal including the initial advice statement to the relevant advisory bodies advising of any time constraints.

The advisory bodies are required to submit comments to the responsible authority as soon as possible. They are required to provide comment in respect of the following matters:

- factors, if any, which need to be studied in detail in an impact assessment study including the types and extent of necessary investigations;
- statutory provisions and approval requirements relevant to the development proposal;
- possible beneficial and detrimental effects which may be caused by the proposed development and their significance;
- the types of measures which the advisory body considers appropriate to ameliorate detrimental impacts where these measures are known to the advisory body from experience;
- possible means of monitoring actual impacts during the project lifetime;
- the possibility and desirability of using the area concerned for purposes other than that proposed;
- information possessed by the advisory body or known to be available elsewhere which would be of relevance to an impact assessment study; and
- any other relevant matters which should be considered by the responsible authority.

Terms of reference

Upon receipt of comments and advice from advisory bodies, the responsible authority is required to re-evaluate the likely effects of the proposed development and when necessary prepare terms of reference for any required studies based on the comments and the advice supplied by advisory bodies and any other relevant information available.

In situations where the nature of the development involves complex factors and/or conflicting advisory objectives or advice, the responsible authority will prepare what it considers to be appropriate draft terms of reference and circulate these to advisory bodies for further comment.

Terms of reference for an impact assessment study will place emphasis on factors likely to be most insignificant for the particular development proposal and where necessary will indicate in detail the types of studies required of those factors and the data required to be presented.

Where applicable the impact assessment study will be required to provide:

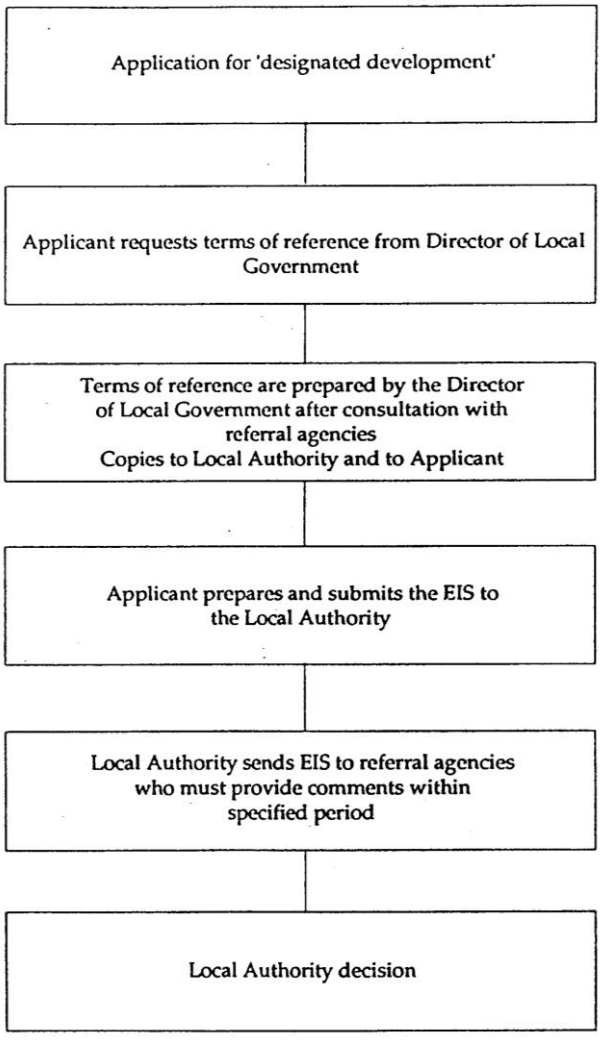
- description of relevant aspects of the existing environment;
- description of the development proposal and any optional means of achieving the development objectives;
- definition and analysis of the likely impacts of the development on the environment;
- definition of all significant impacts and measures proposed to mitigate against those effects; and
- presentation of an environmental management programme to monitor actual impacts of the development and mitigate adverse impacts.

Assessment

Once an impact assessment study report is prepared the responsible authority is required to refer copies to the advisory bodies for comment. The advisory bodies are required to provide comments to the responsible authority as soon as possible. The responsible authority will then determine whether approval for the proposed development should be granted and what conditions are to be imposed.

As can be seen the absorption of environmental assessment within existing decision making procedures has removed difficulties in overlap and duplication which could arise from a separate environmental assessment process. The advisory procedures facilitate a co-ordinated and co-operative approach to the assessment proposals where several approving authorities are involved.

Figure 2 EIA process – Local Government (Planning and Environment) Act 1990



Local Government Act 1936

Section 32A of the now repealed *Local Government Act 1936* imposed mandatory obligations on local governments when considering applications under the Local Government Act or any other Act to take into consideration whether any deleterious effect on the environment would be occasioned by the implementation of the proposal, the subject of the application.

That section which was inserted into the *Local Government Act 1936* in 1973 was the first statutory provision in respect of environmental assessment in Australia.

In a practical sense, section 32A was used by local governments in two contexts. Firstly, to require applicants for planning and subdivisional applications to submit environmental assessments of the projects the subject of the applications. Secondly, local governments have had regard to environmental factors in accordance with section 32A when determining town planning and subdivisional applications. An example of how section 32A was applied by local governments is given by the decision of the Local Government Court in *Keys v Woongarra Shire Council* (1983) QPLR 229. In that case an application for the rezoning of land from the rural zone to the residential "A"

zone was refused by the Local Government Court in part on the grounds of adverse impact of the ultimate subdivision of the land on the celebrated Mon-Repos Beach Turtle Rookery near Bundaberg. That decision was based on the original wording of the Local Government Act which contained no definition of the term "environment".

However, subsequently in August 1989 the Queensland Full Court in the case of *Murphy & Anor v The Crown* (1989) 68 LGRA 286 held by a 2 to 1 majority that the term "environment" did not encompass the turtles at Mon-Repos Beach. That case involved land adjoining the subject land in *Keys* which had been resumed for conservation purposes. The essential issue was whether the land should be valued at the date of the resumption on the basis that the presence of the turtle rookery made any rezoning of the land from rural to residential "A" unlikely to succeed. If such a consideration was relevant the valuation would of course be lower. The Full Court concluded that it would not be open to the local authority to have regard to the effect of rezoning on the turtle rookery because the term "environment" referred to the inanimate surrounds of the land the subject of a hypothetical rezoning not to the living organisms which inhabit those surrounds.

Consequently, on the basis of the Full Court's decision in the *Murphy* case the earlier decision of the Local Government Court in *Keys* was incorrect at least on the environmental ground. Not surprisingly, the Full Court's decision went on appeal to the High Court which in a unanimous joint judgment overturned the Full Court.

However, subsequent to the Full Court judgment but prior to the handing down of the High Court's decision, the Queensland Parliament on 30 June 1990 amended the *Local Government Act 1936* by inserting a definition of "environment" in the following terms:

> *Environment includes land or water and flora and fauna and habitats above and below the surface of the earth.*

Whilst this definition was not considered by the High Court, it made some relevant statements in respect of the ordinary meaning of the word "environment". The Court said:

> *In its ordinary meaning environment signifies that which surrounds and has a meaning understood to include "the conditions under which any person or thing lives": Oxford English Dictionary Second Edition 1989. The latter usage dates from 1827 when Thomas Carlyle used the word to mean "the aggregate of external circumstances, conditions and things that affect the existence and development of an individual organism or group". See Hendrickson, Encyclopedia of Word and Phrase Origins (1987).*
>
> *What constitutes the relevant environment must be ascertained by reference to the person, object or group surrounded or affected. The reference point for the purposes of sub-section 32A(1) and section 33(6A)(e)(v)(B) of the Act is the land which is the subject of an application to which those provisions apply. In the present case, it is the land which was the subject of the application for rezoning and which was later resumed. That land is surrounded by other land including a narrow strip of land fronting the sea. During the nesting season turtles resort to that coastal strip and perhaps also to the adjacent coastal dune areas to lay their eggs. When the eggs are hatched, hatchlings or the survivors of them journey from the coastal strip to the sea.*
>
> *Even taking the narrowest possible meaning of the word "environment" and confining it to the immediately adjacent land, the resumed land was and is environed by land which turtles used and continue to use as a rookery. Any use of the resumed land which directly or indirectly reduced the number of turtles using the adjoining coastal strip as a rookery or the number of surviving hatchlings would affect an alteration of a feature of that coastal strip and hence an alteration of the environment of the resumed land. And, because the presence of turtles during their nesting and hatching seasons might be thought to be a desirable feature of that coastal strip, and the evidence is that a significant number of objectors and the Council considered it so, any reduction in the number of turtles using that land as their rookery or in the number of surviving hatchlings might properly be thought to constitute a deleterious impact on the environment of the resumed land.*

The High Court was prepared unanimously to give the term "environment" a very wide meaning. The new Act was passed at about the time the High Court handed down its judgment in *Murphy*. It is likely that had the judgment been given earlier, the Queensland Parliament would have most likely concluded that an exhaustive definition of the term "environment" was unnecessary.

Section 32A did not impose any administrative procedures in respect of environmental assessment. Accordingly the administrative procedures adopted pursuant to section 29(2) of the Public Works Act were relied upon by Local Governments when they sought to use section 32A to require the preparation of an environmental assessment in respect of a project.

Local Government (Planning and Environment) Act 1990

On 15 April 1991, the *Local Government (Planning and Environment) Act 1990* repealed section 32A of the *Local Government Act 1936*. That Act imposed more substantial obligations in respect of environmental assessment. The relevant section is section 8.2 of the Act.

Section 8.2(1) is identical to the now repealed section 32A(1) of the *Local Government Act 1936*. It provides as follows:

> *Without derogating from any of its powers under this Act or any ether Act, the Local Authority when considering an application for its approval, consent, permission or authority for the implementation of a proposal under this Act or any other Act is to take into consideration whether any deleterious effect on the environment would be occasioned by the implementation of the proposal, the subject of the application.*

The term "environment" is defined in section 1.4 in terms different to the 1990 amendment to the *Local Government Act 1936*. It provides as follows:

> *Environment includes -*
>
> *(a) eco-systems and their constituent parts including people and communities;*
>
> *(b) all natural and physical resources;*
>
> *(c) those qualities and characteristics of locations, places and areas however large or small which contribute to their biological diversity and integrity, intrinsic or attributed scientific value or interest, amenity, harmony and sense of community; and*
>
> *(d) the social, economic, aesthetic and cultural conditions which affect the matters referred to in paragraphs (a), (b) and (c) or which are affected by those matters.*

The scope of the definition of environment has been considered by David Nichols in a paper presented to the LAMS Conference on 8 July 1991. He makes the following comments in relation to the definition:

- Subparagraph (a) covers eco-systems and each constituent part of an eco-system and includes people and communities. Ecology is the science of the organisation of plants and animals or the branch of biology which deals with the relations of living organisms to their surroundings, their habits and modes of life. An eco-system is a set of relationships between living organisms and their surroundings in a particular place. This limited definition specifically includes the relationship between people and communities of people and their surroundings.
- Subparagraph (b) includes all natural and physical resources meaning all animate and inanimate things. The use of the word "natural" in juxtaposition to the term "physical resources" indicates that non-naturally occurring physical resources are included as well such as for example the built environment.
- Subparagraph (c) is much more general. The only satisfactory way to interpret it is to consider all of its constituents parts individually. It is concerned with qualities and characteristics which contribute to the:
  - biological diversity and integrity;
  - intrinsic or attributed scientific value or interest;
  - amenity;
  - harmony;
  - sense of community,

  of large and small locations, places and areas.
- Subparagraph (d) deals with the social, economic, aesthetic and cultural effects and consequences of the matters covered by subparagraphs (a), (b) and (c). Perhaps it might be best explained in terms of an example. Take the timber resources on Fraser Island. The forests constitute a natural resource which is affected by and which affects or has consequences on social, economic, aesthetic and cultural conditions on the island, on the town of Maryborough and generally on the Great Sandy Region. Subparagraph (d) should be viewed as encompassing within the purview of the definition the consequences within the local and the broader community of the specific matters covered in subparagraphs (a), (b) and (c).

The scope of section 32A has been expanded by section 8.2(2) of the *Local Government (Planning and Environment) Act 1990* (**P&E Act**) which requires applications for town planning or subdivisional approval by local governments in respect of designated developments to be accompanied by an environmental impact statement.

Designated developments are defined by section 8.2(15) of the P&E Act and regulation 15 of the *Local Government (Planning and Environment) Regulation 1991* as proposals:

- other than proposals which the local authority considers are of a minor or ancillary nature relating to a development referred to in schedule 1 of the P&E Act or an area referred to in schedule 2 of the P&E Act; or
- specified in a local planning policy as designated developments.

It is important to note that major shopping developments are defined as designated developments. Under the old *Local Government Act 1936* and under the P&E Act until 1993 applications for major shopping centres were required to be accompanied by a separate economic impact assessment. This was repealed in 1993 and major shopping developments were defined as a designated development thereby requiring an environmental impact assessment to be submitted in respect of such developments.

The environmental impact statement must be prepared in accordance with the terms of reference prepared by the Chief Executive of the Department of Housing, Local Government and Planning who is required to consult with referral agencies such as the Department of Environment and Heritage, the relevant local authority and other relevant government departments (sections 8.2(5) and 8.2(15)). To obtain terms of reference a request is made to the Chief Executive of the Department of Housing, Local Government and Planning for advice as to whether an environmental impact statement is required and if required, the terms of reference (section 8.2(3)). The Chief Executive must make a decision within 20 working days (section 8.2(5B)) or such longer period as the Chief Executive determines (section 8.2(6A)).

Section 8.2(4) of the P&E Act provides that the Chief Executive may decide that an environmental impact statement is not necessary if:

- a previous study has been prepared and there are no significant environmental issues that were not covered in that previous study;
- the referral agency has made a study that included environmental issues for the area subject to the development that is not outdated; or
- the consequence of the approval in relation to the designated development was minor.

Where an environmental impact statement is required special provision is made for the giving of public notice of the application in that the application is required to be open for public inspection for 30 working days rather than 20 working days and the period in which the local authority is to decide the application is extended from 40 working days to 60 working days (section 8.2(7)).

Notwithstanding that a proposal is not a designated development, the local authority may require the submission of an environmental impact statement in respect of a proposal (section 8.2(13)). In this case the scope of the environmental impact statement will be specified by the local government, not the Department of Housing, Local Government and Planning, although it is likely that the local government will consult with the Department of Housing, Local Government and Planning, Department of Environment and Heritage and other relevant bodies. Environmental impact statements of this type are not available for public inspection and as such cannot be the subject of objection.

Apart from environmental impact statements, an application for town planning or subdivisional approval may also be required and be accompanied by a site contamination report (section 8.3A(2)). These reports are required where it is proposed to develop land which may have been contaminated in the past by chemicals which are probably hazardous to human health or the environment. These are defined in regulation 18 of the *Local Government (Planning and Environment) Regulation 1991*.

The Act specifies the following process in respect of the preparation of site contamination reports:

- the local government requests a site contamination report (section 8.3A(2));
- the proponent applies to the Land Contamination Unit of the Department of Environment and Heritage for guidelines (section 8.3A(3));
- the proponent prepares a report in accordance with the Land Contamination Unit guidelines; and
- the Land Contamination Unit, if satisfied with the report, issues a site contamination report which is to be submitted with the application to the local government (section 8.3A(4)).

Legal issues relevant to the preparation of environmental assessments

Compliance with TOR

In preparing environmental assessments, practitioners should ensure that the environmental assessment complies with the terms of reference or scope specified by CEPA in the case of the Environmental Protection (Impact Proposals) Act or the Department of Housing, Local Government and Planning or local authority in the case of the *Local Government (Planning and Environment) Act 1990*.

The adequacy of an environmental impact statement may be challenged by:

- any persons seeking a declaration to this effect or an injunction or prevent the responsible authority from deciding an application until an adequate environmental impact statement has been provided; or
- any persons seeking a declaration that a responsible authority's decision is incompetent because of an inadequate environmental impact statement.

Australian precedents

To date there have been no decisions in respect of the Commonwealth and Queensland legislation where the adequacy of an environmental impact statement has been challenged. However the judgment of Cripps J. in *Prineas v Forestry Commission* of New South Wales provides some guidance. His Honour said:

> *… the environmental impact statement must be sufficiently specific to direct a reasonably intelligent and informed mind to the possible or potential environmental consequences of the carrying out or not carrying out of that activity. It should be written in understandable language and should contain material which would alert lay persons and specialists to problems inherent in the carrying out of the activity. … In my opinion, there must be imported into the statutory obligation a concept of reasonableness. Clearly enough, the legislature wished to eliminate the possibility of a superficial, subjective or non-informative environmental impact statement and any statement meeting that description would not comply with the provisions of the Act, with the result that any final decision would be a nullity. But, in my opinion, provided an environmental impact statement is comprehensive in its treatment of the subject matter, objective in its approach and meets the requirement that it alerts the decision-maker and members of the public and the Department of Environment and Planning to the effect of the activity on the environment and the consequences to the community inherent in the carrying out or not carrying out of the activity, it meets the standards imposed by the regulations. The fact that the environmental impact statement does not cover every topic and explore every avenue advocated by experts does not necessarily invalidate it or require a finding that it does not substantially comply with the statute and the regulations. In matters of scientific assessment it must be doubtful whether an environmental impact statement, as a matter of practical reality, would ever address every aspect of the problem. There will be always some expert prepared to deny adequacy of treatment to it and to point to its shortcomings or deficiencies.*

The Queensland cases dealing with the adequacy of economic impact assessments provide an appropriate analogy. The statement of Carter J. in *Barry and Roberts Limited v Caboolture Shire Council* illustrates the standard required by the Court:

> *The definition of economic impact assessment requires the making of a study report. This means that there must at least have been some investigative work done by an appropriate person or persons and the results committed to some identifiable form expressing a conclusion or opinion which is the report-maker's assessment ... One cannot go beyond that and lay down in any meaningful way exactly what form the report should take, what material it must necessarily contain, in what manner the investigative process should be undertaken, what source material must be gathered for the purpose of a valid assessment, what its maximum size should be, or indeed who it is who must be the author of it. The resultant study report will vary in form, content and dimension according to the experience, knowledge, degree of industry and expertise of the maker of it. It will, in my opinion, meet the statutory definition provided it expresses the considered view of the maker of it in relation to the matters set out in the definition and sets out the material relied on by the maker of it for the conclusions which the report expresses. Whether the statements of fact in it are demonstrably true and opinions expressed logically valid is in my view, beside the point. Provided it sufficiently informs a local authority and any other interested persons who may read it of the applicable assessment and the bases for assessment, it will suffice. By its very nature, it must express matters of opinion and that being so, its conclusion will be debatable, but that does not matter. Again, it will be noted that the Act does not identify the person who should make it. ... The expertise of the author of it will no doubt affect its worth, but provided it meets the fundamental criteria in the definition, it matters not who the maker of it is.*

Prudent and feasible alternatives

It should be noted that most terms of reference will require a proponent to consider alternatives. Under the Commonwealth administrative procedures the proponent may be required to consider prudent and feasible alternatives. In Queensland, terms of reference generally require a proponent only to consider alternatives to the proposed action. To date, the meaning of the terms "alternative", "prudent" and "feasible" have not been determined by Australian courts although they have been considered by US courts.

The word "alternative" is used in section 102(2)(c)(iii) of NEPA which requires all agencies of the United States Federal Government to include in every recommendation a report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on alternatives to the proposed action.

The NEPA provisions relating to alternatives were first considered in the case of *Natural Resources Defense Council Incorporated v Morton* 458 F2d 827 (1972). That case involved a challenge to a proposed lease/sale of oil and gas development on the outer continental shelf. The Interior Department's environmental impact statement had addressed only the alternatives of banning the sale, or eliminating certain tracks with higher environmental risks. Over a vigorous dissent, the Court of Appeals found the Department's approach inadequate, and in so doing postulated NEPA obligations of sweeping significance. First, the court rejected the view that agencies may limit their consideration of alternatives to those within their own authority to implement. Recognising that only "reasonably available" alternatives need to be discussed, the court defined availability in terms of time and technological feasibility rather than statutory jurisdiction of the proponent agency. Second, the court was unwilling even to define availability in terms of the jurisdiction of all Federal agencies collectively, holding that the need for fresh or modified statutory authority to implement a "proposed alternative" does not automatically establish it as beyond the domain of what is required for discussion.

The effect of *Morton's* case is that an agency must consider reasonable alternatives. The range of alternatives is thus subject to a rule of reason. The extent of the range depends on the nature and timing of the proposed action. An agency need not consider every variation of every alternative, but the range must be reasonably comprehensive so that the agency may make a "reasoned choice" among them.

Subsequent United States courts have applied the *Morton* test and held that an agency is not required to consider alternatives which:

- are of speculative feasibility because they require a major research breakthrough:

  Natural Resource Defense Council v Morton 148 US App DCS, 458 F2d 827;

- require changes in government policy or legislation:

  Natural Resource Defense Council Inc. v Calloway (CA2 Conn) 524 F2d 79;

- require changes in similar restrictions to those applicable to the proposed action:

  Natural Resource Defense Council Inc. v Calloway (CA2 Conn) 524 F2d 79;

- involve similar or greater harm than the proposed action: *Sierra Club v Morton* (CA5 Fla) 510 F2d 813; *Northern Plains Resources Council v Lujan* 874 F2d 661;

- involve technological advances when agency action requires short-term results;

- effect only a miniscule part of the problem: *Life of the Land v Brinegar* 485 F2d 460;

- are impossible to implement.

The *Morton* case is clear authority for the proposition that a federal agency is required to discuss all reasonable alternatives even those alternatives which are beyond its power to implement. The agency must not confine itself to alternatives within its own jurisdiction or control, but it must also consider those which can be carried out by, or which are within the expertise of, other agencies or branches of government. Consideration of a particular alternative is not precluded by the fact that its implementation would require substantial co-ordination with another Federal agency, or that it requires congressional approval or implementation. This principle has been accepted in the following cases:

> *Sierra Club v Lynn* CA Tex 502 F2d 43, rehearing denied 504 F2d 760, certiorari denied 95 S Ct 2001, 421 US 994, 44 L. Ed2d 484, certiorari denied *Edwards Underground Water Dist. v Hills* 95 S Ct 2668, rehearing denied 96 S Ct 158; *Environmental Defense Fund Inc v Corps of Engineers of United States Army* CA Miss 482 F2d 1123; *Montgomery v Ellis* DC Ala 364 F Supp 517; *Sierra Club v Froehlke* DC Tex 359 F Supp 1289.

The words "prudent" and "feasible" have also been considered by US courts. It is clear from United States cases that feasible smacks of technical considerations, whilst prudence involves the entire range of concerns relevant to wisdom. Since both words appear in the legislation, the courts have found it unnecessary to refine "feasible" beyond the general concept of capability of being built, or of being made to work, with available technology. Nuances as to other factors which might tend to make an engineering project inadvisable, such as excessive cost, have not been addressed as a question of feasibility, but rather under the requirement of prudence.

The meaning of the word "feasible" has been considered in the following cases:

- In *Citizens to Preserve Overton Park Incorporated v Volpe* (1971) 401US402, 28LEd2d136, the US Supreme Court held that the word feasible means, in effect, consistent with sound engineering. The court also stated that the requirement that there be no feasible alternative route admits of little administrative discretion and that for this exemption to apply, the Secretary must find that as a matter of sound engineering, it would not be feasible to building the highway along any other route.

- In *Monroe County Conservation Council Incorporated v Volpe* (1972, CA2NY) 472F2d693, the Supreme Court said that a feasible alternative route is one that is compatible with sound engineering.

- In *Brookes v Volpe* (1472, DCWash) 350F.Supp2649, SUPP (DCWash) 350FSupp287, the Supreme Court said that in order to conclude that there is no feasible alternative, the Secretary must find that as a matter of sound engineering, it would not be feasible to build the highway along any other route.

- In *DC Federation of Civic Associations v Volpe* (1971) 148 AppDC207, 459F2d1231, the Court said that the government can maintain that there was no feasible alternative to a project only if the Secretary of Transportation finds that "as a matter of sound engineering it would not be feasible to build the highway along any other route".

- Other cases where a similar meaning of feasible has been adopted include *Wade v Dole* NDI11631F.Supp1100, affirmed *Eagle Foundation Inc v Dole* 813 F2d798; *Town of Fenton v Dole* NDNY636F.Supp557, affirmed 792 F2d44; *Wade v Lewis* DCI11561F.Supp913, appeal dismissed 767 F2d925.

Prudent means more, apparently, than merely wise. It connotes more than a wide ranging balancing of competing interests. An alternative is prudent if it does not present unique problems. This interpretation has been established in a number of cases:

- In *Citizens to Preserve Overton Park Incorporated v Volpe* (1971) 401US402, the Supreme Court construed the term prudent as meaning not presenting unique problems. The court rejected the argument that the statutory requirement that there be no other prudent route requires the Secretary of Transportation to engage in a wide ranging balancing of competing interests. The Secretary should therefore not weight the detriment resulting from the destruction of parkland against the cost of other routes, safety considerations, and other factors, and determine on the basis of the importance that he attaches to these other factors whether alternative feasible routes would be prudent. The Court said that no such wide ranging endeavour was intended, and that the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems.

  It is obvious, said the court that, in most cases, considerations of cost, directness of route and community disruption will indicate that parklands should not be used for highway construction wherever possible since there will always be a small outlay required from the public purse when parkland is used, the public already owning the land and there being no need to pay for a right of way and since people do not live or work in parks, noted the court, if a highway was built on parkland, there is no disruption of homes or jobs. Since such factors are common to nearly all highway construction, indicated the court, if Congress intended these factors to be on an equal footing with preservation of parkland, there would have been no need for this statute. Noting that it was clear that congress did not intend that cost and disruption of the community were to be ignored by the Secretary, the court stated that the very existence of the statute C indicates that protection of parkland was to be given paramount importance.

- Upon remand from the United States Supreme Court in the above case, the court in *Citizens to Preserve Overton Park Incorporated v Volpe* (1972 DCTenn) 225FSupp837, Supp op (DC Tenn) 357 F.Supp 846 interpreted the Supreme Court's decision, that the use of the word prudent does not permit a wide ranging balancing of interests, as requiring that the Secretary of Transportation not consider the fact that condemnation of land and removal of buildings was almost complete on the challenged route, when he makes his section 4(f) decision, even though he may consider the cost of alternative routes. Furthermore, the court noted that while the Supreme Court's ruling allows the Secretary to consider the disruption that would be caused along an alternative route, he may not consider the fact that the community in the vicinity of the proposed route has already been disrupted and that disruption along an alternative route would be new.

- In *Monroe County Conservation Council Incorporated v Volpe* (1972, CA2NY) 472F2d693, the court said that a prudent alternative route is one that does not present unique problems, that is, an alternative without truly unusual factors so that the cost or community's disruption would reach extraordinary magnitudes. In other words, said the court, a road must not take parkland unless a prudent person concerned with the quality of the human environment is convinced that there is no way to avoid doing so.

- In *Citizens to Preserve Foster Park v Volpe* (1972, CA7Ind) 466F2d991, the court held that the teen "prudent" as used in the parkland statute means not presenting unique problems.

- In *DC Federation of Civic Associations v Volpe* (1971) 148 AppDC207, 459F2d1231, 19ALR Fed854, cert den 405 US 1030, 31 LEd2d 489, 92Sd1290 the court implied that the word prudent requires that the Secretary of transportation not approve the destruction of parkland unless he finds that alternative routes present unique problems. Furthermore, the court noted that it could not have been the intent of Congress that an alternative be considered imprudent merely because the persons who support the use of parkland for a particular project have the power to make alternatives to its use agonising.

- Other cases where this test has been adopted include *Druid Hills Civic Association Inc v Federal Highway Administration* CA11(Ga) 772F2d700, rehearing denied 777F2d704; *National Trust for Historic Preservation in US v Federal Highway Administration* 777 F2d704 appeal after remand 680 F.Supp1368 affirmed 833F2d1545, certiorari; denied 109 S.ct488US819, 102 L.Ed2d38.

  The best espoused in *Overton Park* has also been adopted in respect of pollution control legislation in the United States where the phrase "no prudent & feasible alternative" has been used to define defences. Relevant cases include *Wayne County Department of Health v Olsonite Corp* (1978) 263 NW Rep 2d 778; *Manchester Environmental Coalition v Stockton* (1981) 441 A.2dtB; *Minnesota Public Interest Research Group v Adams* (1979) 482 F.Supp 170; *People for Enlightenment and Responsibility v Minnesota Environmental Quality Council* (1978) 266 NW 2d 858.

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Legal requirements and environmental audits

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This article discusses the nature, role and purpose of environmental auditing along with its accompanying legal requirements

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Nature of environmental auditing

Definition of audit

The International Chamber of Commerce (1993:2) defines environmental auditing as:

> "*A management tool comprising a systematic documented periodic and objective evaluation of how well environmental organisation, management and equipment are performing with the aim of helping to safeguard the environment by:*
>
> *(i) facilitating management control of environmental practices; and*
>
> *(ii) assessing compliance with company policies, which would include meeting regulatory requirements.*"

In simple terms, environmental auditing is an examination involving analyses, tests and confirmations of a facility's methodical procedures and practices with the goal of verifying whether they comply with legal requirements and internal policies and evaluating whether they conform with good environmental practices.

The term "*audit*" has become associated with a wide variety of activities that are intended to examine the performance of a facility or operation and determine or verify the extent to which that activity complies with external requirements and internal company standards. Terms having the same meaning include management audit, technical audit, operational audit, quality assurance audit and energy audit. Furthermore, a variety of other names are used to describe the application of audit principles to environment programmes. Common terms include review, surveillance, survey, appraisal, evaluation and assessment.

Nature of audit

Environmental audits are often compared with statutory financial audits. However, whilst there are some important similarities between environmental auditing and financial auditing activities there are some substantial differences. The similarities include in each case the dependence on standard methodology, an emphasis on verifying compliance against standards and the use of sound auditing techniques. However some of the substantial differences include:

- The Corporations Law provides extensive and detailed obligations upon financial auditors which strictly delineate their duties to the company and if breaches are found, their duties to shareholders and the public in the form of reports to the Australian Securities Commission. Environmental auditing on the other hand is generally unregulated by statute and as such environmental auditors have no statutory delineation of duties to rely upon. Accordingly, the duties of environmental auditors are often defined by contract with the person to whom they are undertaking the audit.
- The extent of a financial auditor's obligations to a company are defined by the Corporations Law. In the case of an environmental audit, the scope of the investigations is defined by the contract between the auditor and the customer requiring the audit.
- The Corporations Law sets out specific requirements for independent certification of financial statements. However, there is no statutory requirement for certification of environmental audit programmes of particular individual companies.
- Standards have been specified for financial accounting but only very limited standards have been determined for environmental audits.

Other substantial differences between environmental and financial audits relate to the frequency of the audit, the subject matter and the relationship of the auditor to the operation audited. These differences can be summarised in the following table:

Financial Audit	Environmental Audit
Statutory requirement	Voluntary action

Financial Audit	Environmental Audit
Annual event	No fixed frequency
Attestation to a statement	Status of conformance with management expectations
External function by external personnel	Internal function by internal or external personnel
Conducted in accordance with generally accepted standards of practice	Considerable variation in approach
Focus on financial accounts	Focus on environmental issues

Source: ICC (1993:3)

Role of auditing

An environmental audit is an assessment of some aspect of environmental management and as such is a key element in a wider environmental management system. An environmental management system is the framework for or method of guiding an organisation to achieve and sustain performance in accordance with established goals and in response to constantly changing regulations, environmental risk and social, financial, economic and competitive pressures (ICC 1993:6).

Environmental management systems are designed to:

- assure compliance with local, regional, national and international environmental laws and regulations;
- establish and promulgate internal policies and procedures needed to achieve the organisation's environmental objectives;
- identify and manage company risks resulting from environmental risks; and
- identify the level of resources and staff appropriate to the organisation's environmental risks and objectives, ensuring their availability when and where needed (ICC 1993:6).

Generally speaking, most environmental management systems consist of several interacted functions including:

- *Planning* – specifying a framework for setting goals and objectives, developing strategies to achieve the goals and objectives, allocating resources to carry out those strategies and establishing policies.
- *Organisation* – establishing the organisational structure, delineating roles, responsibilities and authority and specifying accountability for accomplishing the work.
- *Implementation* – developing mechanisms, motivating, delegating and setting priorities.
- *Control* – establishing a framework for measuring results, identifying problems and taking corrective action (ICC 1993:6-7).

Purpose of auditing

Environmental audits are often undertaken for a variety of reasons including:

- *Minimising legal liabilities* – most environmental laws specify high penalties for environmental offences together with personal liability for directors and managers. Generally speaking the only defence to such prosecution is to show that the company and its employees have shown due diligence in taking the appropriate steps to avoid such liability.
- *Minimising exposure to financial risks* – an environmental audit enables an organisation to put in place appropriate procedures as a means of ensuring reduced exposure to litigation, penalties and commercial risks.
- *Improving management performance* – the International Chamber of Commerce identified the following benefits for organisations of developing an environmental auditing process (1986):
  - identifying current and forthcoming demands from environmental legislation;
  - increasing employee awareness of environmental policies and responsibilities;
  - identifying opportunities for cost savings, including those resulting from waste minimisation and energy efficiency;
  - identifying and prioritising areas of significant risk;
  - providing an information base for use in emergencies and evaluating the effectiveness of contingency plans;

- ensuring adequate up to date environmental databases for all internal management awareness and decision making in relation to plant modifications and new plants;
- enabling management to give credit for good environmental performance;
- assisting, identifying and developing market opportunities;
- helping to assist relations with regulatory authorities by convincing them that complete and effective audits are being undertaken and by informing them of the type of procedure adopted; and
- making it easier to get insurance cover for environmental impairment or liability.

- *Maximises financial gains* – the cost of environmental audits, the development of environmental management plans, and environmental monitoring are tax deductible as they are expenses incurred in the course of a business. Furthermore, environmental management systems may also improve the financial performance of an organisation by reducing raw materials, energy, or waste disposal costs and by leading to improvements in product quality, enhancing the image of the organisation and increasing market share.

History

Overseas experience

In the early 1970s the United States Securities and Exchange Commission began to require the disclosure of environmental liabilities as part of its ordinary administration of the US Securities Codes. In particular, the Securities and Exchange Commission requested three United States Corporations including the Occidental Petroleum Corporation to re-evaluate the liabilities contained in their annual reports to stockholders on the basis that they had underestimated environmental liabilities.

The United States *Securities Act 1933* and the *Securities Exchange Act 1934* empowers the Securities and Exchange Commission to impose disclosure obligations on companies that offer securities publicly. The purpose of these disclosure requirements is to provide investors with material and information that will aid them in making investment decisions. The failure to comply with the relevant standards may lead to criminal liability on behalf of the Corporation and individuals as well as civil enforcement actions by shareholders.

In 1971, the then Securities and Exchange Commission released a document entitled "*Disclosure Pertaining to Matters Involving Environment and Civil Rights*". In that document the Securities and Exchange Commission outlined its views as to the existing general disclosure obligations under the 1933 and 1934 Acts. In particular, the Commission noted that those Acts required the disclosure of:

- circumstances when "*significant capital outlays (which may materially affect the earning power of the business)*" may cause material changes to that business; and
- proceedings arising under environmental laws.

In 1973, the then Securities and Exchange Commission formally issued requirements relating to the disclosure of environmental liabilities. These requirements were modified several times since that date and are currently contained in the Securities and Exchange Regulations.

Since 1979 as a result of a variety of cases heard in the American courts it has been established that the Securities and Exchange Commission environmental disclosure requirements include:

- the development and disclosure of estimates of future costs of environmental compliance;
- disclosure of any proceedings involving the government;
- where the corporation has voluntarily disclosed its environmental policies additional material needed to prevent them from being misleading; and
- any additional material required to comply with US Securities Laws.

In 1980, the Securities and Exchange Commission imposed a disclosure requirement known as the Management Discussion and Analysis of Financial Conditions and Results of Operations (the **MDNA**). An MDNA is a narrative discussion of the corporation's financial condition and is required to discuss known trends, events or uncertainties that are reasonably likely to affect liquidity, capital resources or operating results materially. The Securities and Exchange Commission revised its MDNA requirements in 1989. In particular those provisions required:

- determination by management of whether there are any potentially material environmental problems;
- disclosure of all potential environmental problems unless management determines that such problems are not reasonably likely to occur;
- disclosure where there is at least a reasonable possibility that a loss may have been incurred; and
- determinations by management which are objectively reasonable when made.

The MDNA requirements therefore makes environmental audits an integral and imperative part of US corporate management and requires them to be designed to meet the Securities and Exchange Commission requirements and to ensure that corporate decision making will stand legal challenge (Carney: 1991:415-417).

The Australian experience

Whilst Australia has not developed the public disclosure requirements as set out in the US Securities and Exchange Acts of 1933 and 1934, it is apparent that Australian companies will be forced to develop and implement programmes of environmental audit in the future. This is apparent from a number of trends in Australian environmental laws (Carney 1991:417). These include:

- increasingly substantial penalties and wide ranging court orders;
- individual, civil and criminal liability for directors and managers of companies;
- the imposition on directors and managers of companies of personal, civil and criminal liability for the offences of their corporations irrespective of whether the corporations themselves are subject to proceedings or prosecution;
- the requirement that directors and managers (individually) and companies (collectively) exercise "*due diligence*" in complying with environmental law;
- increasingly comprehensive requirements for corporate disclosure of liabilities including environmental liabilities; and
- the attachment of environmental liability to mere occupational ownership of property.

Increasingly environmental legislation is requiring mandatory environmental audits to be undertaken. Both the New South Wales and Victorian Environmental Protection Authorities have issued guidelines for environmental audits under their respective State legislation. The same is proposed under the Queensland Environment Protection Legislation.

Types of environmental audits

Typology

The term "*environmental audit*" generally encompasses three types of activities in Australia: (Jenkins 1991:2)

- Audit of industrial premises – this involves a review of the discharges and waste management practices of individual facilities to determine compliance with legislative requirements.
- Site contamination audits – this involves an assessment of the past contamination of the soil of a site usually in relation to a change in land use or a change in site ownership.
- Environmental impact audit – this involves the monitoring of the actual levels of environmental impact associated with a development in order to compare with levels predicted in the environmental impact studies.

Industrial premises audits

Industrial premises are frequently audited as a result of the increasing willingness of governments to fine polluters for breaches of pollution control laws. This has resulted in increased auditing of waste water effluent, air discharges, noise emissions, waste disposal and management practice to ensure compliance with discharge licences and emission standards. Audits are also triggered by proposals to acquire industrial premises or to take over companies whose major asset includes industrial premises (Jenkins 1991:3).

Industrial premises audits usually comprise three stages:

- Preparatory stage – in the course of this stage the requirements, approach and audit team are established.
- Site inspection stage – this involves a thorough survey of the plant and its processes including operating practices, maintenance procedures, spill containment, and clean up and emergency procedures.
- Reporting and recommendation stage – this involves the reporting of the results of the inspection, the extent of compliance and the recommendations or actions that are required to be undertaken to ensure compliance.

Site contamination audits

The purpose of a site contamination audit is to allow for proper clean-up of a contaminated site such that the intended future site use has acceptable levels of risk for the proposed inhabitants and off site effects. Site contamination audits are required in most States where industrial land is proposed to be rezoned for another purpose (Jenkins 1991:4).

Site contamination audits are generally conducted in the following steps:

- Identification of possible contamination – this involves a review of the site history and previous land uses to determine the range of potential contaminants and the parts of the site where their occurrence is most likely.
- Systematic sampling and analysis programme – this involves an assessment of the concentration and distribution of the chemical contaminants that could pose a health risk to the proposed site use.
- Health and environmental risk assessment – this involves an assessment of the health and environmental health risk of each identified chemical contaminant on humans and the environment.

- Remediation strategy – this involves the responses that are required to deal with the remediation of contaminated areas. This may involve disposal in a secure land fill, treatment in situ, isolation by encapsulation or design barriers.

Environmental impact audit (EIA)

The objective of the EIA is to determine whether the predictions of impacts, commitments to action or the approval conditions associated with environmental impact assessment process are actually achieved in practice. These reflect the fact that environmental impact assessments are generally only focused on the planning and approval stages of new projects without necessarily requiring monitoring of particular impacts during project operation as a check on the predicted effects.

Environmental impact audits are generally conducted in the following steps:

- review the design commitments to determine whether they have been implemented;
- determine whether the pollution control equipment specified in the EIA have been incorporated;
- review the operating procedures to determine whether relevant procedural manuals have been prepared and whether training programmes are appropriate to ensure instruction in the procedures; and
- monitoring the actual level of the impact to determine whether it exceeds the predicted level of environmental impact.

Legal requirements

Types of audit

Legal requirements generally require three types of audits to be undertaken:

- Compliance audits undertaken by the relevant regulatory authority to ensure compliance with licence conditions and other statutory requirements.
- Voluntary audits undertaken by industry as part of its environmental management system or pursuant to a transaction.
- Mandatory audits undertaken by industry at the direction of the relevant regulatory authority in circumstances where an application is made for the grant of a licence or approval or where a breach of a statutory requirement or licence condition is reasonably suspected.

Operational audits

Audits are often undertaken as part of a company's environmental management system for the following reasons:

- A desire on the part of the board of directors or chief executive officer to obtain an assurance that the company is adequately managing its environmental responsibilities and that no liability attaches to the company or its senior management.
- Initiatives on the part of lower or middle management to improve the company's existing environmental management activities and to keep up with what other companies are doing.
- To help facility managers improve their environmental performance particularly by providing assistance and understanding, and interpreting regulatory requirements; identifying compliance problems; and identifying additional facility personnel needs and opportunities.
- As a result of an environmental problem or incident or in response to a desire to anticipate and head off potential problems.

One of the most important reasons for the increase in operational audits has been the increased liability of companies and their employees under both the common law and legislation. For present purposes I shall only concentrate on liabilities under environmental statutes.

Offences

Environmental statutes create a range of substantive offences for activities which breach prescribed standards. In order to be held liable for breach of statutory offences, the prosecution must prove beyond reasonable doubt that the defendant committed the offence. In traditional offences such as murder, larceny and the like the prosecution must first prove a guilty intent or mens rea. In statutory offences however the requirement to prove guilty intent or mens rea is usually modified or eliminated. Accordingly, a company or an individual charged with an offence under an environmental statute may find itself guilty of that offence notwithstanding that there was no guilty intent or mens rea to commit the offence.

The High Court of Australia in *He Kaw Teh v The Queen* (1985) 157 CLR 523 has recognised three categories of criminal offences:

- those in which the prosecution must prove a guilty intent or mens rea;

- those of strict liability in which a guilty intent will be presumed and unless and until material is advanced by the defendant of the existence of an honest and reasonable belief that the conduct in question is not criminal, in which case the prosecution must undertake the burden of negativing such belief beyond reasonable doubt; and
- those of absolute liability in which a guilty intent plays no part and guilt is established by proof of the objective ingredients of the offence.

It is not possible to generalise and say that all environmental offences fall into one category or another although it is fair to state that very few offences will fall into the first category. Each offence must therefore be examined individually to ascertain the necessary legislative intent.

In examining any statutory offence the court commences with a presumption that mens rea is an element of the crime and that the onus is upon the prosecution to establish that element beyond reasonable doubt. The courts will have regard to the words of the section creating the offence, the subject matter of the statute, the consequences for the community of the offence and the potential consequences for an accused if convicted when assessing whether the presumption of mens rea has been displaced.

- *Defences*: When an offence is categorised as one of absolute liability then in the absence of any specific statutory defences there is no defence. However, where an offence is one of strict liability, a defence of honest and reasonable mistake of fact may be available. In order to raise this defence the defendant must show the possibility that it honestly believed that some aspect of a system or operation was sufficient to prevent the particular event giving rise to liability. Once that is done, the onus passes to the prosecution to rebut that evidence.
- *Onus of Proof*: Traditionally, the onus of proof that a statutory offence has been committed is on the prosecution which must not only prove the elements of the offence but must also negative any defences. However, many environmental statutes reverse the onus of proof at least in respect of the proof of defences. For example, defendants may be deemed to be guilty of an offence in certain circumstances unless they can prove the available defences. In this case once the prosecution proves the specified circumstances, the onus passes to the defendant to prove the defences.
- *Liability of Senior Management*: Existing environmental statutes impose criminal liability on a variety of employees. These employees can be divided in three categories: senior management; line management; and other employees.

  The category of senior management encompasses employees who hold the positions of Chairman of Directors, Governing Officer, Manager, Director, Managing Director, or Member of the Governing Body as well as any other person concerned with the management, administration and government of the company.

  It should be noted that none of these positions are defined in environmental statutes. By way of guidance however the Corporations Law does define a director to include a person acting in a position of a director whether validly appointed or duly authorised or not and a person in accordance with whose directions or instructions the directors are accustomed to act.

  These senior management positions are not necessarily mutually exclusive as members of senior management may fall within several categories. In addition, liability is generally imposed on a number of positions of senior management as illustrated in Table A3.

  The liability of senior management may arise directly or indirectly. Direct liability arises where a member of senior management is actually directly involved in the offence. Indirect liability arises where the member is held personally liable for an offence committed by the company.

Direct liability

Members of senior management as well as other employees of the company may incur liability if they are directly involved in the commission of an offence. The offences which impose liability on senior management can be divided into two broad categories. The first category involves offences which impose general liability on all persons. Members of senior management as well as other employees of the company may be liable under these offences. Almost all environmental statutes impose offences of this kind.

The second category involves offences which impose specific liability on members of senior management. For example, section 51(1) of the *Contaminated Land Act 1991* provides that the Managing Director, Manager or other Governing Officer must ensure that the company complies with the provisions of the Act. Non-compliance with the Act may result in a penalty of up to $6,000.

Under both categories of offences the onus is on the prosecution to prove the elements of the offence and negative any available defences. The nature of the prescribed penalties and the available defences varies depending on the act.

The range of penalties that may be incurred by members of senior management are set out in Table A2. The penalties may range from fines of $200 under the *Coal Mining Act 1925* up to fines of well over $1 million under the *Queensland Heritage Act 1992*. Terms of imprisonment of between six months and two years may also be ordered by the courts in respect of breaches of a particular environmental statute. Generally speaking the smaller penalties are imposed under older statutes whilst more recent legislation has more significant penalties.

The defences that are available to senior management in respect of direct liabilities are extremely limited. The defences that are available vary depending on the act and the nature of the offence. These are set out in Table A2.

Indirect liability

Senior management may also be liable for offences committed by the company. Table A3 indicates which members of senior management may be held liable for offences committed under environmental statutes. Those environmental statutes which impose indirect liability on senior management include:

- *Building Act 1975* and the *Standard Building Law 1993*;
- *Carriage of Dangerous Goods by Road Act 1984* and *Carriage of Dangerous Goods by Road Regulations 1989*;
- *Clean Air Act 1963* and *Clean Air Regulations 1982*;
- *Clean Waters Act 1971* and *Clean Waters Regulations 1973*;
- *Coal Mining Act 1925* and the rules made thereunder;
- *Explosives Act 1952* and *Explosives Regulation 1955*;
- *Mineral Resources Act 1989* and *Mineral Resources Regulations 1989*; and
- *Radioactive Substances Act 1958* and *Radioactive Substances Regulations 1961*.

These Acts reverse the onus of proof in relation to the proof of defences. The prosecution only has to prove that the company is guilty of the offence. The onus then passes to members of senior management to prove that they can satisfy one of the available defences.

Generally speaking the defences that are available to members of senior management in respect of indirect liabilities comprise one or more of the following elements:

- The company committed the offence without the knowledge or connivance of the member.
- The member was not in a position to influence the conduct of the company in relation to the offence.
- The member used reasonable precautions/reasonable steps/due diligence to prevent the contravention by the company.

These elements are not necessarily mutually exclusive and accordingly it may be necessary to prove one or more of the elements in order to successfully establish a defence to prosecution. It will be difficult for a member of senior management to establish the first element even where they do not have actual knowledge. The reason for this is that members of senior management may be considered to have constructive or implied knowledge. Similarly, it will also be difficult for a member of senior management to establish the second element except in special circumstances such as acts of God or unforeseeable accidents. The third element, that of due diligence, is therefore likely to be the only defence on which a member of senior management can rely.

The concept of due diligence has only recently been considered in the environmental context by Australian courts. In *State Pollution Control Commission v Kelly* (1991) 5 ACSR 607 (Land Environment Court 26 June 1991) Hemmings J emphasised that a defendant has the onus to prove not only diligence but all due diligence. This requires that everything properly regarded as due diligence should be done. A standard of perfection however is not required. The court held that:

> "*Whilst 'all' must have its proper connotation, similar stress must be given to 'due' ... diligence ... depends on the circumstances of the case but contemplates a mind concentrated on the likely risks. The requirements are not satisfied by precautions merely as a general matter in the business of the corporation unless also designed to prevent the contravention. Whether a defendant took the precautions that ought to have been taken must also be a question of fact and in my opinion must be decided objectively according to the standard of the reasonable man in the circumstances. It would be no answer for such person to say that he did his best given his particular abilities, resources and circumstances*."

The concept of due diligence is not defined in environmental legislation but by analogy from the trade practice and corporate law arenas it seems that to establish such a defence, a member of senior management would have to show that:

- a proper and suitable system was in place to ensure compliance for legislation;
- the system is being adequately supervised and monitored to ensure that it was being followed;
- members of senior management took steps to ensure that the results of such a supervised system were reported to them and that from time to time they monitored that the integrity of the system was being maintained and imposed and that exceptions or problems which might require additional action (including financial commitments) were dealt with;

- the system itself need not be foolproof but it must cover all material aspects of the business involved;
- merely taking precautions that are usual in the industry does not necessarily mean that they amount to due diligence; and
- the system was to be designed to deal with the likely risks arising out of the particular business.

The fact that a system has been installed does not establish on its own that the system is adequate. Due diligence is in many respects the converse of negligence and thus evidence must be adduced to exhibit a concerned state of mind and steps taken which seek to ensure that all effort was made to prevent the prohibited action. However, it must be emphasised that in establishing a due diligence defence not only will it be necessary to prove the existence of a system (which is supervised) to prevent offences occurring but it will be necessary to convince the court with the benefit of hindsight that such a system was reasonable in the circumstances to prevent all foreseeable risks.

Table A1 sets out the range of penalties that will be incurred by members of senior management and the defences that are available. Penalties may range from fines of only $200 under the *Coal Mining Act 1925* to fines of up to $180,000 under the *Nature Conservation Act 1992*. Imprisonment for up to 12 months can also be ordered by the courts for breaches of particular statutes. Once again the smaller penalties are imposed by the older statutes whilst the more recent statutes set out more significant penalties.

Liability of other employees: In this context the term "*employee*" encompasses both line managers who implement the policy of senior management and have a supervisory role as well as other employees who merely carry out the directions of line managers and the policy of senior management. Like senior managers, the employees of the company may be liable as persons. Almost all environmental legislation imposes some obligation on persons. Accordingly, the nature of the prescribed penalties and the available defences vary greatly depending on the act in question. This can be seen from Table A1 which sets out the range of penalties that may be incurred by persons whether they be the company, senior management or employees for breaches of various environmental statutes.

Transactional environmental audits

In addition to the need for operational environmental audits, environmental auditing has become important in finance and commercial transactions in Australia. To appreciate the importance of environmental auditing and the need to quantify environmental risks in financial and commercial transactions it is appropriate to consider the liability of various parties involved in commercial transactions.

Purchaser of Property or Business: Environmental liabilities generally attach to the owners/occupiers (define widely) of land. Accordingly it is not necessary for the present owner/occupier of the land to have contributed to the environmental problems of the land. Mere occupation of land is sufficient to attract environmental liability. In this regard purchasers of land which had been used for potentially pollution-causing activities need to make an assessment of the extent of any contamination. In the absence of anything else contamination may have affected the purchaser's ability to conduct its activities. The company may also have (or inherited) a liability to decontaminate the land because of its position as the new owner. As a result the purchaser will be keen to undertake an audit to determine its liability (Carney 1991:420).

Vendor of Property or Business: A vendor will also wish to ensure that it is aware of any liability it may incur under the contract and have the appropriate terms inserted in the contract. An example of potential liability of a vendor is the United States case *International Clinical Laboratories v Stephens* (1989) 29 ERC1519 (EDNY) where a vendor was held liable to bear the costs of clean up incurred by the purchaser under the United States Comprehensive Environmental Response Compensation and Liability Act even though the contamination was allegedly caused by a third party (a former lessee) without the knowledge of the vendor and the contract with the purchaser included an "*as is*" clause (Carney 1991:420).

Lessor: As a lessor, as the owner of property, can be made liable for the clean-up of the property for actions caused by the lessee it will normally wish to insert specific clauses in the lease. Where the activities of the lessee are such that there is a high environmental risk the lessor may wish to require specific environmental insurance be obtained or regular environmental audits be provided to the lessor (Carney 1991:420).

Financier: The experience in the United States and Canada indicates financiers are becoming increasingly concerned as to the real worth of assets used as security to cover their loans. A financier will also need to be satisfied in the event of taking possession of land or assuming the running of a business activity under the default provisions in its security documentation that it will not as occupier or manager or successor in title be ordered by a regulatory authority to undertake the remediation action itself (Carney 1991:420-421).

Environmental issues may affect a financier because:

- The costs incurred by a borrower may significantly reduce the capacity of the borrower to meet the obligations to repay a loan.
- Measures imposed by licensing authorities may reduce profitability or close the business.
- The costs of clean up and decontamination may attach as a charge on the business or land where the borrower is unable to meet these costs.

- The financier may directly incur liability for costs for example as mortgagee in possession of land for which a clean-up order has been made.

Recent North American experience has illustrated how vulnerable lenders can be. Where a lender forecloses on a loan it becomes responsible for the day to day activities of the company. As a result it may be liable for the cost of decontamination or clean up. Where a major spill occurs this can leave the lender's so called security with negative value resulting in a lender having to pick up the bill (Carney 1991:421).

The Canadian case of *Panamericana de Bienes y Servicios S.A. v Northern Badger Oil & Gas Limited* (1991) 81 Alta LR (2d) 45 unreported Supreme Court of Alberta 12 June 1991 illustrates the effect which environmental laws may have upon security held by a lender. In that case the court held that orders by regulatory authorities on a receiver of bankruptcy to prevent the risk of environmental degradation took priority over payment to secured and unsecured creditors (Camey 1991:421).

Much concern has also been expressed in the United States as a result of the decision in the *United States v Fleet Factors* (1990) 901 F2d1550. The court held that a secured creditor could be held liable for cleaning up a borrower's property based on its involvement in the financial affairs of the borrower even though it had not foreclosed on the loan. The court held that the lender had "*capacity to influence*" the activities of the company and as a result was bound to pay the cost. Subsequent decisions and the proposed lender liability role published by the United States Environmental Protection Agency have considerably lessened and clarified the extent of creditor's exposure (Carney 1991:421).

Similar concerns may also exist for institutional investors who through their position can influence the company. In the *United States v McGraw - Eddison Company* (1989) 718 FSUPP 154, the court held that a minority shareholder in a corporation suspected of causing hazardous contamination could be held liable due to its actual participation in the company's day to day operations (Carney 1991:421).

While courts in Australia have not yet had to address these issues, the breadth of environmental legislation in Australia makes it quite likely that they will adopt a similar approach to that of the courts in the United States and Canada. Accordingly, before committing itself to provide finance a lender should be satisfied that there are no environmental risks attached to the purchase or venture to be financed or that the environmental risks have been sufficiently identified and quantified. Depending on the nature of the project it may be necessary to conduct an environmental audit to adequately identify the risks and in appropriate circumstances require an environmental audit as a condition of further drawings (Carney 1991:421).

Conduct of audit

The audit team

The conduct of environmental audits is in practice a team effort that requires the co-operation of a number of players including: (Hibbert 1991:432)

- the key executives and/or appropriate officers from the corporate/client organisation;
- lawyers with relevant expertise in environmental law;
- technical and environmental experts including scientists and engineers; and
- possibly financial advisors and accountants.

Roles of players

Each of these players are responsible for playing distinct roles: (Hibbert 1991:432-433)

- Key executives/appropriate officers from the client are responsible for:
  - liaising with lawyers, technical experts and consultants;
  - providing access to relevant information about the sites, the business and activities, past studies and relations of regulatory authorities; and
  - generally liaising with and organising access to other officers of the organisation.
- Lawyers are responsible for:
  - advising on the terms and scope of the audit;
  - assessing legal compliance;
  - advising on personal liability of directors/managers;
  - structuring the audit so that legal professional privilege is, wherever possible, available; and
  - translating the audit findings into its relevant advice.
- Technical environmental experts including engineers are responsible for:
  - analysing and assessing actual environmental impacts;

- potential environmental risks and advising on and arranging necessary site remediation; and
- estimating the cost of remediation processes and the cost/benefit analyses of alternative monitoring programmes.

- Financial advisors and accountants are responsible for integrating audit findings into the reporting of financial results.

Audit team selection

In the absence of a statutory accreditation system under Queensland legislation, it is necessary to assess auditors against certain general criteria including: (Hibbert 1991:434-435)

- the background of individuals responsible for the audit in both scientific investigation and remedial work;
- the extent of experience in such investigation and remedial work in the relevant industry, for example, mining or particular chemicals or process;
- reference from other audit projects;
- type and extent of professional indemnity insurance;
- the extent and nature of the relationship with regulatory authorities; and
- the scope and level of disclosure in the audit report.

Different factors need to be taken into account in choosing an auditor depending on the type of audit conducted whether it be of industrial premises, to assess site contamination or environmental impact.

Some of the key factors essential in the selection of an appropriate audit team and approach for industrial premises include: (Jenkins 1991:6-7)

- a team with knowledge of the industrial process as well as knowledge of pollution control equipment and waste discharges;
- a team with a systematic structured approach in the form of checklists, protocols or questionnaires; and
- a team which understands the applicable legislation.

On the other hand site contamination audits usually require a significant site sampling and analytical programme leading to recommendations for site remediation. In addition to the matters noted above, in such audits the emphasis in audit design and audit selection should be on: (Jenkins 1991:6-7)

- a sampling programme tailored to meet the historical use of the site as well as the site geology;
- a team with efficient drilling equipment as well as field analytical equipment for chemical analysis of possible contamination;
- a team with knowledge and experience of appropriate laboratories that have the special equipment and established protocols for analysing levels of substances; and
- a methodology which makes it possible to undertake a community health risk assessment in addition to a remediation approach. This means a sampling programme needs to test for priority pollutants and determine the possible exposure pathways.

The auditing of the actual level of environmental impact for comparison with the predicted level can be quite complex where background levels are variable or there are alternative sources of a parameter being measured (Hibbert 1991:435). In undertaking such an audit, key issues are: (Jenkins 1991:6-7)

- *The monitoring and sampling programme*: Relevant questions include whether the programme will identify the increment due to the project and provide a basis for assessing(the predicted effect and whether the measurement design is statistically valid.
- *The instrumentation proposed*: Relevant questions include whether the equipment proposed has adequate sensitivity to measure the required levels and is sufficiently robust to operate in the field and whether the measurement protocols are appropriate for the task.
- *Data management*: Relevant questions include whether the collection processing and analysis of data is appropriate and efficient.
- *Quality assurance*: A relevant question is whether the recorded data is accurate and its accuracy can be demonstrated.

Content of environmental audit report

It is impossible to specify the content of an environmental audit report as each report must be tailored to the circumstances of the facility being audited. However the content of the audit report is to a large degree determined by the objectives to be met by the report (Carney 1991:422). These objectives generally include: (Camey 1991:422)

- to define corporate, civil and criminal liabilities and to reduce or eliminate them;
- to define individual, civil and criminal liabilities (particularly of directors and managers) and to reduce or eliminate those liabilities;
- to ascertain potential environmental liabilities in mergers acquisitions, financing a range of other corporate transactions;
- to establish facts relevant to forming appropriate representations, warranties and other contractual provisions aimed at apportioning environmental risk in corporate transactions; and
- to establish the costs of compliance with environmental law.

An effective environmental audit report should therefore include the following general elements: (Carney 1991:422)

- explicit management support;
- a settled management policy on environmental protection;
- a commitment to implementing the findings of the audit;
- the incorporation of the ordinary principles of auditing so as to ensure an objective and unobstructed enquiry;
- adequate professional skills in auditing and risk assessment;
- an appropriate range of professional skills;
- timeliness (the audit must begin and continue as an intricate part of the operations being audited); and
- provision for regular review (including review in light of changing legal circumstances).

Status of report

Environmental audits may produce information or opinions which if revealed could be harmful to the organisation undertaking the audit or to individuals within that organisation.

Accordingly, if it is determined that information should be protected from disclosure then the audit should be designed and implemented with an eye towards meeting the requisite of those legal protections which are available to prevent disclosure. Most relevant of these legal principles is the solicitor/client privilege. The rationale for the privilege is the assumption that it is more desirable to risk an occasional miscarriage of justice then to inhibit a client's right to obtain effective legal representation. In order to establish this privilege it is necessary to establish four elements:

- The privilege applies only to communications between the client and the lawyer. It does not protect underlying facts which may have been disclosed to a lawyer. For example the fact of a facility's violation of an environmental permit cannot be protected from disclosure to a third party by simply communicating the fact of a violation to a lawyer. However recommendations or analyses relating to a violation which is discovered during the course of an environmental audit and communicated by an environmental consultant to the lawyer who has been retained by the facility for the purpose of giving legal advice on the environmental compliance can under certain circumstances be protected by the privilege.
- Communications must be made for the purpose of obtaining legal advice. Communications which are for the purpose of obtaining business, technical or other non-legal advice are not covered by the privilege. As a result a letter retaining outside Counsel to assist in undertaking an environmental audit should specify that the purpose of the environmental audit is to obtain legal advice.
- The communication for which protection is sought must remain confidential. This element is particularly relevant in the context of corporate disclosures. Documents which are indiscriminately circulated within a corporation may lose the privilege protection. Accordingly, the dissemination of the audit report should be limited to those that are immediately concerned with the results of the audit. Access to confidential documents should also be carefully controlled. The words "*privileged*" and "*confidential*" should be stamped on all documents for which protection will be sought.
- The privilege must not have been waived. Accordingly, if the holder of a privilege intentionally discloses the communication for which protection is sought, the privilege will be deemed to be waived.

Liability of auditor

Source of liability

An environmental auditor can be liable either under contractual duties or because they have come into such an approximate relationship with another party such that they owe that other party a duty of care.

Contractual obligations of auditors

In a contract to audit a company's affairs, an auditor in the absence of any express contractual obligation will be obliged to use reasonable care and skill in the conduct of the audit and the making of the report. The test of reasonable skill as a contractual obligation for an auditor does not force the auditor to become an omniscient superman but yet provides onerous obligations. The auditor has been described as a watchdog but not a bloodhound. However, it is clear that the courts are expecting a high degree of skill from the auditors as environmental legislation becomes more complicated.

Auditor's duty to third parties

There are increasing signs from court cases that auditors could be held liable to third parties. The New Zealand case of *Scott Group Limited v McFarland (1978)* 1 NZLR 553 found that auditors of a takeover target company who knew that a particular takeover company was "*almost certain*" to take over the target owed a duty of reasonable skill in their auditing to the takeover raider. The case was decided on the traditional principles of proximity and duty of care under the law of negligence.

Duty of confidentiality

Contracts for services by experts have been readily interpreted by the courts to have implied duties to protect confidences imported within the contractual relationship. It would therefore appear that the duty of confidentiality would be an implied term in contracts for an environmental audit. The reason for this is that much of the information and facts put in the environmental audit would necessarily be sensitive to the company and would be understood by both parties at the time of making the contract to be sensitive. Accordingly, most contracts for the provision of environmental audits expressly provide the results of the audit are to remain confidential. However, the obligation of confidentiality does not extend to direct evidence of the environmental auditor or disclosing the audit papers and findings on a subpoena in a court proceeding or if specifically required by statute to an appropriate authority with jurisdiction to require disclosure.

Liability for failing to notify a serious and continuing breach of a regulatory obligation

If an environmental auditor detects a possible breach of a regulation with criminal sanctions (fines or imprisonment), the question arises whether an auditor could be subject to criminal or civil liability for failing to notify the breach of the regulation to the appropriate statutory authority.

In terms of the criminal law, the question arises as to whether an environmental auditor who failed to disclose to the regulatory authority the criminal offence will be guilty of aiding and abetting the criminal offence. In order to be guilty of aiding and abetting the environmental auditor must:

- know the essential matters which constitute the offence even if he does not know that the matters constitute a crime;
- he cannot deliberately close his eyes (a concept quite distinct from a suspicion) to the facts which constitute the offence; and
- actually assist in the matters constituting a crime.

It would be unlikely that a court would decide that an auditor simply by doing his audit intentionally assisted in the crime that he discovers. However, the auditor would have to ensure that no acts were made that in any way could be interpreted to encourage the facts that constitute a breach of the law.

In terms of civil liability, it is unlikely that the environmental auditor would be held liable to the client for failing to disclose breaches of environmental laws to the appropriate regulatory authority. Indeed, given that most contracts to perform an environmental audit either have an express or implied provision of confidentiality by the environmental auditor, it is far more likely that it would be a breach of contract for the auditor to disclose the breach of the law to the public authority. However, it is conceivable that an environmental auditor could become liable to third parties such as shareholders for damages caused by non-disclosure to a public authority of environmental audit defects. This is a real possibility and should be specifically catered for in the contract under which the environmental auditor is employed. Accordingly, the environmental auditor might request and obtain an indemnity from the company for liability to third parties. Further, as a matter of prudence, environmental auditors should always obtain professional liability insurance (Train 1990:9).

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Table A1 Liability of senior management, Line management and employees as persons

Act	Range of Penalties	Defences
Clean Air Act and Regulations	▪ 6 months imprisonment ▪ $1,000 + $100 / day – $500 + $50 day	Nil
Queensland Heritage Act	▪ $1,020,000 – $3,000	Nil
Noise Abatement Act and Regulations	▪ Arrest by Police Officer ▪ $500 – $200	Nil
Clean Waters Act and Regulations	▪ 6 months imprisonment ▪ $400 + $40 day – $400	Nil
Nature Conservation Act	▪ 2 years imprisonment ▪ $180,000 – $3,000	Limited depending on offence
Refuse Management Regulations	▪ $2,400	Nil
Carriage of Dangerous Goods by Road Act and Regulations	▪ 12 months imprisonment ▪ $10,000 – $2,400 + $120 / day	Nil
Coal Mining Act and Rules	▪ $200	Compliance not reasonably practicable (s104(4))
Underground Coal Mine Electrical Rules	–	–
Underground Coal Mines Fine Precautions Rules	–	–
Underground Belt Conveyor Rules	▪ $200	Compliance not reasonably practicable
General Rules for Underground Coal Mines	▪ $200	Compliance not reasonably practicable
Special Rules for Underground Mines	▪ $200	Report breach and reasonable steps taken to enforce Act and prevent breach
General Rules for Open Cut Coal Mines	▪ $200	Report breach and reasonable steps taken to enforce Act and prevent breach
Contaminated Land Act	▪ $60,000 + $600 / day – $3,000	Limited depending on offence
Mineral Resources Act and Regulations	▪ 12 months imprisonment ▪ $12,000 + $600 / day – $1,200	No knowledge and exercised due diligence
Radioactive Substances Act and Regulations	▪ 6 months imprisonment ▪ $400 + $20 day – $200	Limited depending on offence
Building Act and Standard Building By-Laws	▪ $1,200 + $120 / day ▪ $200 + $50 / day	Nil
Explosives Act and Regulations	▪ $50,400	Limited depending on offence

Table A2 Liability of senior management for offences by company

Act	Range of Penalties	Defences
Clean Air Act and Regulations	Same as company: ▪ $20,000 + $2,000 day ▪ $1,000 + $100 / day	No consent or connivance and exercised due diligence
Queensland Heritage Act	–	–
Noise Abatement Act and Regulations	–	–
Clean Waters Act and Regulations	$20,000 + $2,000 / day	No consent or connivance and exercised due diligence
Nature Conservation Act	1/5 of company penalty: ▪ $180,000 – $3,000	Reasonable precautions and exercised due diligence
Refuse Management Regulations	–	–
Carriage of Dangerous Goods by Road Act and Regulations	▪ 12 months imprisonment ▪ $10,000	No knowledge or connivance and exercised due diligence
Coal Mining Act and Rules	$200	No knowledge or connivance and no reasonable means of knowing
Contaminated Land Act	Same as company: ▪ $60,000 + $6,000 / day – $3,000 ▪ $6,000	No consent or connivance and reasonable steps taken to prevent failure
Mineral Resources Act and Regulations	▪ 12 months imprisonment ▪ $12,000	No knowledge and exercised due diligence
Radioactive Substances Act and Regulations	$400 + $20 day	No connivance and exercised due diligence
Building Act and Standard Building By-Laws	Same as company: ▪ $1,200 + $120 / day ▪ $200 + $50 / day	▪ No knowledge; or ▪ Could not have prevented the commission of the offence by the exercise of reasonable diligence
Explosives Act and Regulations	$50,400	▪ Lack of knowledge; or ▪ Lack of position to influence conduct of company in relation to commission of offence; or ▪ Used all diligence to prevent offence

Table A3 Liability of members of senior management for offences by company

Act	Chairman of Directors	Managing Director	Governing Officer	Manager	Member of Governing Body	Person Concerned with Management
Clean Air Act and Regulations	–	X	–	X	X	X
Queensland Heritage Act	–	–	–	–	–	–
Noise Abatement Act and Regulations	–	–	–	–	–	–
Clean Waters Act and Regulations	–	X	–	X	X	X
Nature Conservation Act	–	–	–	–	–	X
Refuse Management Regulations	–	–	–	–	–	–
Carriage of Dangerous Goods by Road Act and Regulations	X	X	X	–	X	X
Coal Mining Act and Rules	–	–	–	X	X	–
Contaminated Land Act						
Mineral Resources Act and Regulations	–	–	–	–	X	–
Radioactive Substances Act and Regulations	–	X	X	X	X	X
Building Act and Standard Building By-Laws	–	–	–	–	X	–
Explosives Act and Regulations	X	X	X	–	X	X

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Environmental protection legislation: Implications for Environmental Health Managers

Ian Wright | Allison Stanfield

This article discusses the *Environmental Protection Bill 1994*. It identifies in detail what the Bill introduces and changes to the pre-existing legislation

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Introduction

Scope of Bill

The *Environmental Protection Bill 1994* (**Bill**) is expected to be passed by the Queensland Parliament in September 1994. It will repeal the Clean Air Act, Clean Waters Act, Noise Abatement Act and Litter Act.

The objective of the Bill is ecologically sustainable development which is defined as development that improves the total quality of life both now and in the future in a way that maintains the ecological processes on which life depends.

This objective is intended to be implemented through the adoption of environmental management systems by industry and development interests. The adoption of environmental management systems is encouraged through:

- the specification of offences and penalties in respect of various acts or omissions giving rise to environmental degradation;
- the introduction of legally binding Environmental Protection Policies (**EPPs**) concerned with the setting of standards for specific issues such as water, air quality and waste disposal;
- the imposition of a general environmental duty and a duty to notify;
- the obtaining of environmental authorisations (licences and approvals) for what are called level 1 and level 2 environmentally relevant activities to be prescribed by regulation;
- environmental evaluations being an environmental audit and environmental investigation;
- the preparation of Environmental Management Programmes (**EMPs**) setting out a plan for achieving gradual compliance with environmental standards;
- the issue of Environmental Protection Orders (**EPOs**) to enforce the provisions of the Act; and
- the issuing of non-legally binding guidelines to advise industry, local government and the public about how best to minimise environmental impact.

Administration of Bill

The Bill provides that the Department of Environment and Heritage will be the lead agency for environment protection but that the day to day administration of much of the Act will be handled by other bodies such as local governments and other State government departments.

The Bill is intended to be administered, as far as practicable, in consultation with and having regard to the views and interests of (s.5):

- industry;
- interested groups;
- Aborigines and Torres Strait Islanders under Aboriginal tradition and island custom; and
- the community generally.

Operation of Bill

The Bill is intended to bind the State and so far as is possible the Commonwealth and the other States (s.12). The Bill is also intended to have an extra territorial operation in that a person who causes environmental harm within Queensland by conduct engaged in outside Queensland will be guilty of an offence if the conduct would have constituted an offence if engaged in within Queensland (s.14).

The Bill has no application in relation to matters regulated by the Pollution of Waters by Oil Act and Radioactive Substances Act. However, the Local Government Act, Local Government (Planning and Environment) Act, Contaminated Land Act, Nature Conservation Act and State Counter Disaster Organisation Act are not affected by the Bill.

Environmental offences

Offences

The Bill introduces an extensive range of environmental offences including:

- breach of the general duty to notify the administering authority of environmental harm (s.28);
- wilfully and/or unlawfully causing serious environmental harm (s.82);
- wilfully and/or unlawfully causing material environmental harm (s.83);
- wilfully and/or unlawfully causing an environmental nuisance (s.85);
- contravening, wilfully or otherwise, an environmental protection policy (s.86);
- releasing a prescribed contaminant into the environment (s.87);
- allowing a contaminant to be placed in a position where it could reasonably be expected to cause serious or material environmental harm or environmental nuisance (s.88); and
- interfering with any monitoring equipment.

Environmental harm

The offences of wilfully causing material or serious environmental harm give rise to penalties of $100,000 or two years imprisonment and $500,000 or five years imprisonment respectively.

"*Material environmental harm*" is defined as environmental harm (other than environmental nuisance) that:

- is not trivial or negligible in nature, extent or context;
- causes actual or potential loss or damage to property of an amount of or amounts totalling more than $5,000 but less than $50,000; or
- results in costs of more than $5,000 but less than $50,000 being incurred in taking action to prevent or minimise the harms or rehabilitate or restore the environment to its condition before the harm.

"*Serious environmental harm*" is defined in the same manner as material environmental harm except that in this case the threshold amount is $50,000 or a greater amount prescribed by regulation. Serious environmental harm also extends to environmental harm (other than environmental nuisance) that:

- causes actual or potential harm to environmental values that is irreversible, of a high impact, or widespread; or
- causes actual or potential harm to environmental values of an area of high conservation value or special significance.

The term "*environmental harm*" is defined as any adverse effect or potential adverse effect on an environmental value (whether temporary or permanent and of whatever magnitude duration or frequency) (s.8). Environmental harm may be caused by an activity whether the harm is a direct or indirect result of the activity or whether the harm results from the activity alone or from the combined effects of the activity and other activities or factors (s.8(2)).

The phrase "*environmental value*" is defined as:

- a quality or physical characteristic of the environment that is conducive to ecological health or public amenity or safety; or
- another quality of the environment identified and declared to be an environmental value under an environmental protection policy or regulation.

Environmental nuisance

The offence of wilfully causing an environmental nuisance gives rise to a penalty of $50,000. An environmental nuisance is defined to be an unreasonable interference or likely interference with an environmental value caused by noise, dust, odour, light or an unhealthy, offensive, or unsightly condition because of contamination (or any other way prescribed by regulation) (s.6).

Contamination of environment

The Bill also has specific offences and penalties in respect of the contamination of the environment. The "*contamination of the environment*" occurs where a contaminant is released (whether by act or omission) into the environment.

The term contaminant is defined very broadly as including a gas, liquid or solid or odour or an organism (whether alive or dead) including a virus or energy, including noise, heat, radioactivity and electromagnetic radiation or a combination of contaminants. This is broader than the definition of "*hazardous substance*" under the *Contaminated Land Act 1991* which relates to a hazard to human health or the environment.

The term "*environment*" is defined in the same manner as the *Local Government (Planning and Environment) Act 1990*. The definition is extremely broad and includes:

- ecosystems and their constituent parts, including people in communities;
- all natural and physical resources;
- the qualities and characteristics of locations, places and areas however large or small, that contribute to their biological diversity and integrity, intrinsic or attributed scientific value or interest, amenity, harmony and sense of community; and
- the social, economic, aesthetic and cultural conditions that affect or are affected by matters mentioned above.

Proof of offences and defences

An authorised officer may give evidence (without the need to call further opinion evidence) that the authorised officer formed the opinion based on the authorised officer's own senses that noise, smoke, dust, fumes or odour was emitted from a place occupied by the defendant and travelled to a place occupied by another person or constituted an unreasonable interference with the person's enjoyment of the place (s.134).

It is a defence however to each of the offences of material or serious environmental harm, environmental nuisance or contamination of the environment to prove:

- the harm happened in the course of a lawful activity; and
- the defendant complied with the general environmental duty.

Offences by corporations

Where a corporation is charged with an offence and it becomes necessary to establish the state of mind of a person in relation to an act or omission of a corporation, it is sufficient for the administering authority to show (under s.135(1)) that:

- the act or omission was done or omitted to be done by a representative of the person within the scope of the representative's actual or apparent authority; and
- the representative had the necessary state of mind.

It is a defence for the person however to show that they took all reasonable steps to prevent the acts or omissions (s.135(2)).

Furthermore, the executive officers of a corporation are required by the Bill to ensure that the body corporate complies with the Bill. If the body corporate commits an offence each of the executive officers of the body corporate also commits an offence, namely the offence of failing to ensure that the body corporate complies with the Act. However, it is a defence (s.136) for the executive officer to prove that the officer:

- took all reasonable steps to ensure the corporation complied with the provision if the officer was in a position to influence the conduct of the corporation in relation to the offence; or
- was not in a position to influence the conduct of the corporation in relation to the offence.

Environmental Protection Policies (EPPs)

Preparation of EPPs

Central to the legislation is the preparation of EPPs which set the standards of environmental quality and provide a framework for achieving those standards. The maximum penalty for failing to comply with an EPP is $100,000 or two years imprisonment (s.86).

The Bill prescribes a procedure for preparing EPPs:

- The Minister must give public notice of the proposal to prepare the draft EPP (s.18(1)) by advertising the draft EPP once a week for two consecutive weeks in a newspaper circulating throughout the State (s.18(2)(a)(i)) or if the policy applies only to a particular area of the State, then in a newspaper circulating in that area (s.18(2)(a)(ii)). The notice must specify whether the EPP relates to an aspect or part of the environment and if so, what aspect or part (s.18(2)(b)). Section 18 does not apply to a draft EPP prepared by the Minister before the commencement of Part 5 of the Bill.
- Public submissions may be made within a 40 day period (s.18(2)(e)) and the Minister is obliged to consider the submissions in preparing the draft EPP (s.19).

- Once formulated the Minister must give public notice of the draft EPP in the same manner as in respect of the proposal to prepare a policy (s.20). Again, the Minister must consider all submissions properly made to the Minister on the draft EPP (s.21).
- Once approved, there is a positive obligation on the administering authority (the relevant department or local government) to give effect to the EPP (s.23).

The Minister must review the EPP within seven years after its commencement (s.25). In addition an EPP may be amended by the Governor-in-Council by following the same procedures for public consultation in respect of a draft EPP (s.24).

Types of EPPs

The Department has indicated that the first four Environmental Protection Policies under the Act will relate to noise, air, water and waste management. The first stage of the two stage process of public consultation has been completed and the draft EPPs are presently being prepared for further public consultation prior to being submitted to the Minister for approval.

Environmental duties

Types

The Bill imposes upon persons a general environmental duty as well as a duty to notify the administering authority of environmental harm.

General environmental duty

Under the general environmental duty a person must not carry out an activity that causes or is likely to cause environmental harm unless the person takes all reasonable and practicable measures to prevent or minimise the harm. In deciding the measures required to be taken regard must be had to the following factors (s.27):

- the nature of the harm or potential harm;
- the sensitivity of the receiving environment;
- the current state of technical knowledge for the activity;
- the likelihood of successful application of the various measures that might be taken; and
- the financial implications of the various measures as they would relate to the type of activity.

Duty to notify

In addition, a duty is imposed on persons who have become aware of an event or condition involving a serious or material environmental harm (or the threat of same) to give written notice to the administering authority of the event or condition, its nature and the circumstances in which it happened as soon as is reasonably practicable (s.28).

If the person is an employee or agent, the person must tell the employer of the event or condition. If the employer cannot be contacted, the employee or agent must give written notice to the administering authority (s.28(3)). Such a notice is not admissible in evidence against the person in a prosecution for an offence against the Act (s.28(8)).

Environmental authorisations

Environmentally relevant activities

The Bill provides for the licensing and control of environmentally relevant activities. An activity can be prescribed as an environmentally relevant activity by regulation if the Governor-in-Council is satisfied that a contaminant will or may be released into the environment when the activity is carried out and the release of the contaminant will or may cause environmental harm (s.29). Depending on the level of risk to the environment the activity may be classified as a level 1 or level 2 activity (s.29(2)).

A person is prohibited from carrying out a level 1 environmentally relevant activity without a licence (s.30) and an approval is required before a person can carry out works for the construction or alteration of a building or structure for use in respect of a level 2 environmentally relevant activity. An approval is also required for the installation or alteration of any plant or equipment for use in a level 2 environmentally relevant activity if the construction, alteration or installation will result in an increase of 10% or more in the release of a contaminant into the environment under the activity (s.31).

Application for approval or licence

The Bill specifies the procedure to be followed for an application for an environmental authorisation whether it be an approval or a licence (s.32).

- The application must be supported by enough information to enable the administering authority to properly decide the application. The administering authority is empowered to seek further information from the applicant (s.53).

- After the application is lodged with the administering authority, the applicant must give public notice of the application by (s.33):
  - placing an advertisement in a newspaper circulating in the area in which the environmentally relevant activity to which the application relates is proposed to be carried out;
  - placing a notice on the premises to which the application relates; and
  - serving a notice on the occupiers of all premises adjoining the premises to which the application relates.

Submissions must also be invited from government departments, public authorities, local governments, landholders, industry, interested groups and persons and members of the public (s.33(2)(b)). Submissions may be lodged within 10 business days (s.33(2)(c)).

- The administering authority is required to consider the following matters prior to determining the application (s.34A):
  - the standard criteria (as defined in s.6) being:
    - the principles of ecologically sustainable development as set out in the National Strategy for Ecologically Sustainable Development;
    - any relevant environmental protection policy;
    - any relevant Commonwealth, State or local government plans, standards, agreements or requirements;
    - any relevant environmental impact study, assessment or report;
    - the character, resilience and values of the receiving environment;
    - all submissions made by the applicant and interested parties;
    - the best practice environmental management for the activity under the authorisation, programme or order;
    - the financial implications of the requirements of the authorisation, programme or order as they would relate to the type of activity or industry carried on under the authorisation, programme or order; and
    - the public interest;
  - any additional information provided under s.53;
  - a report following an inquiry of the administering authority under s.53A into the suitability of the applicants;
  - the resolution of any conference called by the administering authority under s.53B to assist in the resolution of the application.
- The administering authority must determine the application for an environmental authorisation within 28 days from the application date (s.34). If the administering authority decides to refuse an application, the administering authority must give written reasons for refusal within 10 days of making its decision (s.38(4)).
- All licences and approvals granted by the administering authority are required to be entered into a publicly available register (s.151).

The decision to grant or refuse a licence is an "*original decision*" and the applicant is entitled to apply for a review of the decision under the terms of s.149.

Provisional licences

The administering authority is empowered to issue a provisional licence if, in the authority's opinion, the applicant is not able to give enough information about the application to permit the authority to issue a licence but the authority is satisfied the applicant will be able, and the applicant gives the authority an undertaking, to comply with all relevant environmental protection policies (s.37). A provisional licence remains in force for the period specified in the licence but in any event, for not more than five years (s.37(3)(b)). Applications for provisional licences can be subject to review under s.149.

Licence conditions

The administering authority can require as a licence condition that an applicant prepare and carry out an EMP and take specified measures to minimise the likelihood of environmental harm (s.36). The requirement that an EMP be prepared is subject to review under s.149.

Financial assurance may also be required by way of a licence condition (s.77) provided a notice is first served upon the applicant (s.78).

Amendment of licences

An application may be made to the administering authority to amend the licence (s.39). Public notice of the application must be given on the same basis as that of an application for a new licence if the administering authority is satisfied that there is likely to be a substantial increase in the risk of environmental harm because of a substantial change in:

- the quantity or quality of a contaminant licensed to be released into the environment; or
- the results of the release of a quantity or quality of contaminant licensed to be released into the environment.

An increase in 10% or more in the quantity of the contaminant to be released into the environment is deemed to be a substantial change (s.39(4)). A decision to grant or refuse an application to amend a licence is subject to review under s.149.

The administering authority is also empowered to amend a licence where the licensee consents to the amendment or the administering authority considers it necessary or desirable as a result of (s.40):

- a contravention of the Act by the licensee;
- the licence was issued on the basis of a false or misleading representation or declaration, made either orally or in writing;
- the licence was issued on the basis of a miscalculation of the quantity or quality of contaminant licensed to be released into the environment;
- the licence was issued on the basis of a miscalculation of the effects of the release of a quantity or quality of contaminant licensed to be released into the environment;
- a change in the way in which, or the place where, contaminants are, or are likely to be, released into the environment;
- the approval of an environmental protection policy or the approval of the amendment of an environmental protection policy;
- an environmental report; or
- another circumstance prescribed by regulation.

An amendment made by an administering authority is subject to review under s.149.

Transfer of licences

Where the business of carrying on an environmentally relevant activity is to be transferred, the licensee must give written notice to the buyer that the buyer must make application under the Act for the transfer of the licence or a new licence. This applies where the licensee proposes to sell or dispose of the licensee's business to another person (s.43).

The administering authority must decide an application for transfer within 28 days after the application date (s.45). The administering authority must give written notice to the applicant of its decision to grant or refuse an application and the reasons for any refusal within 10 days after making its decision (s.46(1) and s.47(4)).

The administering authority may refuse a transfer if the applicant is not a suitable person to hold the licence (s.47(2)), has been convicted of an offence against the Act, or has had a licence cancelled or suspended under the Act (s.47(3)(a)). If the applicant is a corporation, then offences of executive officers will be relevant (s.47(3)(b)). Any refusal of an application for transfer under s.47 is subject to review under s.149.

Cancellation and suspension of licence

A licence can be suspended or cancelled if the administering authority is satisfied on reasonable grounds that the licensee has been convicted of an offence against the Act or the licence was issued because of a false or misleading representation (s.48). A show cause procedure must be followed prior to cancellation or suspension (s.49). A decision to suspend or cancel a licence is subject to review and appeal under s.149 and s.150.

Environmental evaluation

Environmental audits and investigations

The Bill empowers the administering authority to require an environmental evaluation to be undertaken. The decision to require an evaluation can be the subject of a request for internal review and appeal under s.149 and s.150.

An environmental evaluation may take the form of either an environmental audit or an environmental investigation. An audit may be required where it appears to the administering authority that a licensee is not complying with licence conditions, an EPP or an EMP (s.56). An environmental investigation may be required where an activity is causing or is likely to cause serious or material environmental harm but there is no apparent breach of conditions or want of compliance with an EPP or EMP.

Content of environmental evaluation report

Failure to undertake the evaluation is an offence, the maximum penalty for which is $6,000. The evaluation must be accompanied by a declaration from the person required to conduct the evaluation and the auditor who in fact carried out the evaluation. The owner's declaration is to state that no false or misleading information has been given to the auditor and no relevant information has knowingly been withheld. The auditor's declaration must certify the report is accurate (s.59).

Review of environmental evaluation report

Following the receipt of an environmental evaluation report the administering authority may amend licence conditions, require the recipient to prepare and submit an EMP, serve an environmental protection order on the recipient, commence proceedings against the recipient for an offence under the Act, or take any other action it considers appropriate (s.60). The cost of conducting or commissioning an evaluation report is to be met by the recipient (s.61).

Environmental management programme

Purpose of EMP

An environmental management programme is a specific programme that when approved achieves compliance with the Act by reducing environmental harm or detailing the transition to an environmental standard (s.62).

Application for EMP

The Bill specifies the procedure by which applications for EMPs are made and determined by the administering authority.

- A person may at any time submit for approval a draft EMP to the administering authority for an activity which the person is carrying out or proposes to carry out (s.65).
- Where the draft EMP specifies a period longer than three years over which the programme is to be carried out, public notice of the submission must be given within two days after the application date by (s.66A):
  - advertisement published in a newspaper circulating in the area in which the activity to which the draft programme relates is carried out; and
  - placing a notice on the premises to which the draft programme relates; and
  - serving a notice on the occupiers of all premises adjoining the premises to which the draft programme relates.

The notice is required to invite submissions on the draft programme from government departments, public authorities, local governments, landholders, industry, interested groups and persons and members of the public (s.66A(3)).

Protection from prosecution

The Bill specifies a procedure whereby a person who has caused or threatened environmental harm during the course of an activity that would be lawful but for the Act may gain protection from prosecution in respect of a continuing offence. A three stage procedure is specified:

- A programme notice must be given to the administering authority stating that an act or omission that has caused or threatened environmental harm during the course of an activity carried out by the person is lawful but for the Act (s.70A). The programme notice and other documents submitted are not admissible in evidence in any prosecution for the original offence (s.70B).
- Within 14 days of receipt of the programme notice the administering authority must give written notice to the person of its receipt and specify the day by which a draft EMP must be submitted for approval.
- A draft EMP must be submitted to the administering authority within three months after the authority's receipt of the programme notice (s.70C).

The person giving the programme notice cannot be prosecuted for a continuation of the original offence that happens after the administration authority's receipt of the notice until the person submitting the notice (s.70D):

- receives from the administering authority a certificate of approval of the EMP for the relevant event;
- receives from the administering authority a notice of refusal to approve the EMP for the relevant event; or
- a draft EMP for the relevant event is not submitted to the administering authority within the specified time.

However the protection from prosecution is also lost if the holder of a certificate of approval for an EMP under a programme notice does not comply with the EMP. The administering authority may also apply to the Planning and Environment Court for an order that the protection from prosecution should be removed because of the nature and extent of the environmental harm caused or threatened by the continuation of the original offence (s.70G). In deciding whether to make such an order the court will have regard to the following:

- the nature and extent of the environmental harm caused or threatened by a continuation of the original offence under the programme notice;
- the resilience of the receiving environment;
- the previous environmental record of the person who gave the programme notice; and
- whether an EMP or protection order is in force for the relevant event.

The court may also make an order which the court considers appropriate pending a decision of the application for an EMP. For example the court may:

- direct the person who gave the programme notice to do or stop doing anything specified in the order to prevent a continuation of the original offence under the notice; or
- make an order appropriate to prevent or minimise environmental harm.

A person who contravenes an order of the court commits an offence against the Act attracting a maximum penalty of $180,000 or imprisonment for two years (s.70H).

Disclosure of EMP

Where a certified holder of an approved EMP wishes to sell or dispose of the place of business to which the programme relates the certificate holder must give written notice to the proposed buyer of the existence of the programme and within 14 days of making the agreement to sell give written notice of the sale to the authority. Failure to do so is an offence, the maximum penalty for which is $3,000 (s.70).

Environmental Protection Orders

The administering authority may issue an Environmental Protection Order (**EPO**) where there is (s.71):

- non-compliance with a requirement to conduct or commission an environmental evaluation;
- a failure to prepare an EMP if required;
- serious or material environmental harm being or likely to be caused by an activity; or
- non-compliance with the general environmental duty, a condition of a licence, or an environmental protection policy.

A decision to issue an EPO can be the subject of a request for internal review (s.149) and appeal (s.150). Failure to comply with an EPO is an offence, the maximum penalty for which is 2000 penalty units ($120,000) (s.74). The existence of any EPO must be disclosed to an intending purchaser of a business before making the agreement to sell (s.75).

Investigation and enforcement

Authorised officers

Officers of the public service, an employee of the Department of Environment and Heritage, an employee of the local government or a person in an "*approved class*" may be appointed an "*authorised officer*" for the administration and enforcement of the Act (s.90).

Authorised officers are to be issued with photo ID cards (s.94) which the authorised officer must produce for inspection when exercising a power under the Act (s.95(1)), unless the authorised officer is uniformed (s.95(2)).

An authorised officer is immune to civil liability if an act done or an omission is made honestly and without negligence (s.96(2)). Instead, civil liability will attach to the local government, or the State, whichever is the body giving directions to the official (s.96(3)).

Powers of authorised officers

An authorised officer may enter a place to ascertain if the Act is being complied with (s.97(1)) or if there is reasonable evidence of the commission of an offence against the Act (s.98). The entry must be at a reasonable time (s.97(3)) and must be subject to the following conditions:

- the occupier consents to the entry;
- the entry is authorised by a monitoring warrant;
- if the place is a public place, it must be open to the public at the time of entry;
- if the place is licensed, it must be open for the conduct of business or otherwise open for entry and the authorised officer must believe on reasonable grounds that the environmentally relevant activity is being carried out;
- if industry is conducted on the land, the authorised officer must be entering to establish the place from which a contaminant causing an environmental nuisance has been released and the authorised officer must believe on reasonable grounds that the place is open for the conduct of business or is otherwise open for entry (s.97(2)).

Before seeking the consent of an occupier to enter the premises, the authorised officer must inform the occupier that they may refuse to give such consent (s.106(2)). If consent is given, the authorised officer may require an acknowledgment to be signed (s.106(3)). If an acknowledgment is not signed, the court may presume (in any proceedings) that the occupier did not consent (s.107).

If unlawful environmental harm has been caused by release of a contaminant into the environment, the authorised officer can enter land to confirm the source of the release of the contaminant (s.98A).

If a vehicle is suspected of being used in the commission of an offence against the Act or of providing evidence of the commission of an offence against the Act or is being used to transport waste (to be prescribed by regulation), the authorised officer may board it (s.99(1)), stop it or order it not to be moved (s.99(2)). Failure to stop or move a vehicle as requested by an authorised officer is an offence with a maximum penalty of 50 penalty units (s.115(1)). A defence exists however where compliance with the request would have posed a danger to a person and the request was complied with as soon as was reasonably practicable (s.115)(2)). An authorised officer may require the person in the vehicle to give reasonable help (s.99(3)). Failure to render such help is an offence, the maximum penalty for which is $3,000 (s.115(1)).

In relation to a place or vehicle, an authorised officer has power (under s.100) to:

- search any part;
- inspect, examine, test, measure, photograph or film anything;
- take samples of any contaminant, substance or thing;
- record, measure, test or analyse the release of contaminants into the environment;
- take extracts from, or make copies of any document;
- take any equipment and materials the officer reasonably requires with him/her;
- install or maintain any equipment and materials the authorised officer reasonably requires;
- in carrying out the authorised officer's powers listed above, the authorised officer may require the occupier to render help (failure to do so is an offence (s.116)) OR require the person in control of a vehicle to bring it to a specified place and to remain in control of the vehicle for a reasonable time.

Authorised officers are empowered to seize evidence (s.101). They are also required to give notice of the seizure or damage to the person from whom the thing was seized (s.130(3)(a)) or to the person who appears to be the owner of the thing (s.130(3)(b)).

An authorised officer can require a person to state their name and address if that person is committing an offence against the Act or the authorised officer has reasonable grounds to suspect the person is committing an offence against the Act (s.103). Failure to provide name and address is an offence, with a maximum penalty of $3,000.

Similarly a person can be required to answer a question by the authorised officer. The authorised officer must first warn the person that it is an offence not to answer unless the person has a reasonable excuse for not doing so (s.104). The maximum penalty for failing to answer is $3,000 (s.122).

Authorised officers have power to require production of documents and to take copies of same (s.105). The failure to produce documents carries a maximum penalty of $3,000.

Warrants

An application can be made to the Magistrates Court for the issue of a warrant for an authorised officer to enter a place (other than residential premises) (s.110). This is known as a "*monitoring warrant*". If the warrant is required urgently or if an authorised officer is on a remote location, a warrant can be applied for by telephone, facsimile, radio or another form of communication (s.113). Similarly the warrant can be faxed to the authorised officer (s.113(4)). If it cannot be faxed then the Magistrates Court must tell the authorised officer the terms of the warrant and the authorised officer is to fill out a form of warrant (s.113(5)).

Noise complaints

The Bill is intended to apply to the abatement of environmental nuisance caused by excessive noise that is audible in any residential or commercial premises and is emitted from a place by a musical instrument, an amplifier, a motor vehicle that is not on a road or a party, celebration or the like. Noise emitted by an open-air concert or commercial entertainment or a public meeting under permit is excluded from the application of the Bill.

Complaints in respect of excessive noise may be made to the police who are then obliged to investigate (s.107C). The police are given power to investigate without a warrant (s.107D) and may issue a "*noise abatement direction*" against the person. Failure to comply with such direction is an offence, the maximum penalty for which is $600.

Emergency powers

If an authorised officer is satisfied on reasonable grounds that a serious or material environmental harm has been or is likely to be caused and urgent action is necessary to prevent or minimise the harm, or rehabilitate or restore the environment because of the harm the authorised officer may enter the property without a warrant (s.108).

Authorised officers can use such help and force as is necessary and reasonable in exercising their emergency powers (s.108(6)). The police are also empowered to remove a person or thing obstructing entry (s.108(7)). However steps must be taken to cause as little inconvenience and damage as is practicable (s.108(8)).

An authorised officer can authorise in writing the emergency release of a contaminant into the environment, if the release of the contaminant is necessary and reasonable and there is no other practicable alternative to the release (s.109). If a person fails to comply with a direction for the emergency release of a contaminant, the person commits an offence, the maximum penalty for which is $3,000 (s.125).

Failing to answer a question in an emergency is an offence, the maximum penalty for which is $600 (s.121). Self-incrimination is not an excuse (s.121(4)), however, if the person objects to answering the question on the basis that it may be self-incriminating, then the answer may not be used in evidence against the person (s.121(2)(c)).

General offences

Apart from the specific environmental offences and other offences mentioned in this paper the Bill also specifies a range of other offences including:

- impersonation of an authorised officer – maximum penalty of $3,000 (s.129);
- obstruction of an authorised officer – maximum penalty of $6,000 (s.128);
- abusing or intimidating an authorised officer – maximum penalty of $6,000;
- giving false or misleading documents – maximum penalty of $9,900 (s.126); and
- giving false or misleading information to an authorised officer – maximum penalty of $9,900 (s.127).

Internal review and appeal

Internal review by administering authority

An application by a dissatisfied person for a review of a decision under the Bill must be made to the administering authority within 14 days after the day on which the person receives notice of the original decision or such longer period as the authority, in special circumstances, allows (s.149(2)).

If the administering authority does not decide the application for review and notify the person of its decision within 14 days of receiving the application the authority is taken to have made a decision affirming the original decision (s.149(8)).

Appeal by Planning and Environmental Court

Following internal review an aggrieved person may appeal to the Planning and Environment Court if they are dissatisfied with the review (s.150). That appeal to the court must be commenced within 30 days from the day on which the person receives notice of the review decision or such longer period as the court in special circumstances allows (s.150A).

Where the administration and enforcement of an EPP, the issue of environmental authorisations or any other matter under the Act has been devolved by regulation to a local government the local government is empowered to make by-laws or ordinances with respect to that devolved matter. No right of internal review exists in respect of a decision made by a local government under the Bill. These decisions can only be appealed to the Planning and Environment Court (s.149(10)).

Powers of court

A court hearing a prosecution under the Act is empowered to award compensation or damages to any person who has suffered loss as a result of a contravention of the Act (s.140).

In addition to orders pertaining to compensation, damages and penalties the court can also order action to be taken to rehabilitate and restore the environment and require payment of the authority's investigative costs (s.140).

Claim for compensation

If a person suffers loss or expense because of a purported exercise of power under the Act, the person may claim compensation from the local government or the State if the power was exercised by an authorised officer (s.131).

Transitional provisions

Licences obtained under the Clean Air Act and the Clean Water Act continue until such time as they are cancelled by the Department of Environment and Heritage under the provisions of the new Act (s.161).

Under section 165 an unhealthy, offensive or unsightly condition caused by noise is not an environmental nuisance. Section 165 will cease on the repeal of the *Noise Abatement Act 1978* (s.165A)).

References

Environmental Protection Bill 1994, Queensland Government Printer Brisbane.

Department of Environment and Heritage (1994) *Enforcement Guidelines*, Queensland Government Printer Brisbane.

This paper was presented at the Australian Institute of Environmental Health conference, Ipswich, August 1994.

Recount of the first prosecution relying on heritage laws

Ian Wright

This article discusses the first successful prosecution which relied upon heritage laws in Australia. It also discusses various changes to planning and environment legislation in Australian and abroad

September 1994

Heritage laws

In March this year Giuseppe Scaffidi pleaded guilty to the demolition of the façade and balconies of the Railway Hotel in Perth in which the prosecution related to such unlawful demolition The Railway Hotel was built in 1903 and had been subject to a conservation order imposed by the Heritage Council of Western Australia. The court ordered that Mr Scaffidi rebuild the façade and balconies to their original condition using original material wherever possible. The court also ordered that the work be carried out under the direction of a South Australian heritage architect. The Judge described the action as sheer vandalism and a deliberate attack upon the Parliament of Western Australia and the people of that State. The Judge deferred final sentencing until September 1994 at which time Mr Scaffidi is to demonstrate satisfactory progress of the construction work. This would appear to be the first time heritage legislation has been relied upon for a successful prosecution of this nature.

Local government amendments

The *Local Government (Planning and Environment) Amendment Regulation (No. 1) 1994* was gazetted on 31 March 1994. It amends the *Local Government (Planning and Environment) Regulation 1990* in the following respects:

- section 16(b) – the original regulation is amended by inserting the words "*or having a common boundary with*" after "*located in*";
- replacement of section 18(1)(a);
- inserting a new section 29 dealing with transitional provisions for national parks;
- replacement of schedule 1 – developments;
- replacement of schedule 2 – areas.

The *Local Government Regulation 1994* was gazetted on 24 March 1994. Section 36 commences on 1 July 1994 whilst the remainder of the regulation commenced on 26 March 1994. The regulation deals with the following:

- criteria for cities and towns;
- interaction with the State;
- meaning of joint arrangements;
- principles on criteria when external boundaries may be affected;
- criteria for considering referred matters about external boundaries;
- aims of joint arrangements;
- application of joint arrangements;
- contents of agreements about joint arrangements;
- criteria when the class of area may be changed;
- local government councillors;
- local government elections;
- general operations of local governments;
- financial operations of local governments;
- local laws and local law policies;
- local government infrastructure;

- register of roads;
- rates and charges;
- provisions aiding local government;
- local government staff;
- register of delegations by Chief Executive Officer; and
- matters about disclosures by employees.

The *Building (Flammable and Combustible Liquids) Regulation 1994* commenced on 26 March 1994. The regulation relates to the storage and handling of flammable and combustible liquids and comprises the following parts:

- offences;
- licensing of premises;
- flammable and combustible liquids advisory committee;
- appeals and variations panel;
- appeals;
- variations; and
- public safety.

The *Sewerage and Water Supply Amendment Regulation (No. 1) 1994* commenced on 26 March 1994. The regulation provides for the following amendments:

- the insertion of a new section 3A which requires a local government to keep a map showing its sewers and sewered area;
- deletion of section 28;
- replacement of section 173 dealing with storage tanks;
- various amendments to section 182 dealing with the disposal of effluent; and
- insertion of a new part 10A dealing with stormwater drainage.

The *Aboriginal Land Amendment Regulation (No. 1) 1994* was made on 10 March 1994 and amends the *Aboriginal Land Regulation 1991*. The amendment inserts a new part 8 (miscellaneous) which declares that certain tidal land described in a schedule to the regulation is available Crown land.

Threatened species strategy

The South Australian Minister of Environment and Natural Resources has released a threatened species strategy for South Australia. The draft strategy has been prepared by the Threatened Species Steering Committee comprising representatives from State and local government and non-governmental agencies with interest in environmental management, economic development, primary industries, Aboriginal culture and mining. The five main elements of the strategy are the:

- identification, management and monitoring of the processes that threaten the survival of native species and ecological communities;
- identification, management and monitoring of threatened species and ecological communities;
- integration of the needs of biological diversity and social and economic planning and decision making to remove or mitigate existing threats and ensure that no threats are inadvertently introduced;
- development of community awareness and involvement in the conservation of the State's biological diversity including threatened species and ecological communities; and
- provision of an administrative and legislative framework to support the conservation of biological diversity including threatened species and ecological communities incorporating emergency measures.

OK Tedi

Papua New Guinea's OK Tedi Mine has been served with a claim for $4 billion in damages by villagers purportedly affected by environmental damage from the mine. The villagers lodged a writ in the Victorian Supreme Court on 5 May 1994 seeking $2 billion in compensation and $2 billion in exemplary damages from BHP which is the major shareholder in the company operating the mine, OK Tedi Mining Limited. The action was commenced by some 6,000 villagers living along PNG's OK Tedi River. The basis of the action is a report entitled "*Impacts of the OK Tedi Mine in Papua New Guinea"* produced by the Australian Conservation Foundation which alleges that waste from the mine has reduced the fish catch in some areas of the Fly river system by some 40% and was endangering other important wetlands.

Ports Corporation of Queensland

The Ports Corporation of Queensland is a government owned corporation responsible for the trading ports of Hay Point, Abbot Point, Lucinda, Mourilyan, Cape Flattery and Weipa. The Ports Corporations is in the course of developing a broad environmental management programme for the whole corporation and individual management plan for each port. In developing these plans the Ports Corporation is seeking to achieve ecologically sustainable development and to ensure consistency with other plans and policies such as the Transport Department's Environment Policy for Queensland Ports and The Great Barrier Reef World Heritage Area Strategic Plan.

Environmental management initiatives under way include:

- a $100,000 study of the adequacy of waste reception facilities in all corporation ports;
- a three year dust and noise monitoring programme at the coal port of Hay Point;
- development of a long term dredge spill management strategy for the Port of Weipa;
- a $210,000 three year study for seagrass surveys and water quality monitoring in Mourilyan Harbour;
- $200,000 for coastal revegetation of native species at the Port of Lucinda; and
- various environmental studies and monitoring programmes relating to specific development projects including the proposed development at the Port of Karumba.

Coastal management

The South Australian Department of Conservation and Environment has recently released a discussion paper on coastal management. The discussion paper outlines the process to improve coastal planning and management in South Australia. In particular, it seeks to improve coastal planning and management arrangements by:

- creating a Statewide Coastal and Bay Management Council;
- establishing arrangements to co-ordinate strategic planning for the coast;
- simplifying the approvals process for use and development on coastal crown land with clearly defined roles and responsibilities; and
- clarifying management responsibilities on coastal Crown land.

The Coastal and Bay Management Council is intended to be created under legislation to provide a single head of power for effective co-ordination of strategic coastal planning and management along the coastline. It will provide an integrated approach to the development of coastal policy and strategic coastal planning in the coastal zone including both public and private land. The council will advise the Minister for Conservation and Environment on the development and implementation of coastal policy, prepare guidelines for the development and establish clear objectives for the rationalisation of use of coastal crown land. Coastal strategies developed by the council would be approved by government as a key step in achieving unified commitment to the implementation of the government's policy for the coast. The council will approve regional coastal plans and management plans for coastal crown land outside national parks but will not usually be involved in day to day decision making.

Protected wildlife

The Queensland Department of Primary Industries has released a policy options paper in respect of the farming of protected wildlife in Queensland. The policy paper notes that the commercial utilisation of protected wildlife (native plants and animals) through sustainable harvesting, artificial propagation or closed cycle farming (all under the control of the Department of Environment and Heritage) is increasingly recognised as an appropriate use of natural resources. The policy paper focuses on artificial propagation and closed cycle farming.

National pollutant inventory

The Commonwealth Environment Protection Agency has released a public discussion paper on the National Pollutant Inventory. The inventory was originally announced by the Commonwealth government in December 1992. Pollutant inventories provide information about toxic or hazardous chemicals being released into the environment. They can provide an incentive to reduce or prevent pollution at the source due to the general availability of information to communities for planning and other purposes. The proposed inventory for Australia will be an information system providing an annual report of major pollutants and wastes released to the environment. The exact structure and organisation of information gathered for the inventory have yet to be determined.

Court Appeal – climate change

An appeal has been lodged in the New South Wales Land and Environment Court by Greenpeace against the construction of the Redbank Power Station in New South Wales. National Power is to construct the 130 megawatt fluidised-bed station near Warkworth Coal Mine in the Hunter Valley. The coal mine is expected to burn coal washery rejects. One of the main grounds of appeal lodged in the Land and Environment Court is that the station will contravene Australia's commitment to the framework convention on climate change due to its carbon dioxide emissions. This ground of appeal reflects the concern expressed by a number of industry associations and political groups about the domestic implications of Australia signing international conventions.

Environmental management systems

There will be an increasing need for Australian companies to develop due diligence programs to provide legal protection against potential liabilities by reducing the likelihood of environmental harm, provide a defence to certain offences, and minimise the penalties which may be imposed by a court. Due diligence involves taking all reasonable steps to prevent foreseeable environmental harm and to ensure environmental compliance by establishing and maintaining a suitable management system which contains a form programme of corporate policies, procedures and practices designed to ensure that environmental risks and liabilities are identified, reported and managed.

Due diligence may be achieved through an appropriately structured, resourced and supported environmental management system. The British standard for environmental management systems (BS7750) defines an environmental management system as "*the organisational structure, responsibilities, practices, procedures, processes and resources for implementing environmental management which shall be documented*".

In essence an environmental management plan should comprise the following key components:

- commitment from the Board or manager that the future of the organisation is dependent on environmental performance;
- delegation of responsibility to line managers and staff to ensure non-compliance is identified and managed;
- an appropriate reporting system which enables incidents and perceived risks to be identified, reported and managed;
- the achievement of environmental objectives through appropriate operating procedures;
- the establishment of performance measures;
- education and training programs for employees and contractors;
- compliance monitoring programs;
- non-compliance rectification programs;
- emergency response procedures; and
- complaints handling procedures and community consultation.

National Forest Policy Statement

The National Forest Policy Statement (**NFPS**) was signed on 7 December 1992 by the Prime Minister and all mainland State Premiers and Territory Chief Ministers. Although Tasmania did not sign the NFPS many of the aims of the policy are addressed through the Tasmanian Forests and Forestry Industry Strategy introduced in 1990.

The NFPS is a response to the recommendations of a number of enquiries which have been undertaken in recent years including the Ecologically Sustainable Development Working Group on Forestrys, the Resource Assessment Commission and the National Plantations Advisory Committee.

The NFPS establishes a policy framework which balances the demand for the protection of forests and their conservation and demand for the sustainable utilisation of those forests. Two ministerial councils are responsible for the policy. They include the Australia and New Zealand Environment and Conservation Council (**ANZECC**) and the Ministerial Council on Forestry, Fisheries and Aquaculture (**MCFFA** formerly the Australian Forestry Council). A joint sub-committee has been established to report to governments on the progress made in implementing the NFPS. It is called the Joint ANZECC/MCFFA NFPS Implementation Sub-committee or JANIS and is made up of representatives of the two ministerial councils. Tasmania participates as an observer.

Sewerage treatment plants

The Department of Environment and Heritage has recently conducted a review of Queensland's sewerage treatment plants with a view to ascertaining whether there has been compliance with the appropriate discharge standards. The review revealed that most of Queensland's 200 sewerage treatment plants have failed to comply with their licence conditions under the Clean Waters Act. Accordingly the Department of Environment and Heritage has been instructed to obtain from licence holders their plans to upgrade practices and procedures to enable compliance with their licences and to initiate a review of each licensed condition.

Radioactive waste repository

The Commonwealth government has recently invited comment from the public on a discussion paper designed to identify a suitable site for a national repository for disposal of low and short-lived intermediate level radioactive wastes. The repository would be used for those radioactive wastes generated in Australia from the medical, industrial and research use of radionuclides which international practice recognises as being suitable for near surface disposal. The discussion paper outlines eight preferred general regions being Mt Isa, Glary, Billa Kalina, Everard, Maralinga, Jackson, Bloods Range and Tanemi. The next phase of the project involves the identification of a preferred region for further study; detailed regional information would then be collected and field studies

undertaken to identify a potentially suitable site for detailed investigation. The use of the selected site will be negotiated with the relevant State and local government.

Shoalwater Bay inquiry

The Shoalwater Bay Inquiry has recently released its final report. Shoalwater Bay is owned by the Commonwealth and since the mid 1960s has been used by the Australian Defence Force as a military training area. It is located 700 kilometres north of Brisbane and covers an area of 450,000 hectares of land and sea. Shoalwater Bay is entered on the register of the National Estate and the marine part of the training area lies within the Great Barrier Reef world heritage area. The Commission of Inquiry into the Shoalwater Bay area was established by the Minister of Environment Sport and Territories on 10 May 1993 under section 11 of the Commonwealth *Environment Protection (Impact of Proposals) Act 1974*. The Inquiry has recommended that because of the high conservation values associated with the area no mining including sand mining should be permitted. It is recommended that the Department of Defence should continue to use the area for training activities but in a manner to maintain conservation values. The Inquiry also recommended that Aboriginal communities with traditional links to the area be given access. The Inquiry also found the Shoalwater Bay area to be an important catchment for the Capricorn Coast water supply and recommended that no activity which places the water supply at risk be permitted.

Environmental Management and Pollution Control Bill 1994

The Tasmanian Parliament has passed the *Environmental Management and Pollution Control Bill 1994*. The Bill is intended to support the new Planning Legislation, the new Resource Management and Planning Appeal Tribunal Legislation and the *State Policies and Projects Act 1993*. The Bill consolidates the existing approval process with a separate environmental licensing system being replaced by a consolidated planning permit which includes planning and environmental conditions. The legislation therefore removes the separate approval system and provides an integrated assessment of planning and environmental issues associated with new developments.

Queensland waste management strategy

The Department of Environment and Heritage has released a waste management strategy to deal with the treatment and disposal of domestic, industrial and hazardous waste. The major proposals contained in the draft strategy include:

- a solid waste disposal strategy based on the user pays principle to promote and support waste management initiatives of both State and local governments and industry;
- a waste tracking inventory for vehicle with a system to ensure wastes arrive at approved premises;
- the application of the user and polluter pays principles for all waste disposal incorporating the realistic cost of preventing environmental damage;
- the provision of an adequate number and range of waste treatment facilities; and
- the introduction of statutory criteria for siting, design and operation of waste management facilities including landfills.

It is also proposed that a solid waste disposal levy will be introduced in 1995/96 modelled on the similar levies applying in New South Wales, Victoria and South Australia. The cost to householders from the levy expect to be about $1.00 per person per year. The strategy also recommends that local governments develop cost-effective regional waste and management plants instead of single local government facilities.

Sustainable development

Australia has submitted to the United Nations Commission on Sustainable Development its first report. The Commission which was established following the Summit in Rio De Janeiro in June 1992 is empowered to monitor the implementation of Agenda 21 which is intended to provide an agenda for actions by all countries to achieve sustainable development. Australia's response to Agenda 21 was outlined in the National Strategy for Ecologically Sustainable Development which was initiated in 1992 and endorsed by the Council of Australian Governments in December 1992. This process involved the establishment of nine working groups to examine sectorial and cross-sectorial issues of importance to Australia. Other relevant strategies include the National Water Quality Management strategy, the Decade of Land Care Plans, the National Land Care Program, the Murray Darling Basin Initiative, the National Drought Policy and the National Water Watch Program as well as the National Waste Minimisation and Recycling Strategy, the draft National Hazardous Waste Management Guidelines, the National Strategy for the Management of Chemicals Used at Work, the National Pollutants Inventory, the National Herbicide Recycling Strategy, the National Packaging Guidelines and Programs of the National Occupation Health and Safety Commission.

State of the environment reporting

The Department of Environment, Sport and Territories has released a discussion paper on the State of the Environment Reporting. The discussion paper sets out a framework for State of the Environment Reporting for Australia and is a response to the National Strategy for Ecologically Sustainable Development. The reporting system requires partnership arrangements between various government agencies and non-government organisations and groups. The system makes provision for the following:

- use of the Australian and New Zealand Environment Conservation Council Task Force on State of the Environment Reporting to provide formal contact with and encourage co-operation between the Commonwealth and State and Territory governments in the development of their respective reporting activities;
- the establishment of a State of the Environment Advisory Council appointed by the Minister for the Environment, Sport and Territories to advise on the overall form and direction of reporting;
- the use of reference groups to identify issues and prepare and review draft materials to ensure its scientific integrity;
- the establishment of a National Environmental Indicators Task Force to develop a nationally agreed set of environmental indicators for use and reporting;
- the use of specialist and public workshops and forums to share information and improve understanding of issues encountered through reporting;
- liaison with universities and research organisations to share scientific information;
- liaison with non-government organisations and groups to increase understanding of and interest and involvement in the development and outcomes of reporting; and
- public consultation including the use of opinion polls to identify environmental issues and report on changes in community values and attitudes towards environmental matters.

Commonwealth environment impact assessment processes

The House of Representatives Standing Committee on Environment, Recreation and the Arts has tabled a report reviewing the response of government departments to the report of the Auditor-General entitled *Living with our Decisions*. The efficiency audit undertaken by the Auditor-General found that there were inefficiencies in the Commonwealth's environment impact assessment processes which added to the length and complexities of the process. The Auditor-General also reported that there were opportunities for government departments to manipulate the process and possibly circumvent the legislation under which it operated. In particular the Auditor-General noted that under the Environmental Protection (Impact of Proposals) Act the initial decision as to whether the proposed action might cause significant environmental harm and therefore trigger an environmental impact assessment was the responsibility of the agency dealing with the proposal. The committee found that the Commonwealth Environment Protection Agency (**CEPA**) had taken positive and proactive steps to implement the audit report. However, the committee noted that the efforts of CEPA had not been matched by other departments and agencies with responsibilities under the Act. The Committee also found that there was a pressing need for information and training in the environmental impact assessment process. The Committee also noted another deficiency in the Act namely the lack of provision for the monitoring of compliance with conditions imposed on developments and for the assessing of the actual impact of projects once they become operational. The Committee also recommended that the memoranda of understanding which currently exist between the Department of Environment, Sport and Territories and all other government agencies that make environmental decisions have been underrated and under-utilised and that further steps should be undertaken to ensure that memoranda of understanding are signed with as many government departments as possible. The Committee also noted that there were deficiencies in the existing legislation. A noted example was the growth of mobile phone towers by Optus, Telecom and Vodafone which are all exempt from environmental impact considerations.

Financial liability of contaminated land

The Australia and New Zealand Environment Conservation Council have released a position paper on financial liability attaching to the remediation of contaminated sites. The position paper details 15 key recommendations including:

- governments should not intervene to direct that remedial action be taken in the case of contaminated sites where the existing land use proposes no threat to human health or the environment;
- governments should put in place proper mechanisms within the planning process to ensure that potentially contaminated land is not rezoned to allow more sensitive uses without adequate assessment of environmental and human health risks and appropriate remediation;
- governments should be empowered to intervene to direct remedial action to be taken to minimise risk where contamination gives rise to a risk to human health or the environment;
- governments should ensure that the polluter where solvent bears the cost of any remediation;
- where the polluter is insolvent or not identifiable the persons in control of the site irrespective of whether that person is the owner or the current owner should be liable as a general rule for the cost of any necessary remediation;
- parties directed by government to take remedial action in the case of high risk sites should be strictly liable to comply with that direction;
- there should be a statutory right to recover costs incurred in the clean-up of a high risk site from the polluter or polluters and any other party who may have exacerbated the situation;

- governments should be responsible for ensuring that the necessary remedial action to minimise risks is taken in the case of orphan sites posing risk;
- Federal, State and Territory government agencies and local governments who cause land contamination should also be liable;
- government agencies or local governments which contribute to or exacerbate contamination as a result of the operation of their functions should also be liable on the basis of negligence;
- government agencies should not be liable for the cost of impacts on parties resulting from changes in applicable standards relating to contaminated sites;
- governments need to determine the means of providing funding for the remediation of orphan sites;
- governments should be empowered to sell abandoned orphan sites in order to recover as much as possible the clean-up costs;
- governments should provide information to the public to enable parties to make informed decisions; and
- governments should require lenders who merely hold security over high risk sites to make a clear choice between assuming control and therefore responsibility, transferring ownership to another party, agreeing to undertake and fund remedial action or otherwise abandoning the property as an orphan site.

Coastal policy

The New South Wales government has released a draft coastal policy. The document is in two parts comprising firstly a review of the 1990 coastal policy and secondly a revised coastal policy. Part 2 consists of a policy statement and strategic plan. The draft strategic plan defines nine goals which are the desired long-term outcomes for the revised policy. Under each of the goals there is a set of principles. They are statements which guide decision-making and clarify the basic philosophy of the goals. Following up from the goals and principles are objectives. These objectives are operational targets which when met ensure that the goal is achieved. Under each objective are strategic actions. These provide the context for decision-making and resource allocation by both State government agencies and local governments. Because the revised policy applies to the entire New South Wales coastline many of the strategic actions are general in nature. They do however provide State government agencies and local governments with sufficient flexibility to develop specific work programs to give effect to the objectives of the revised policy.

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Planning law: Review of council planning and subdivisional decisions

Ian Wright

This article discusses the legal mechanisms by which local authority decisions in respect of planning and subdivisional matters are reviewed. It explains the legal mechanisms in detail, whereby examples of various planning and the environment court forms are provided for reference

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Introduction

The purpose of this paper is to consider the legal mechanisms by which local authority decisions in respect of planning and subdivisional matters under the *Local Government (Planning and Environment) Act 1990* are reviewed.

I will approach this topic by discussing the following matters:

- the types of legal proceedings under the Local Government (Planning and Environment) Act;
- the right of appeal in respect of council decision;
- the time within which to appeal;
- the form of the appeal;
- the service of the notice of appeal;
- the entry of the appeal for hearing;
- the process of discovery;
- the need for further and better particulars;
- the application for directions;
- preparation for trial;
- hearing of the appeal;
- decision of the court;
- appeals against decision of the court; and
- review of local authority decisions.

Types of legal proceedings

The Local Government (Planning and Environment) Act (**Act**) makes provision for five types of proceedings:

- Appeals to the Planning and Environment Court against council's planning and subdivisional decisions (section 7.1).
- Prosecutions in the Magistrates Court for an offence (including non-compliance with the conditions of a local authority approval) (section 2.23(2)).
- Proceedings in the Planning and Environment Court for a declaration (section 2.24(1)).
- Proceedings in the Planning and Environment Court for an order to remedy or restrain the commission of an offence (section 2.24(4)).
- Application to the Planning and Environment Court for a review of a decision of the local authority on an application for modification of a minor nature of an approved staged rezoning approval or a town planning consent approval (section 7.2).

This paper only focuses on the first type of proceedings, that is appeals in respect of council's planning and subdivisional decisions.

Right of appeal

The Act provides for rights of appeal to the Planning and Environment Court in five circumstances.

An appeal may be lodged with the Planning and Environment Court in respect of the decision of a local authority made in response to one of the following applications:

- an application for compensation for injurious affection caused by a planning scheme or for expenditure incurred under an erroneous town planning certificate (section 3.5(13));
- an application to amend a planning scheme (for example, an application to zone or rezone land or amend a regulatory map or a development control plan map) (section 4.4(8));
- an application to rezone land in stages (sections 4.7(8), 4.9(7));
- an application to amend conditions attaching to an approval of an amendment to a planning scheme or rezoning (section 4.4(8));
- an application for a town planning consent or interim development permit (section 4.13(8));
- an application for subdivision of land (sections 5.1(10), (11));
- a combined application (section 4.11(6));
- an application for a staged subdivision (section 5.9(9));
- an application for subdivision of land incorporating a lake (section 5. 10(1));
- an application to amalgamate a parcel of land (section 5.11(8));
- an application for approval of engineering drawings and specifications relating to a subdivision involving works (section 5.2(5));
- an application to reseal a plan of survey where the plan was not lodged for registration within six months after sealing (section 5.3(10)).

Where council has made a decision in respect of one of the applications listed above, the appeal right is vested in the applicant. A right of appeal is also given to persons who have duly objected to the application where there is a requirement that the application be publicly advertised.

Therefore, both the applicant and the objectors will have appeal rights in respect of applications to local authorities that are required to be publicly advertised. However, in respect of applications to local authorities that are not required to be publicly advertised such as subdivisional applications, only the applicant will have appeal rights.

An appeal may also be lodged by an applicant where the local authority has failed to make a decision within the time prescribed by the Act in respect of the following applications:

- an application to amend a planning scheme (section 4.4(10);
- an application to rezone land in stages (sections 4.7(10), 4.9(8));
- an application to amend conditions attaching to an approval of an amendment to a planning scheme or rezoning (section 4.4(10));
- an application for town planning consent or an interim development permit (section 5.13(10));
- an application for subdivision of land (section 5.1(11));
- a combined application (section 4.11(6));
- an application for a staged subdivision (section 5.9(10);
- an application for subdivision of land incorporating a lake (section 5.10(1));
- an application to amalgamate a parcel of land (section 5.11(9));
- an application for approval of engineering drawings and specifications relating to a subdivision involving works (section 5.2(6)).

An appeal may be lodged in respect of a decision of a local authority to revoke a town planning consent, interim development consent, subdivisional approval, approval of engineering drawings and specifications, approval of a staged subdivision or an approval of subdivision of land incorporating a lake (section 4.14(8)).

In these circumstances the appeal right is vested in the person entitled to object to council's notice. The persons required to be served with a notice of intention to revoke and who are entitled to object are the persons to whom the permit was granted, the occupier and the owner of the land. These persons are therefore entitled to object and appeal.

An appeal may be lodged by an applicant who is dissatisfied with a decision of a local authority or a condition applied pursuant to the planning scheme or a by-law with respect to the use of any premises or the erection of a building or other structure permitted by the planning scheme (other than where a right of objection is conferred by the *Building Act 1975*) (section 7.1(b).

This appeal right is intended to cover two situations:

- First it covers decisions which are made by a local authority in respect of what are called applications for notification of conditions. These applications are frequently required by local authority planning schemes or planning by-laws. Essentially the planning scheme will provide that some specified uses of land are permitted or as of right uses within a particular zone subject to the notification of conditions by the local authority. Where this is specified an application is required to be lodged with the local authority so that it may notify conditions. The application is not required to be publicly advertised and the role of the local authority is limited to notifying conditions. The local authority cannot refuse the application. Accordingly pursuant to section 7.1(b) an appeal may be lodged where the applicant is dissatisfied with the conditions notified by the council.
- Second, the appeal right covers decisions made by local authorities in respect of applications for variation or relaxation of planning scheme requirements such as those relating to landscaping or carparking.

An appeal may be lodged by an applicant or objector who is dissatisfied with the decision of a local authority made pursuant to an interim development control provision (section 7.1(1)(c)).

This appeal right relates to decisions made by a local authority pursuant to an interim development by-law that has been introduced pending the preparation of a planning scheme. The effect of an interim development by-law is to require an application for consent to be lodged in respect of any development within the local authority area. The by-law may require these applications to be publicly advertised such that objections may be lodged. Pursuant to section 7.1(1)(c) both the applicant and any objectors may appeal in respect of council's decision.

Time for appeals

An appeal against a local authority's decision must be instituted within 40 days from the date on which the decision was made (section 7.1(1)(2)(a)).

However, since local authority decisions made in respect of planning and subdivisional applications are required to be notified within 10 days of the date of the decision, an appellant may effectively only have 30 days in which to appeal.

The time for instituting an appeal may be extended by the Planning and Environment Court where the clerk of the local authority has failed to notify the potential appellant (whether it be the applicant or objectors) within the 10 day period specified by the Act (section 7.1(2)(a)).

Where a local authority has failed to make a decision within the period specified by the Act an appeal may be instituted any time after the expiration of the period specified for the decision of the local authority which in the case of rezoning applications is 40 days (section 7.1(2)(b)).

Form of the appeal

An appeal is instituted by filing in the Planning and Environment Court Registry in Brisbane (in the Law Courts building in George Street) or at the District Court Registry in the provincial cities, a notice of appeal in the form prescribed by the Rules of Court (section 7.1(2)(c)).

The Planning and Environment Court Rules purport to prescribe the form which the various procedural documents must follow. Form 1 in the schedule to the rules prescribes the form of a notice of appeal.

Example 1 is a typical notice of appeal by an aggrieved applicant. Example 1A is a typical notice of appeal by an objector.

The following important matters should be noticed about the form of each notice of appeal:

- The name of the court and the registry in which the appeal is instituted is specified in the top left hand corner. These forms refer to the Local Government Court. Since the commencement of the Local Government (Planning and Environment) Act the court has been renamed the Planning and Environment Court. Accordingly Planning and Environment Court should be substituted for Local Government Court at the top of the forms which have been enclosed with this paper.
- Each appeal is given a year number by the Registrar of the Planning and Environment Court indicating the year in which it is filed. This is specified in the top right hand corner. For example it may read Appeal No 1 of 1993. This number is then used in all subsequent documents relating to the appeal.
- Since the appeal is lodged against the local authority's decision, the applicant or objector is referred to as the appellant and the local authority is the respondent.
- The notice of appeal is required to set out the decision being appealed against, the orders that are sought from the court, the grounds of the appeal and the facts and circumstances relied upon in support thereof.
- The appeal can be signed by the appellant or the appellant's solicitor.

Service of appeal

Within 10 days of filing the notice of appeal the appellant must serve a copy of the notice of appeal on the respondent local authority (section 7.1(4)).

If the appellant is an applicant, the notice of appeal must also be served on any objectors to the application together with a notice stating that the objectors may elect within 14 days of service to become a respondent to the appeal (section 7.1(4)(a)(i)).

If the appellant is an objector, the notice of appeal must also be served on the applicant together with a notice stating that the applicant may elect within 14 days of service to become a respondent to the appeal (section 7.1(4)(a)(ii)).

Generally speaking all applicants and only some objectors elect to become respondents. The notice of election is not required to follow any particular format although it must be in writing.

The notice of election must be filed in the Planning and Environment Court Registry and should be served on the appellant and the respondent local authority.

Should the appellant or the objectors elect to become parties the alignment of the parties will be as follows:

- the applicant (appellant) v the local authority (respondent);

  plus one or more objectors (respondents by election);

- one or more objectors (appellants) v the local authority (respondent) and (usually)

  the applicant (respondent by election).

After the appellant has attended to service of the notice of appeal and the notice of the right to elect on the respondents, the appellant must file an affidavit in the Registry declaring that the respondents have in fact been served. Example 2 shows the form which the affidavit should take for this purpose.

Entry of appeal

This is the term used to describe the next major step. It is a request by one of the parties to the appeal that the appeal be set down for hearing.

The rules of court require that the entry of appeal be in accordance with form 5. Example 3 shows the form which an entry of appeal should take. It should be noted that the entry of appeal should be addressed to the Registrar and to the other party or parties.

To be effective the entry of appeal must be filed in the Planning and Environment Court Registry and served on each of the other parties to the appeal (rule 18(4)).

Thus, the appellant and the local authority who are automatically parties to all appeals may enter an appeal for hearing as soon as the appeal is instituted. Immediately after a notice of election is filed a respondent by election may take similar action. This may well be the case in respect of an objector appeal where the applicant who has elected to become a respondent by election may wish to ensure that the hearing of the appeal is not unduly delayed by the objector appellant.

Discovery

This is process of literally discovering what documents relevant to the appeal are held by the opposing party or parties. The purpose of discovery is to give the parties the opportunity to see what documents the other parties intend to use in support of their case.

Each party is entitled to discovery and if need be any party may serve a formal notice in accordance with Form 2A of the rules of court upon any other party requiring them to furnish a list of documents or to make discovery on oath by filing an affidavit declaring what documents are in their possession or power.

Example 4 is an example of a formal request for a list of relevant documents. The general form of response to a formal notice requiring discovery is set out in Forms 2B and 3 of the rules. These forms use the formal heading and merely require a statement listing the relevant documents and indicating where necessary those documents which the party objects to producing or which are no longer in its possession. Such responses must be made within 14 days.

It should be noted that it is open to the parties to object to producing certain documents because they are subject to privilege such as legal professional privilege.

An appellant may institute the discovery process immediately after filing an entry of appeal but frequently the arrangements for discovery are made at the stage of the directions hearing (see section 10 below).

In practice, a respondent local authority may be willing to respond immediately to a request for discovery in which case arrangements can be made by telephone with the local authority's legal representatives for mutual discovery. This will involve the local authority making its file available for inspection whilst at the same time inspecting the documents of the other parties.

The parties seeking discovery of council documents will generally be accompanied by experts familiar with the technical issues which are the subject of the appeal.

Generally speaking, parties will be seeking documents such as council minutes, expert reports, inter office memos, plans and details of similar applications considered by the local authority. Provided these documents are relevant to the issues in the appeal they are all discoverable. However documents such as advices of the local authority's legal representatives are privileged and do not have to be shown to the other parties although reference should be made to these documents in any list or affidavit produced in response to a formal notice for discovery.

Following inspection of each party's documents, the parties are entitled to obtain copies at their expense of any documents that have been inspected.

Further and better particulars

The respondent council and the respondents by election have the right to obtain further and better particulars of the appellant's grounds of appeal.

There is no set form for this sort of request. Example 6 provides an example of how such a request can be made.

The appellant can reply in the same format spelling out in greater detail the grounds of the appeal referred to. The appellant is entitled to refuse to provide the particulars where the request is a mere fishing expedition or it would be more appropriate to leave the particulars for evidence at the hearing.

Where the appellant refuses to provide the particulars an application can be made at the directions hearing for an order requiring the giving of particulars (see section 10 below).

Application for directions

The appellant is required by rule 18(4A) of the Rules of Court to file with the Registrar of the Planning and Environment Court an application for directions within 14 days of the filing of the entry of appeal.

Example 5 shows the form for an application for directions. In this example the objector appellant has applied for directions.

The appellant can nominate a date for the hearing of the application for directions but it must not be sooner than three days after the date of filing. If no date is nominated the Registrar of the court will fill in the date.

The notice is then required to be served on the other parties. An affidavit attesting to service on the other parties is then prepared and filed in the Registry.

If the appellant does not apply for a directions hearing within 14 days of the filing of the entry of appeal the other parties may do so.

The directions hearing takes place in court before the judge assigned to hear the appeal. This is usually a fairly short hearing.

The hearing commences with the advocates representing the parties formally announcing themselves. This is followed by legal arguments over preliminary points of law such as compliance with the public notice requirements of the Act. Following the disposal of these preliminary points of law, the court will make the orders as to:

- the giving of any further and better particulars of the grounds of appeal;
- the issues of the appeal;
- the discovery of each party's document if this has not already been attended to;
- the discovery of documents of persons who are not parties to the appeal, that is third party discovery;
- the exchange of expert reports;
- the holding of without prejudice conferences; and
- the dates for the hearing of the appeal.

Pursuant to rule 18(4A) of the Rules of Court the Judge is required where possible to fix a date within two months of the directions hearing if the appeal is one which has been instituted by an objector.

In addition where both the applicant and any objectors have lodged appeals in respect of the respondent local authority's decision the court may order that both appeals be heard together.

Preparation for trial

Once discovery has been undertaken expert witnesses and barristers are provided with detailed briefs. The experts and barristers are generally engaged after it becomes apparent that the matter will be going to trial. The usual catalyst for this is the filing of the application for directions.

The brief to expert witnesses and barristers will usually contain the court documents such as the notice of appeal, the local authority's planning documents, expert reports and all correspondence and other documents relating to the issues in the appeal.

After preparation of draft reports by the experts, conferences will be arranged with the barrister to discuss the reports. Alterations are then made to the reports by the experts prior to exchanging the reports with the other parties.

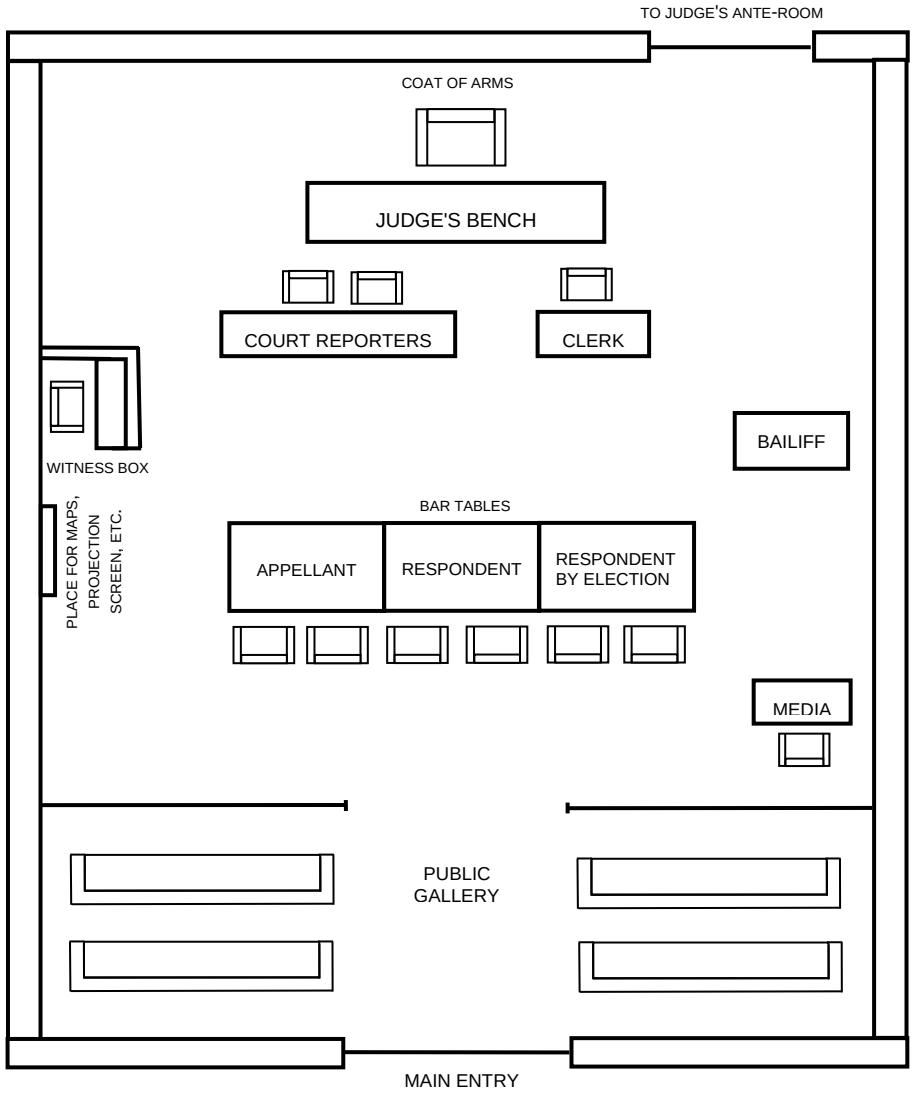
The reports received from the other parties are then provided to the barrister and the experts for criticism. The expert is generally instructed to prepare a supplementary report addressing the matters set out in the expert reports of the other parties. This report is usually discussed in conference with the barrister. In appropriate cases these reports are exchanged with the other parties.

Local authorities will generally require their officers to provide reports and give evidence in relation to the local authority's decision. Sometimes however this may be impossible such as where the local authority has acted against the advice of its officers. In such cases external consultants are engaged to support the council's case. External consultants are also engaged where officers do not have sufficient time to allocate to the hearing or where the issues are especially contentious and an additional expert opinion is required.

Hearing of the appeal

Planning appeals are generally set down for hearing at 10.00 am. In Brisbane these appeals are heard in the courtrooms on the second floor of the Law Courts Complex in George Street. A typical arrangement of the courtroom is set out in Figure 1.

Figure 1 Plan of courtroom



Source: Day, P and Nall, S (1988:40 - 54)

The Judges and the barristers involved in the hearing will normally wear their wigs and gowns. Everyone stands when the Judge preceded by his clerk enters or leaves the courtroom. At the commencement or resumption of the hearing the clerk intones words to the effect "*This Honourable Planning and Environment Court is now in session and all persons having witnessed before it shall now draw nigh and be heard: God save the Queen*."

The advocates of each party then introduce themselves to the court. The proceedings are then commenced by the tendering of expert reports, written statements of witnesses, plans and photographs which are intended to be produced to the court in evidence.

This is usually followed by a discussion about how long the case will last and the order in which the witnesses are to be presented. Agreement is then reached as to if and when an inspection of the site will take place. The site inspection does not always precede the hearing of evidence although this is favoured by the court.

When the site inspection does take place, a representative of each party is usually present. During the site inspection the parties' advocates can point out some of the features of the site but it is not the occasion for evidence or argument.

Returning to the courtroom and the start of proceedings. Two important points need to be appreciated. First, the appellant is the one who starts first and finishes last. This is followed by the case for the respondent local authority and the respondent by election.

Second, the onus of proof generally lies with the applicant (section 7.1A(2)). In other words, it is the applicant who has the responsibility of proving that the respondent local authority's decision was wrong in the case of an applicant appeal or right in the case of an objector appeal.

Generally speaking, the appellant will present its case in the following stages:

- first, an opening address is made in which the party outlines its case, the main line of argument, the witnesses to be called and the substance of the evidence which each party will give; and
- secondly, witnesses are then called to present their evidence in chief. These witnesses are then subjected to cross examination by the other parties and re-examination by the party that called the witness.

The case of the other parties is then presented in a similar manner. Each party then delivers a concluding address with the appellant delivering its address last.

Decision of the court

The decision of the court on appeal is deemed to be that of the local authority (section 7.1A(4)).

In dismissing an objector appeal, the court may impose or vary conditions attaching to an approval in order to address the concerns of the objector (section 7.1A(3)(b)).

The court is given limited jurisdiction to award costs. The general rule is that each party will bear its own costs. However the court may order costs against a party where:

- the appeal is frivolous or vexatious;
- a party has not given reasonable notice of an adjournment;
- a party has incurred costs because of the procedural defects of another party;
- a party has introduced new material without giving the other parties reasonable time to consider the material; and
- the local authority does not take an active part in the proceedings.

Review of court decisions

A party dissatisfied with a decision of the Planning and Environment Court may appeal to the Court of Appeal. The procedure for lodging this appeal is prescribed by the Supreme Court Rules. The grounds of the appeal must be limited to issues of law not fact.

A party dissatisfied with a decision of the Court of Appeal may appeal to the High Court of Australia if leave to appeal is granted by the Court of Appeal. If leave to appeal is not granted then a party may make application to the High Court for special leave to appeal.

Review of local authority decisions

Decisions made by local authorities pursuant to the Local Government (Planning and Environment) Act or other subordinate legislation such as planning schemes or town planning and subdivisional by-laws are subject to judicial review under the *Judicial Review Act 1991* (Qld).

A person aggrieved by a decision of a local authority may apply to the Supreme Court for a statutory order of review in relation to that decision.

In relation to planning matters, applications for judicial review can be expected in relation to decisions made by the Department of Transport in relation to transport planning issues, the Water Resources Commission in respect of catchment management issues, local authorities in respect of decisions made under by-laws and planning schemes and the Department of Housing, Local Government and Planning in respect of decisions made pursuant to the *Local Government (Planning and Environment) Act 1990* such as the issue of terms of reference for environmental impact statements.

COLIN BIGGERS & PAISLEY LAWYERS

Example 1

IN THE PLANNING AND ENVIRONMENT COURT
HELD AT ROCKHAMPTON,
QUEENSLAND

Appeal No. of 1988

BETWEEN: JOHN CITIZEN Appellant

AND: BANANALAND SHIRE COUNCIL Respondent

TAKE NOTICE that JOHN CITIZEN of 123 Main Street, Bananaville, in the State of Queensland hereby appeals to the Local Government Court at its next sittings against the decision of the BANANALAND SHIRE COUNCIL to refuse to grant its consent to the use of part of residential premises at 123 Main Street, Bananaville, more particularly described as Lot 12 on Registered Plan No.12345, Parish of Sunshine, for the purposes of a cake and pastry shop. Notification of council's refusal of the application was contained in a letter from the Shire Clerk dated 1st February 1988.

IN LIEU THEREOF the Appellant seeks the following order or judgement:

That the appeal be allowed and that the said application to use part of the premises for a cake and pastry shop be approved.

The grounds of this appeal and the facts and circumstances relied upon in support thereof are as follows:

1. The proposed shop falls within the class of shops serving a residential neighbourhood which are permissible with the consent of the council in a Residential zone in the Bananaland Shire Plan;
2. The proposed use will not generate excessive traffic as alleged by Bananaland Shire Council;
3. The appearance of the premises when converted will not be detrimental to the amenity of the area;
4. There is a demand for the goods and services which the proposed shop will provide;
5. The establishment of a fruit and vegetable shop was previously approved by council on land situated at 127 Main Street.

DATED this first day of March, 1988

.....
(Appellant or Solicitor or Agent)

TO: The Respondent
BANANALAND SHIRE COUNCIL

This notice of appeal is filed by the appellant whose address for service is 123 Main Street, Bananaville.

It is intended to effect service of this notice of appeal on the BANANALAND SHIRE COUNCIL, and upon those persons who have lodged objections to the application.

EXAMPLE 1 — NOTICE OF APPEAL (by an Applicant for Development)

This is the form in which an aggrieved applicant would lodge an appeal against a local authority's decision. If there were no objectors, the words after "COUNCIL" in the last paragraph would be omitted. When a notice of appeal is filed at the...Registry, the Registrar gives the appeal a number (which is then used in all subsequent documents relating to the appeal). (This is an example only. It is not a copy of any actual notice of appeal.)

Source: Day, P and Nall, S (1988:40 - 54)

Example 1A

IN THE PLANNING AND ENVIRONMENT COURT
HELD AT ROCKHAMPTON,
QUEENSLAND Appeal No. of 1988

BETWEEN: JOHN CITIZEN Appellant

AND: BRISBANE CITY COUNCIL Respondent

TAKE NOTICE that JOHN CITIZEN of 123 Suburban Street, Kangaroo Point, Brisbane in the State of Queensland hereby appeals to the Local Government Court at its next sittings against the decision of the BRISBANE CITY COUNCIL to grant its consent to the proposed use by BIG DEVELOPMENT PTY. LTD. of land at No. 12 Point Street, Kangaroo Point, more particularly described as part of Lot 1 on Registered Plan No. 123456, Parish of South Brisbane, and the erection and use of an apartment building thereon containing 25 storeys. Notification of council's approval was contained in a letter from the Town Clerk dated 1st February 1988.

IN LIEU THEREOF the Appellant seeks an order or judgment that the appeal be allowed and that the application by BIG DEVELOPMENT PTY. LTD. for consent to use the said land for the purpose of an apartment building containing 25 storeys be refused.

The grounds of this appeal and the facts and circumstances relied upon in support thereof are as follows:

1. The subject application will detrimentally affect the amenity of the area or locality in which the land is situated;
2. The subject application will create a traffic problem and/or increase an existing traffic problem in the area or locality in which the land is situated;
3. The subject application is in conflict with the policy of the Brisbane City Council to restrict the height of buildings erected between the approaches to the Story Bridge and the river;
4. The subject application is in conflict with the general planning intentions of the Brisbane City Council as set out in the aims of the City of Brisbane Town Plan 1987;
5. The subject application is contrary to sound town planning principles in that it will destroy important vistas of an architecturally and historically significant feature of Brisbane's built environment;
6. The subject application is against the public interest and possesses no features which justify departure from sound town planning principles.

DATED this twenty-eighth day of February, 1988

.....
(Appellant or Solicitor or Agent)

TO: The Respondent
BRISBANE CITY COUNCIL

AND TO: The Applicant
BIG DEVELOPMENT PTY. LTD.

This notice of appeal is filed by the Appellant whose address for service is 123 Suburban Street, Kangaroo Point, Brisbane.

It is intended to effect service of this notice of appeal on the BRISBANE CITY COUNCIL and on BIG DEVELOPMENT PTY. LTD.

EXAMPLE 1A — NOTICE OF APPEAL (by an Objector)

This is the form in which an objector would lodge an appeal against a local authority's decision to approve an advertised application by a development applicant (for consent or rezoning). (Like Example 1, it is an example only and not a copy of any actual notice of appeal.)

Example 2

IN THE PLANNING AND ENVIRONMENT COURT
HELD AT BRISBANE
QUEENSLAND Appeal No. of 1988

BETWEEN: JOHN CITIZEN Appellant

AND: Respondent

I, JOHN CITIZEN, of (*address and occupation*) make oath and say as follows:

1. I am the Appellant in these proceedings.

2. I did on the day of 1988 at (*time*) serve on the respondent (name of the local authority) and on (names of the objectors, if any, if the appellant is the applicant as in Example 1; or the name of the applicant, if the appellant is an objector appellant as in Example 1A) a true copy of the Notice of Appeal in these proceedings.

3. Now produced and shown to me and marked with the letter "A" is a copy of the Notice of Appeal.

SWORN by the abovenamed
Deponent at
this day of
1988 before me

.....
Deponent

.....
A Justice of the Peace

EXAMPLE 2 — AN AFFIDAVIT OF SERVICE

An affidavit in this form must normally be filed by the appellant on two occasions. The first occasion is to confirm, as in the above example, that he has served his Notice of Appeal on the respondent local authority and upon anybody else who is entitled to become a party to the appeal. The second occasion is to confirm that he has served his Application for Directions on the respondent local authority and upon the respondents by election (if any) who by this time will have made himself (or itself, or themselves) known. On this second occasion the document "A" referred to will be the Application for Directions (see Example 5, hereunder).

A document which is annexed to an affidavit should have an "annexure marking" typed on the back of the last page and signed and dated by the same J.P. before whom the affidavit was sworn. An annexure marking is in the following form:

IN THE LOCAL GOVERNMENT COURT
HELD AT
QUEENSLAND Appeal No. of 1988

BETWEEN: JOHN CITIZEN Appellant

AND: Respondent

This and the preceding (number) pages is the (description of document, e.g. Notice of Appeal) marked "A" mentioned and referred to in the Affidavit of JOHN CITIZEN dated the day of 1988.

.....
A Justice of the Peace

Source: Day, P and Nall, S (1988:40 - 54)

Example 3

IN THE PLANNING AND ENVIRONMENT COURT
HELD AT BRISBANE
QUEENSLAND

Appeal No. 22 of 1988

BETWEEN:	JOHN CITIZEN	Appellant
AND:	BRISBANE CITY COUNCIL	Respondent
AND:	BIG DEVELOPMENT PTY. LTD.	Respondent by Election

ENTER this Appeal for hearing before the Local Government Court at Brisbane at its sittings commencing on the day of 1988.

DATED this 9th day of March 1988.

.....
(Appellant or Solicitor or Agent)
Address and Telephone No.

TO: The Registrar
Local Government Court
BRISBANE

AND TO: The Respondent
BRISBANE CITY COUNCIL

AND TO: The Respondent by Election
BIG DEVELOPMENT PTY. LTD.

EXAMPLE 3 — ENTRY OF APPEAL

This example illustrates the next stage in the appeal of the objector in Example 1A. (Upon the filing of the notice of appeal the appeal is given a number by the Registrar. The appellant then serves the notice of appeal on the other parties and files an affidavit to this effect (Example 2).) In this example it is assumed that the applicant for development has responded and notified the appellant and the respondent local authority that it has elected to become a respondent to the appeal. This example is an example of an entry of appeal filed by the objector appellant, but an entry of appeal can be filed by either of the other parties, for example by the developer if he is anxious to have the matter settled as soon as possible. An entry of appeal filed by the applicant appellant in Example 1 would be in the same form, except that the respondent(s) by election, if any, would be persons who lodged objections.

Source: Day, P and Nall, S (1988:40 - 54)

COLIN BIGGERS & PAISLEY LAWYERS

Example 4

IN THE PLANNING AND ENVIRONMENT COURT
HELD AT BRISBANE
QUEENSLAND

Appeal No. 22 of 1988

BETWEEN:	JOHN CITIZEN	Appellant
AND:	BRISBANE CITY COUNCIL	Respondent
AND:	BIG DEVELOPMENT PTY. LTD.	Respondent by Election

TAKE NOTICE that you the abovenamed Respondent BRISBANE CITY COUNCIL are required within 14 days after the service of this notice on you to furnish a list of the documents which are or have been in your possession or power relating to the matters in question in the appeal.

.....
(Appellant or Solicitor or Agent)
Address and Telephone No.

EXAMPLE 4 — NOTICE REQUIRING LIST OF DOCUMENTS

This is an example of a formal request for a list of relevant documents. It may be made by an appellant or, in the same format, by either of the other parties. It may not be necessary. More commonly, arrangements for the mutual discovery of documents will be agreed upon at the hearing for directions (Example 5). If, however, a formal request is received in the above form, compliance is a straightforward matter. Using the same formal heading, it merely requires a statement listing the documents (indicating, if need be, the documents which you object to producing, or which are no longer in your possession).

Source: Day, P and Nall, S (1988:40 - 54)

Example 5

IN THE PLANNING AND ENVIRONMENT COURT
HELD AT BRISBANE
QUEENSLAND

Appeal No. 22 of 1988

BETWEEN:	JOHN CITIZEN	Appellant
AND:	BRISBANE CITY COUNCIL	Respondent
AND:	BIG DEVELOPMENT PTY. LTD.	Respondent by Election

APPLICATION is made to the Court by the Appellant JOHN CITIZEN for directions as to the conduct of the appeal.

This application has been set down for hearing by the Court at Brisbane on the day of 1988 at the hour of 9.30 o'clock in the forenoon or so soon thereafter as the course of business will permit.

DATED this 9th day of March 1988.

.....
(Appellant or Solicitor or Agent)
Address and Telephone No.

This application is filed by the Appellant [or on behalf of the Appellant if filed by a solicitor or agent] whose address for service is 123 Suburban Street, Kangaroo Point, 4169.

It is intended to effect service of this application on the Respondent, BRISBANE CITY COUNCIL, and on the Respondent by Election, BIG DEVELOPMENT PTY. LTD.

EXAMPLE 5 — APPLICATION FOR DIRECTIONS

In this example, the objector appellant (in Example 1A) has applied for directions, but either of the other parties may similarly apply. The Registrar responds by filling in the date for the directions hearing, and the applicant then serves a copy of the application on the other parties and files an affidavit — as per Example 2 — indicating that he has done so. Examples 7 and 7A are examples of more elaborate applications for directions now used by some practitioners, but they are not mandatory.

Source: Day, P and Nall, S (1988:40 - 54)

COLIN BIGGERS & PAISLEY LAWYERS

Example 6

IN THE PLANNING AND ENVIRONMENT COURT
HELD AT BRISBANE
QUEENSLAND

Appeal No. 22 of 1988

BETWEEN:	JOHN CITIZEN	Appellant
AND:	BRISBANE CITY COUNCIL	Respondent
AND:	BIG DEVELOPMENT PTY. LTD.	Respondent by Election

REQUEST FOR FURTHER AND BETTER PARTICULARS

The Respondent requests the following Further and Better Particulars of the Appellant's Notice of Appeal:—

1. With respect to paragraph 2 thereof, where is it alleged that a traffic problem would be created and/or increased?

2. With respect to paragraph 4, state what aims of the City of Brisbane Town Plan 1987 are therein referred to.

DATED this 18th day of March 1988.

.....
City Solicitor
Brisbane City Council
Solicitor for the Respondent

EXAMPLE 6 — REQUEST FOR PARTICULARS

This is an example of the sort of request the appellant might receive from either of the other parties at or about the time of the hearing for directions. There is no set form for this sort of request. The appellant can reply in the same format spelling out in greater detail the grounds of appeal referred to.

Source: Day, P and Nall, S (1988:40 - 54)

EXAMPLE 7

IN THE PLANNING AND ENVIRONMENT COURT
HELD AT BRISBANE
QUEENSLAND

Appeal No. of 1988

BETWEEN: JOHN CITIZEN Appellant

AND: Respondent

AND: Respondent by Election

I, JOHN CITIZEN, of (*address and occupation*) make oath and say as follows:

1. I am the Appellant in these proceedings.

2. The Notice of Appeal and Entry of Appeal were filed on (date or dates).

3. By application dated the Appellant applied to (indicate the nature of the proposed development). The application was duly advertised and considered by the council following which a letter of refusal was received by the Appellant. Now produced and shown to me and marked with the letter "A" is a copy of the application dated and a copy of the letter of refusal dated .

4. Now produced and shown to me and marked with the letter "B" is a copy of the Statutory Declaration [that the appellant has advertised and notified his application] declared and signed on , together with a copy of the advertisement placed in the newspaper, a copy of the notice posted on the land and a copy of the notices sent to the adjoining owners.

5. The Appellant seeks an order or direction that there are no questions of law which arise in relation to the hearing of this appeal.

6. At the date of swearing of this affidavit arrangements have been made to complete discovery between the parties. Mutual voluntary discovery has been attended to.

7. The Respondent Council's letter of refusal dated informed the Appellant of the reasons for the refusal of his application. Now produced and shown to me and marked with the letter "C" is a copy of a letter to the Solicitors for the Respondent Council dated requesting further and better particulars of the reasons for refusal, and a copy of council's Solicitor's reply dated .

8. The Appellant seeks an order or direction that the evidence in the appeal shall be limited to the disputed issues which have been identified and particularised.

9. The Appellant seeks an order or direction that in relation to the conduct of the appeal the parties shall exchange reports of their expert witnesses 48 hours before the first day of the hearing of the appeal, such exchange to take place only where the opposing parties have expert witnesses in the same field.

10. The Appellant seeks such orders or directions in relation to the setting down of the appeal for hearing.

SWORN by the abovenamed
Deponent at
this day of
1988 before me

.....
Deponent

.....
A Justice of the Peace

EXAMPLE 7 — AN AFFIDAVIT IN WHICH AN APPLICATION FOR DIRECTIONS IS COMBINED WITH THE VERIFICATION OF RELEVANT DOCUMENTS, CONFIRMATION OF DISCOVERY ARRANGEMENTS, AND CONFIRMATION OF A REQUEST FOR FURTHER PARTICULARS AND THE ANSWER (S) GIVEN THERETO.

This example is a form appropriate for an applicant appellant who is appealing against the refusal of his development application (as in the case of Example 1). Nothing like this form will be found in the Rules of Court. It is not mandatory. It is an illustration of how procedures have evolved and been adapted in the course of practice. Practice among solicitors is by no means uniform. An affidavit in this form purports to deal in one document with a number of the matters subsequent to the Notice of Appeal and Entry of Appeal. It will be noted that in this particular example the discovery arrangements have been mutually agreed to, which is usually the case. In effect an affidavit in this form combines a history of the matter and confirms that the essential preconditions of an appeal hearing have been met, namely that a development application was lodged and advertised and dealt with by the local authority, and that the discovery of the relevant documents and clarification of the grounds of appeal have either been attended to or are requested.

Whatever form these various legalistic documents take, the whole pre-hearing process can be best understood (and complied with) if it is kept in mind that the objective is to ensure before the hearing that the basis for a hearing by the judge exists, and that, as far as possible, the hearing will not be frustrated by technical omissions or deficiencies.

A patient reading of these various examples and the text of this chapter will (it is hoped) give you a fair idea of the essential preliminaries and some feel for the kinds of documents you may encounter. If, as a lay appellant you don't get everything right, the sky will not fall down. As explained in the text you can always seek some advice or confirmation about procedures from the opposition's legal representatives without too much embarrassment Moreover, if you're an objector appellant, the applicant developer's solicitors may initiate some of the formal steps such as filing an entry of appeal and applying for directions.

Source: Day, P and Nall, S (1988:40 - 54)

Example 7A

IN THE PLANNING AND ENVIRONMENT COURT
HELD AT BRISBANE
QUEENSLAND Appeal No. of 1988

BETWEEN: JOHN CITIZEN Appellant

AND: Respondent

AND: Respondent by Election

I, JOHN CITIZEN, of (*address and occupation*) make oath and say as follows:

1. I am the Appellant in these proceedings.

2. The Notice of Appeal and Entry of Appeal were filed on (*date or dates*).

3. By application dated the applicants applied to (indicate the nature of the proposed development). I am informed by the Clerk of the Respondent Council and verily believe that the application was duly advertised and considered by council together with the written objection which I lodged. Now produced and shown to me and marked with the letter "A" is a copy of the application dated and a copy of my objection dated .

4. On (*date*) I received a letter from the Clerk of the Respondent Council notifying me that the application aforesaid had been approved. Now produced and shown to me and marked with the letter "B" is a true copy of the Respondent Council's letter dated .

5. The Appellant seeks an order or direction that there are no questions of law which arise in relation to the hearing of this appeal.

6. At the date of swearing of this affidavit arrangements have been made to complete discovery between the parties. Mutual voluntary discovery has been attended to.

7. The Appellant's Notice of Appeal identifies (number) grounds of appeal. The Appellant seeks an order or direction that the evidence in the appeal shall be limited to the disputed issues which have been identified and particularised.

8. The Appellant seeks an order or direction that in relation to the conduct of the appeal the parties shall exchange reports of their expert witnesses 48 hours before the first day of the hearing of the appeal, such exchange to take place only where the opposing parties have expert witnesses in the same field.

9. The Appellant seeks such orders or directions in relation to the setting down of the appeal for hearing.

SWORN by the abovenamed
Deponent at
this day of
1988 before me

……...
Deponent

……...
A Justice of the Peace

EXAMPLE 7A — AN AFFIDAVIT SIMILAR TO EXAMPLE 7 BUT FILED BY AN OBJECTOR APPELLANT.

This example is in a form appropriate for an objector appellant who is appealing against the approval by the respondent local authority of the respondent by election's development application (as in the case of Example 1A). As with Example 7, this form will not be found in the Rules. The expression is necessarily slightly different from that in Example 7. The object and general substance are the same, however, and the explanatory notes and advice appended to Example 7 are equally applicable and should be read carefully.

Source: Day, P and Nall, S (1988:40 - 54)

Example 8

IN THE PLANNING AND ENVIRONMENT COURT
HELD AT BRISBANE
QUEENSLAND

Appeal No. of 1988

BETWEEN: JOHN CITIZEN Appellant

AND: Respondent

AND: Respondent by Election

I, JOHN CITIZEN, of (*address and occupation*) make oath and say as follows:

1. Now produced and shown to me and marked with the letter "A" is a true copy of

SWORN by the abovenamed
Deponent at
this day of
1988 before me

.....
Deponent

.....
A Justice of the Peace

EXAMPLE 8 — GENERAL FORM OF AFFIDAVIT

An affidavit in this general form may be required to be filed before the hearing in order to verify copies of documents (although at the hearing the identity of documents tendered can be sworn to by a witness). The documents will be referred to in the text of the affidavit as true copies marked with the letters "A", "B" etc. and the separate copies so marked will be attached to the affidavit. The justice of the peace will sign each such attachment identifying it as the document mentioned in the affidavit sworn to by the deponent. If the affidavit extends to more than one page, the annexure marking will refer to the preceding pages — see the explanatory note to Example 2.

In addition to verifying documents, you may need to verify the carrying out of some formal step in the proceedings by some other (identified) person on your behalf. In this case you can expand the above example using words to this effect: "On (date) I was informed by (name and position) and I verily believe that (set out the details of what you were informed was done)" . Then add at the end a paragraph as follows: "All facts and circumstances herein deposed to are within my own knowledge save such as are deposed to from information only and my means of knowledge and sources of information appear on the face of this my Affidavit."

Source: Day, P and Nall, S (1988:40 - 54)

Administration of swimming pool fencing laws

Ian Wright

This article discusses the appropriate administrative procedures for local governments to limit their liability and enforce the provisions of the *Building Act 1975* in relation to fencing of private swimming pools

September 1994

Administration of swimming pool fencing laws

The provisions of the Building Act concerning the fencing of private swimming pools have been and continue to be a challenge for local government in implementing them with good effect acting reasonably and safeguarding both community and councils' interests. The councils' duty of care in particular situations is always a prime focus if councils are to avoid actions for negligence arising from some unfortunate tragedy involving a private pool.

Central to local government's role in enforcement of the legislation is prosecution action against the owner of land for non-compliance with the Act. Councils may be held liable in negligence where a person is injured through the non-compliance of an owner in circumstances where the council should have reasonably taken action to ensure compliance.

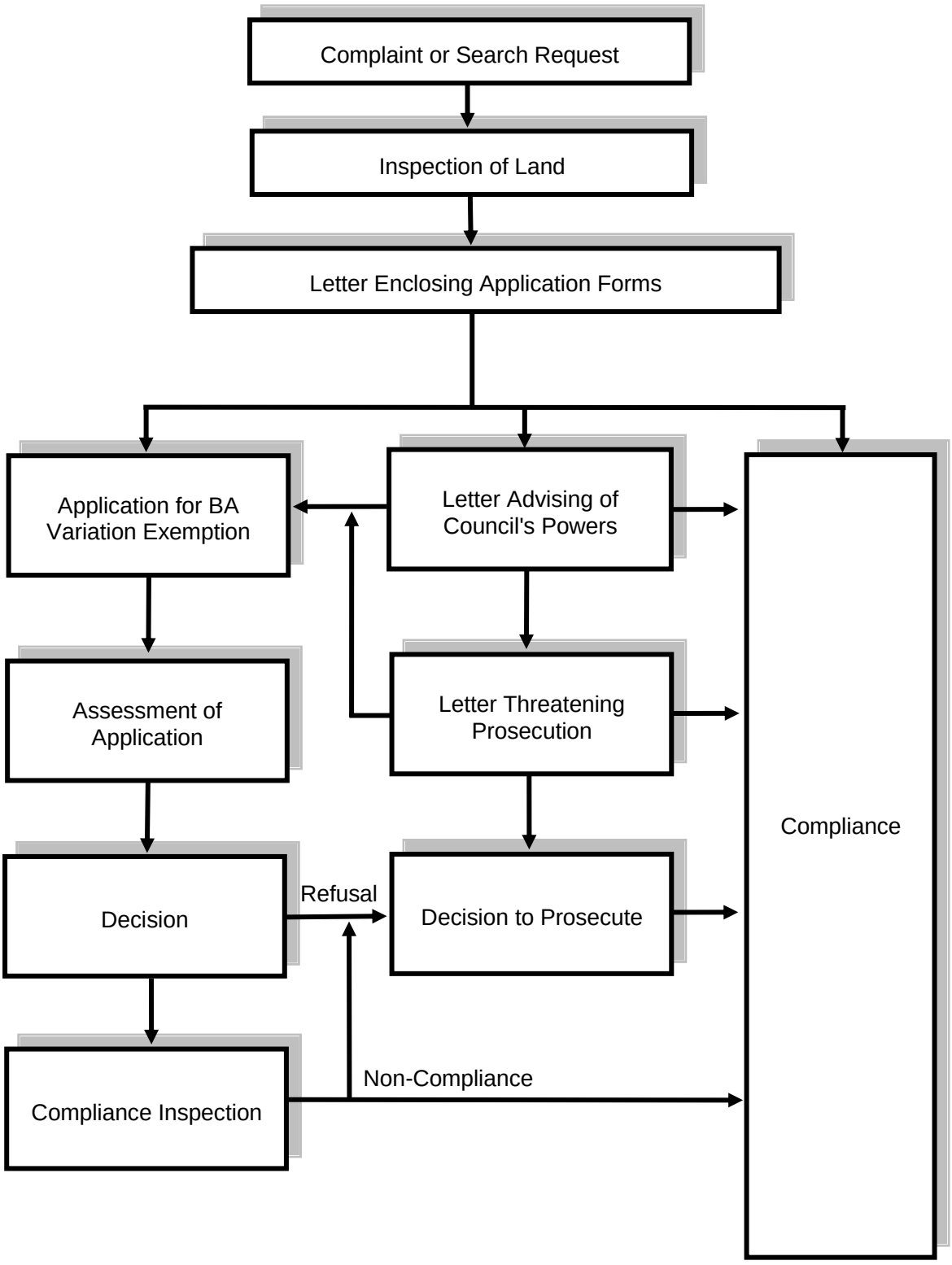
The council should therefore put in place appropriate administrative procedures that satisfy council's objectives of minimising liability whilst at the same time taking a practical and common sense approach to the enforcement of statutory provisions for which there is some community resentment.

There are certain administrative procedures which should establish a standard of good practice in approaching the implementation of the fencing legislation.

The administrative procedures should comprise the following elements:

- Where a building compliance search has been lodged or a complaint made, the subject property should be inspected to determine whether there has been compliance with the provisions of the Act.
- Where an inspection reveals that there has been non-compliance with the swimming pool fencing provisions of the Act, the council should serve a written notice on the owner of the property specifying the relevant requirements of part 4B of the Act and clause 11 of the Standard Building Law, the particular areas of non-compliance, the time within which the owner must comply and the ability of the owners to apply for variations or exemptions from the requirements of the Act and the Standard Building Law.
- Where the owner fails to comply with the written notice, the council should advise the owner in writing of the council's power to require compliance with the provisions of the Act and the penalties that are applicable in respect of non-compliance with the provisions of the Act.
- Where the owner fails to comply with the written notice the council should advise the owner in writing that unless action is taken to ensure compliance with the provisions of the Act, the council will commence proceedings in the Magistrates Court for non-compliance.
- Where the owner continues not to comply with the provisions of the Act, the council should consider commencing prosecution proceedings. In deciding whether to commence proceedings the council should have regard to factors such as the nature of the non-compliance and the magnitude of the risk of injury represented by the non-compliance.
- If in respect of a written notice from the council the owner lodges an application for building approval or a variation or exemption from the swimming pool fencing requirements of the Act, the council should assess the application and decide it in accordance with the Act and the Standard Building Law.
- If the swimming pool fencing requirements are complied with as a result of the application, then no further action should be taken. However, if the application is refused or if after approval a compliance inspection reveals that there has not been compliance with the swimming pool fencing requirements then the council should once again advise the owner in writing of the penalties for non-compliance and follow the procedures set out above.

Figure 1 Swimming pool fencing laws: administrative procedure



This paper was published in the Municipal Manager, 4(3):16 17 (September) 1994.

Environmental protection

Ian Wright

This article discusses the objectives of the Environmental Protection Bill 1994 and the Contaminated Land Act 1991

September 1994

Part A – Environmental Protection Bill

Introduction

Scope of Bill

The *Environmental Protection Bill 1994* (**Bill**) is expected to be passed by the Queensland Parliament in September 1994. It will repeal the Clean Air Act, Clean Waters Act, Noise Abatement Act and Litter Act.

The objective of the Bill is ecologically sustainable development which is defined as development that improves the total quality of life both now and in the future in a way that maintains the ecological processes on which life depends.

This objective is intended to be implemented through the adoption of environmental management systems by industry and development interests. The adoption of environmental management systems is encouraged through:

- the specification of offences and penalties in respect of various acts or omissions giving rise to environmental degradation;
- the introduction of legally binding Environmental Protection Policies (**EPPs**) concerned with the setting of standards for specific issues such as water, air quality and waste disposal;
- the imposition of a general environmental duty and a duty to notify;
- the obtaining of environmental authorisations (licences and approvals) for what are called level 1 and level 2 environmentally relevant activities to be prescribed by regulation;
- environmental evaluations being an environmental audit and environmental investigation;
- the preparation of Environmental Management Programmes (**EMPs**) setting out a plan for achieving gradual compliance with environmental standards;
- the issue of Environmental Protection Orders (**EPOs**) to enforce the provisions of the Act; and
- the issuing of non-legally binding guidelines to advise industry, local government and the public about how best to minimise environmental impact.

Administration of Bill

The Bill provides that the Department of Environment and Heritage will be the lead agency for environment protection but that the day to day administration of much of the Act will be handled by other bodies such as local governments and other State government departments.

The Bill is intended to be administered, as far as practicable, in consultation with and having regard to the views and interests of (s.5):

- industry;
- interested groups;
- Aborigines and Torres Strait Islanders under Aboriginal tradition and island custom; and
- the community generally.

Operation of Bill

The Bill is intended to bind the State and so far as is possible the Commonwealth and the other States (s.12). The Bill is also intended to have an extra territorial operation in that a person who causes environmental harm within Queensland by conduct engaged in outside Queensland will be guilty of an offence if the conduct would have constituted an offence if engaged in within Queensland (s.14).

The Bill has no application in relation to matters regulated by the Pollution of Waters by Oil Act and Radioactive Substances Act. However, the Local Government Act, Local Government (Planning and Environment) Act, Contaminated Land Act, Nature Conservation Act and State Counter Disaster Organisation Act are not affected by the Bill.

Environmental offences

Offences

The Bill introduces an extensive range of environmental offences including:

- breach of the general duty to notify the administering authority of environmental harm (s.28);
- wilfully and/or unlawfully causing serious environmental harm (s.82);
- wilfully and/or unlawfully causing material environmental harm (s.83):
- wilfully and/or unlawfully causing an environmental nuisance (s.85);
- contravening, wilfully or otherwise, an environmental protection policy (s.86);
- releasing a prescribed contaminant into the environment (s.87);
- allowing a contaminant to be placed in a position where it could reasonably be expected to cause serious or material environmental harm or environmental nuisance (s.88); and
- interfering with any monitoring equipment.

Environmental harm

The offences of wilfully causing material or serious environmental harm give rise to penalties of $100,000 or 2 years imprisonment and $500,000 or 5 years imprisonment respectively.

"Material environmental harm" is defined as environmental harm (other than environmental nuisance) that:

- is not trivial or negligible in nature, extent or context;
- causes actual or potential loss or damage to property of an amount of or amounts totalling more than $5,000 but less than $50,000; or
- results in costs of more than $5,000 but less than $50,000 being incurred in taking action to prevent or minimise the harms or rehabilitate or restore the environment to its condition before the harm.

"Serious environmental harm" is defined in the same manner as material environmental harm except that in this case the threshold amount is $50,000 or a greater amount prescribed by regulation. Serious environmental harm also extends to environmental harm (other than environmental nuisance) that:

- causes actual or potential harm to environmental values that is irreversible, of a high impact, or widespread; or
- causes actual or potential harm to environmental values of an area of high conservation value or special significance.

The term "environmental harm" is defined as any adverse effect or potential adverse effect on an environmental value (whether temporary or permanent and of whatever magnitude duration or frequency) (s.8). Environmental harm may be caused by an activity whether the harm is a direct or indirect result of the activity or whether the harm results from the activity alone or from the combined effects of the activity and other activities or factors (s.8(2)).

The phrase "environmental value" is defined as:

- a quality or physical characteristic of the environment that is conducive to ecological health or public amenity or safety; or
- another quality of the environment identified and declared to be an environmental value under an environmental protection policy or regulation.

Environmental nuisance

The offence of wilfully causing an environmental nuisance gives rise to a penalty of $50,000. An environmental nuisance is defined to be an unreasonable interference or likely interference with an environmental value caused by noise, dust, odour, light or an unhealthy, offensive, or unsightly condition because of contamination (or any other way prescribed by regulation) (s.6).

Contamination of environment

The Bill also has specific offences and penalties in respect of the contamination of the environment. The "contamination of the environment" occurs where a contaminant is released (whether by act or omission) into the environment.

The term contaminant is defined very broadly as including a gas, liquid or solid or odour or an organism (whether alive or dead) including a virus or energy, including noise, heat, radioactivity and electromagnetic radiation or a combination of contaminants. This is broader than the definition of "hazardous substance" under the *Contaminated Land Act 1991* which relates to a hazard to human health or the environment.

The term "environment" is defined in the same manner as the *Local Government (Planning and Environment) Act 1990*. The definition is extremely broad and includes:

- ecosystems and their constituent parts, including people in communities;
- all natural and physical resources;
- the qualities and characteristics of locations, places and areas however large or small, that contribute to their biological diversity and integrity, intrinsic or attributed scientific value or interest, amenity, harmony and sense of community; and
- the social, economic, aesthetic and cultural conditions that affect or are affected by matters mentioned above.

Proof of offences and defences

An authorised officer may give evidence (without the need to call further opinion evidence) that the authorised officer formed the opinion based on the authorised officer's own senses that noise, smoke, dust, fumes or odour was emitted from a place occupied by the defendant and travelled to a place occupied by another person or constituted an unreasonable interference with the person's enjoyment of the place (s.134).

It is a defence however to each of the offences of material or serious environmental harm, environmental nuisance or contamination of the environment to prove:

- the harm happened in the course of a lawful activity; and
- the defendant complied with the general environmental duty.

Offences by corporations

Where a corporation is charged with an offence and it becomes necessary to establish the state of mind of a person in relation to an act or omission of a corporation, it is sufficient for the administering authority to show (under s.135(1)) that:

- the act or omission was done or omitted to be done by a representative of the person within the scope of the representative's actual or apparent authority; and
- the representative had the necessary state of mind.

It is a defence for the person however to show that they took all reasonable steps to prevent the acts or omissions (s.135(2)).

Furthermore, the executive officers of a corporation are required by the Bill to ensure that the body corporate complies with the Bill. If the body corporate commits an offence each of the executive officers of the body corporate also commits an offence, namely the offence of failing to ensure that the body corporate complies with the Act. However, it is a defence (s.136) for the executive officer to prove that the officer:

- took all reasonable steps to ensure the corporation complied with the provision if the officer was in a position to influence the conduct of the corporation in relation to the offence; or
- was not in a position to influence the conduct of the corporation in relation to the offence.

Environmental Protection Policies

Preparation of EPPs

Central to the legislation is the preparation of EPPs which set the standards of environmental quality and provide a framework for achieving those standards. The maximum penalty for failing to comply with an EPP is $100,000 or 2 years imprisonment (s.86).

The Bill prescribes a procedure for preparing EPPs:

- The Minister must give public notice of the proposal to prepare the draft EPP (s.18(1)) by advertising the draft EPP once a week for two consecutive weeks in a newspaper circulating throughout the State (s.18(2)(a)(i)) or if the policy applies only to a particular area of the State, then in a newspaper circulating in that area (s.18(2)(a)(ii)). The notice must specify whether the EPP relates to an aspect or part of the environment and if so, what aspect or part (s.18(2)(b)). Section 18 does not apply to a draft EPP prepared by the Minister before the commencement of Part 5 of the Bill.
- Public submissions may be made within a 40 day period (s.18(2)(e)) and the Minister is obliged to consider the submissions in preparing the draft EPP (s.19).
- Once formulated the Minister must give public notice of the draft EPP in the same manner as in respect of the proposal to prepare a policy (s.20). Again, the Minister must consider all submissions properly made to the Minister on the draft EPP (s.21).
- Once approved. there is a positive obligation on the administering authority (the relevant department or local government) to give effect to the EPP (s.23).

The Minister must review the EPP within seven years after its commencement (s.25). In addition, an EPP may be amended by the Governor-in-Council by following the same procedures for public consultation in respect of a draft EPP (s.24).

Types of EPPs

The Department has indicated that the first four EPPs under the Act will relate to noise, air, water and waste management. The first stage of the two stage process of public consultation has been completed and the draft EPPs are presently being prepared for further public consultation prior to being submitted to the Minister for approval.

Environmental duties

Types

The Bill imposes upon persons a general environmental duty as well as a duty to notify the administering authority of environmental harm.

General environmental duty

Under the general environmental duty a person must not carry out an activity that causes or is likely to cause environmental harm unless the person takes all reasonable and practicable measures to prevent or minimise the harm. In deciding the measures required to be taken regard must be had to the following factors (s.27):

- the nature of the harm or potential harm;
- the sensitivity of the receiving environment;
- the current state of technical knowledge for the activity;
- the likelihood of successful application of the various measures that might be taken; and
- the financial implications of the various measures as they would relate to the type of activity.

Duty to notify

In addition, a duty is imposed on persons who have become aware of an event or condition involving a serious or material environmental harm (or the threat of same) to give written notice to the administering authority of the event or condition, its nature and the circumstances in which it happened as soon as is reasonably practicable (s.28).

If the person is an employee or agent, the person must tell the employer of the event or condition. If the employer cannot be contacted, the employee or agent must give written notice to the administering authority (s.28(3)). Such a notice is not admissible in evidence against the person in a prosecution for an offence against the Act (s.28(8)).

Environmental authorisations

Environmentally relevant activities

The Bill provides for the licensing and control of environmentally relevant activities. An activity can be prescribed as an environmentally relevant activity by regulation if the Governor-in-Council is satisfied that a contaminant will or may be released into the environment when the activity is carried out and the release of the contaminant will or may cause environmental harm (s.29). Depending on the level of risk to the environment the activity may be classified as a level 1 or level 2 activity (s.29(2)).

A person is prohibited from carrying out a level 1 environmentally relevant activity without a licence (s.30) and an approval is required before a person can carry out works for the construction or alteration of a building or structure for use in respect of a level 2 environmentally relevant activity. An approval is also required for the installation or alteration of any plant or equipment for use in a level 2 environmentally relevant activity if the construction, alteration or installation will result in an increase of 10% or more in the release of a contaminant into the environment under the activity (s.31).

Application for approval or licence

The Bill specifies the procedure to be followed for an application for an environmental authorisation whether it be an approval or a licence (s.32).

- The application must be supported by enough information to enable the administering authority to properly decide the application. The administering authority is empowered to seek further information from the applicant (s.53).
- After the application is lodged with the administering authority, the applicant must give public notice of the application by (s.33):
  - placing an advertisement in a newspaper circulating in the area in which the environmentally relevant activity to which the application relates is proposed to be carried out;
  - placing a notice on the premises to which the application relates; and

- serving a notice of the occupiers of all premises adjoining the premises to which the application relates.

Submissions must also be invited from government departments, public authorities, local governments, landholders, industry, interested groups and persons and members of the public (s.33(2)(b)). Submissions may be lodged within 10 business days (s.33(2)(c)).

- The administering authority is required to consider the following matters prior to determining the application (s.34A):
  - the standard criteria (as defined in section 6) being:
    - the principles of ecologically sustainable development as set out in the National Strategy for Ecologically Sustainable Development;
    - any relevant environmental protection policy;
    - any relevant Commonwealth, State or local government plans, standards, agreements or requirements;
    - any relevant environmental impact study, assessment or report;
    - the character, resilience and values of the receiving environment;
    - all submissions made by the applicant and interested parties;
    - the best practice environmental management for the activity under the authorisation, programme or order;
    - the financial implications of the requirements of the authorisation, programme or order as they would relate to the type of activity or industry carried on under the authorisation, programme or order; and
    - the public interest;
  - any additional information provided under section 53;
  - a report following an inquiry of the administering authority under section 53A into the suitability of the applicants;
  - the resolution of any conference called by the administering authority under section 53B to assist in the resolution of the application.
- The administering authority must determine the application for an environmental authorisation within 28 days from the application date (s.34). If the administering authority decides to refuse an application, the administering authority must give written reasons for refusal within 10 days of making its decision (s.38(4)).
- All licences and approvals granted by the administering authority are required to be entered into a publicly available register (s.151).

The decision to grant or refuse a licence is an "original decision" and the applicant is entitled to apply for a review of the decision under the terms of section 149.

Provisional licences

The administering authority is empowered to issue a provisional licence if, in the authority's opinion, the applicant is not able to give enough information about the application to permit the authority to issue a licence but the authority is satisfied the applicant will be able, and the applicant gives the authority an undertaking, to comply with all relevant environmental protection policies (s.37). A provisional licence remains in force for the period specified in the licence but in any event, for not more than five years (s.37(3)(b)). Applications for provisional licences can be subject to review under section 149.

Licence conditions

The administering authority can require as a licence condition that an applicant prepare and carry out an environmental management programme and take specified measures to minimise the likelihood of environmental harm (s.36). The requirement that an EMP be prepared is subject to review under section 149.

Financial assurance may also be required by way of a licence condition (s.77) provided a notice is first served upon the applicant (s.78).

Amendment of licences

An application may be made to the administering authority to amend the licence (s.39). Public notice of the application must be given on the same basis as that of an application for a new licence if the administering authority is satisfied that there is likely to be a substantial increase in the risk of environmental harm because of a substantial change in:

- the quantity or quality of a contaminant licensed to be released into the environment; or
- the results of the release of a quantity or quality of a contaminant licensed to be released into the environment.

An increase in 10% or more in the quantity of the contaminant to be released into the environment is deemed to be a substantial change (s.39(4)). A decision to grant or refuse·an application to amend a licence is subject to review under section 149.

The administering authority is also empowered to amend a licence where the licensee consents to the amendment or the administering authority considers it necessary or desirable as a result of (s.40):

- a contravention of the Act by the licensee;
- the licence was issued on the basis of a false or misleading representation or declaration, made either orally or in writing;
- the licence was issued on the basis of a miscalculation of the quantity or quality of contaminant licensed to be released into the environment;
- the licence was issued on the basis of a miscalculation of the effects of the release of a quantity or quality of contaminant licensed to be released into the environment;
- a change in the way in which, or the place where, contaminants are, or are likely to be, released into the environment;
- the approval of an environmental protection policy or the approval of the amendment of an environmental protection policy;
- an environmental report; or
- another circumstance prescribed by regulation.

An amendment made by an administering authority is subject to review under section 149.

Transfer of licences

Where the business of carrying on an environmentally relevant activity is to be transferred, the licensee must give written notice to the buyer that the buyer must make application under the Act for the transfer of the licence or a new licence. This applies where the licensee proposes to sell or dispose of the licensee's business to another person (s.43).

The administering authority must decide an application for transfer within 28 days after the application date (s.45). The administering authority must give written notice to the applicant of its decision to grant or refuse an application and the reasons for any refusal within 10 days after making its decision (s.46(1) and s.47(4)).

The administering authority may refuse a transfer if the applicant is not a suitable person to hold the licence (s.47(2)), has been convicted of an offence against the Act or has had a licence cancelled or suspended under the Act (s.47(3)(a)). If the applicant is a corporation, then offences of executive officers will be relevant (s.47(3)(b)). Any refusal of an application for transfer under section 47 is subject to review under section 149.

Cancellation and suspension of licence

A licence can be suspended or cancelled if the administering authority is satisfied on reasonable grounds that the licensee has been convicted of an offence against the Act or the licence was issued because of a false or misleading representation (s.48). A show cause procedure must be followed prior to cancellation or suspension (s.49). A decision to suspend or cancel a licence is subject to review and appeal under section 149 and section 150.

Environmental evaluation

Environmental audits and investigations

The Bill empowers the administering authority to require an environmental evaluation to be undertaken. The decision to require an evaluation can be the subject of a request for internal review and appeal under section 149 and section 150.

An environmental evaluation may take the form of either an environmental audit or an environmental investigation. An audit may be required where it appears to the administering authority that a licensee is not complying with licence conditions, an EPP or an EMP (s.56). An environmental investigation may be required where an activity is causing or is likely to cause serious or material environmental harm but there is no apparent breach of conditions or want of compliance with an EPP or EMP.

Content of environmental evaluation report

Failure to undertake the evaluation is an offence, the maximum penalty for which is $6,000. The evaluation must be accompanied by a declaration from the person required to conduct the evaluation and the auditor who in fact carried out the evaluation. The owner's declaration is to state that no false or misleading information has been given to the auditor and no relevant information has knowingly been withheld. The auditor's declaration must certify the report is accurate (s.59).

Review of environmental evaluation report

Following the receipt of an environmental evaluation report the administering authority may amend licence conditions, require the recipient to prepare and submit an EMP, serve an environmental protection order on the recipient or commence proceedings against the recipient for an offence under the Act, or take any other action it considers appropriate (s.60). The cost of conducting or commissioning an evaluation report is to be met by the recipient (s.61).

Environmental Management Programme

Purpose of EMP

An EMP is a specific program that when approved achieves compliance with the Act by reducing environmental harm or detailing the transition to an environmental standard (s.62).

Application for EMP

The Bill specifies the procedure by which applications for EMPs are made and determined by the administering authority.

- A person may at any time submit for approval a draft EMP to the administering authority for an activity which the person is carrying out or proposes to carry out (s.65).
- Where the draft EMP specifies a period longer than three years over which the programme is to be carried out, public notice of the submission must be given within two days after the application date by (s.66A):
  - advertisement published in a newspaper circulating in the area in which the activity to which the draft programme relates is carried out; and
  - placing a notice on the premises to which the draft programme relates; and
  - serving a notice on the occupiers of all premises adjoining the premises to which the draft programme relates.

The notice is required to invite submissions on the draft programme from government departments, public authorities, local governments, landholders, industry, interested groups and persons and members of the public (s.66A(3)).

Protection from prosecution

The Bill specifies a procedure whereby a person who has caused or threatened environmental harm during the course of an activity that would be lawful but for the Act may gain protection from prosecution in respect of a continuing offence. A three stage procedure is specified:

- A programme notice must be given to the administering authority stating that an act or omission that has caused or threatened environmental harm during the course of an activity carried out by the person is lawful but for the Act (s.70A). The program notice and other documents submitted are not admissible in evidence in any prosecution for the original offence (s.70B).
- Within 14 days of receipt of the programme notice the administering authority must give written notice to the person of its receipt and specify the day by which a draft EMP must be submitted for approval.
- A draft EMP must be submitted to the administering authority within three months after the authority's receipt of the programme notice (s.70C).

The person giving the programme notice cannot be prosecuted for a continuation of the original offence that happens after the administration authority's receipt of the notice until the person submitting the notice (s.70D):

- receives from the administering authority a certificate of approval of the EMP for the relevant event;
- receives from the administering authority a notice of refusal to approve the EMP for the relevant event; or
- a draft EMP for the relevant event is not submitted to the administering authority within the specified time.

However the protection from prosecution is also lost if the holder of a certificate of approval for an EMP under a programme notice does not comply with the EMP. The administering authority may also apply to the Planning and Environment Court for an order that the protection from prosecution should be removed because of the nature and extent of the environmental harm caused or threatened by the continuation of the original offence (s.70G). In deciding whether to make such an order the Court will have regard to the following:

- the nature and extent of the environmental harm caused or threatened by a continuation of the original offence under the programme notice;
- the resilience of the receiving environment;
- the previous environmental record of the person who gave the programme notice; and
- whether an environmental management programme or protection order is in force for the relevant event.

The Court may also make an order which the Court considers appropriate pending a decision of the application for an EMP. For example the Court may:

- direct the person who gave the programme notice to do or stop doing anything specified in the order to prevent a continuation of the original offence under the notice; or
- make an order appropriate to prevent or minimise environmental harm.

A person who contravenes an order of the Court commits an offence against the Act attracting a maximum penalty of $180,000 or imprisonment for two years (s.70H).

Disclosure of EMP

Where a certified holder of an approved EMP wishes to sell or dispose of the place of business to which the programme relates, the certificate holder must give written notice to the proposed buyer of the existence of the programme and within 14 days of making the agreement to sell, give written notice of the sale to the authority. Failure to do so is an offence, the maximum penalty for which is $3,000 (s.70).

Environmental Protection Orders

The administering authority may issue an EPO where there is (s.71):

- non-compliance with a requirement to conduct or commission an environmental evaluation;
- a failure to prepare an EMP if required;
- serious or material environmental harm being or likely to be caused by an activity; or
- non-compliance with the general environmental duty, a condition of a licence, or an environmental protection policy.

A decision to issue an EPO can be the subject of a request for internal review (s.149) and appeal (s.150). Failure to comply with an EPO is an offence, the maximum penalty for which is 2000 penalty units ($120,000) (s.74). The existence of any EPO must be disclosed to an intending purchaser of a business before making the agreement to sell (s.75).

Investigation and enforcement

Authorised officers

Officers of the public service, an employee of the Department of Environmental Heritage, an employee of the local government or a person in an "approved class" may be appointed an "authorised officer" for the administration and enforcement of the Act (s.90).

Authorised officers are to be issued with photo ID cards (s.94) which the authorised officer must produce for inspection when exercising a power under the Act (s.95(1)), unless the authorised officer is uniformed (s.95(2)).

An authorised officer is immune to civil liability if an act done or an omission is made honestly and without negligence (s.96(2)). Instead, civil liability will attach to the local government, or the State, whichever is the body giving directions to the official (s.96(3)).

Powers of authorised officers

An authorised officer may enter a place to ascertain if the Act is being complied with (s.97(1)) or if there is reasonable evidence of the commission of an offence against the Act (s.98). The entry must be at a reasonable time (s.97(3)) and must be subject to the following conditions:

- the occupier consents to the entry;
- the entry is authorised by a monitoring warrant;
- if the place is a public place, it must be open to the public at the time of entry;
- if the place is licensed, it must be open for the conduct of business or otherwise open for entry and the authorised officer must believe on reasonable grounds that the environmentally relevant activity is being carried out;
- if industry is conducted on the land, the authorised officer must be entering to establish the place from which a contaminant causing an environmental nuisance has been released and the authorised officer must believe on reasonable grounds that the place is open for the conduct of business or is otherwise open for entry (s.97(2)).

Before seeking the consent of an occupier to enter the premises, the authorised officer must inform the occupier that they may refuse to give such consent (s.106(2)). If consent is given. the authorised officer may require an acknowledgment to be signed (s.106(3)). If an acknowledgment is not signed, the court may presume (in any proceedings) that the occupier did not consent (s.107).

If unlawful environmental harm has been caused by release of a contaminant into the environment, the authorised officer can enter land to confirm the source of the release of the contaminant (s.98A).

If a vehicle is suspected of being used in the commission of an offence against the Act or of providing evidence of the commission of an offence against the Act or is being used to transport waste (to be prescribed by regulation), the authorised officer may board it (s.99(1)), stop it or order it not to be moved (s.99(2)). Failure to stop or move a vehicle as requested by an authorised officer is an offence with a maximum penalty of 50 penalty units (s.115(1)). A defence exists however where compliance with the request would have posed a danger to a person and the request was complied with as soon as was reasonably practicable (s.115)(2)). An authorised officer may require the person in the vehicle to give reasonable help (s.99(3)). Failure to render such help is an offence, the maximum penalty for which is $3,000 (s.115(1)).

In relation to a place or vehicle, an authorised officer has power (under s.100) to:

- search any part;
- inspect, examine, test, measure, photograph or film anything;
- take samples of any contaminant, substance or thing;
- record, measure, test or analyse the release of contaminants into the environment;
- take extracts from, or make copies of any document;
- take any equipment and materials the officer reasonably requires with him/her;
- install or maintain any equipment and materials the authorised officer reasonably requires;
- in carrying out the authorised officer's powers listed above, the authorised officer may require the occupier to render help (failure to do so is an offence (s.116) OR require the person in control of a vehicle to bring it to a specified place and to remain in control of the vehicle for a reasonable time.

Authorised officers are also empowered to seize evidence (s.101). They are also required to give notice of the seizure or damage to the person from whom the thing was seized (s.130(3)(a)) or to the person who appears to be the owner of the thing (s.130(3)(b)).

An authorised officer can require a person to state their name and address if that person is committing an offence against the Act or the authorised officer has reasonable grounds to suspect the person is committing an offence against the Act (s.103). Failure to provide name and address is an offence, the maximum penalty of $3,000.

Similarly a person can be required to answer a question by the authorised officer. The authorised officer must first warn the person that it is an offence not to answer unless the person has a reasonable excuse for not doing so (s.104). The maximum penalty for failing to answer is $3,000 (s.122).

Authorised officers have power to require production of documents and to take copies of same (s.105). The failure to produce documents carries a maximum penalty of $3,000.

Warrants

An application can be made to the Magistrates Court for the issue of a warrant for an authorised officer to enter a place (other than residential premises) (s.110). This is known as a "monitoring warrant". If the warrant is required urgently or if an authorised officer is on a remote location, a warrant can be applied for by telephone, facsimile, radio or another form of communication (s.113). Similarly the warrant can be faxed to the authorised officer (s.113(4)). If it cannot be faxed then the Magistrates Court must tell the authorised officer the terms of the warrant and the authorised officer is to fill out a form of warrant (s.113(5)).

Noise complaints

The Bill is intended to apply to the abatement of environmental nuisance caused by excessive noise that is audible in any residential or commercial premises and is emitted from a place by a musical instrument, an amplifier, a motor vehicle that is not on a road or a party, celebration or the like. Noise emitted by an open-air concert or commercial entertainment or a public meeting under permit is excluded from the application of the Bill.

Complaints in respect of excessive noise may be made to the police who are then obliged to investigate (s.107C). The police are given power to investigate without a warrant (s.107D) and may issue a "noise abatement direction" against the person. Failure to comply with such direction is an offence, the maximum penalty for which is $600.

Emergency powers

If an authorised officer is satisfied on reasonable grounds that a serious or material environmental harm has been or is likely to be caused and urgent action is necessary to prevent or minimise the harm, or rehabilitate or restore the environment because of the harm, the authorised officer may enter the property without a warrant (s.108). Authorised officers can use such help and force as is necessary and reasonable in exercising their emergency powers (s.108(6)). The police are also empowered to remove a person or thing obstructing entry (s.108(7)). However steps must be taken to cause as little inconvenience and damage as is practicable (s.108(8)).

An authorised officer can authorise in writing the emergency release of a contaminant into the environment, if the release of the contaminant is necessary and reasonable and there is no other practicable alternative to the release (s.109). If a person fails to comply with a direction for the emergency release of a contaminant, the person commits an offence, the maximum penalty for which is $3,000 (s.125).

Failing to answer a question in an emergency is an offence, the maximum penalty for which is $600 (s.121). Self-incrimination is not an excuse (s.121(4)), however, if the person objects to answering the question on the basis that it may be self-incriminating, then the answer may not be used in evidence against the person (s.121(2)(c)).

General offences

Apart from the specific environmental offences and other offences mentioned in this paper, the Bill also specifies a range of other offences including:

- impersonation of an authorised officer – maximum penalty of $3,000 (s.129);
- obstruction of an authorised officer – maximum penalty of $6,000 (s.128);
- abusing or intimidating an authorised person – maximum penalty of $6,000;
- giving false or misleading documents – maximum penalty of $9,900 (s.126); and
- giving false or misleading information to an authorised officer – maximum penalty of $9,900 (s.127).

Internal review and appeal

Internal review by administering authority

An application by a dissatisfied person for a review of a decision under the Bill must be made to the administering authority within 14 days after the day on which the person receives notice of the original decision or such longer period as the authority, in special circumstances, allows (s.149(2)).

If the administering authority does not decide the application for review and notify the person of its decision within 14 days of receiving the application, the authority is taken to have made a decision affirming the original decision (s.149(8)).

Appeal by Planning and Environment Court

Following internal review an aggrieved person may appeal to the Planning and Environment Court if they are dissatisfied with the review (s.150). That appeal to the Court must be commenced within 30 days from the day on which the person receives notice of the review decision or such longer period as the Court in special circumstances allows (s.150A).

Where the administration and enforcement of an EPP, the issue of environmental authorisations or any other matter under the Act has been devolved by regulation to a local government, the local government is empowered to make by-laws or ordinances with respect to that devolved matter. No right of internal review exists in respect of a decision made by a local government under the Bill. These decisions can only be appealed to the Planning and Environment Court (s.149(10)).

Powers of Court

A Court hearing a prosecution under the Act is empowered to award compensation or damages to any person who has suffered loss as a result of a contravention of the Act (s.140).

In addition to orders pertaining to compensation, damages and penalties, the Court can also order action to be taken to rehabilitate and restore the environment and require payment of the authority's investigative costs (s.140).

Claim for compensation

If a person suffers loss or expense because of a purported exercise of power under the Act, the person may claim compensation from the local government or the State if the power was exercised by an authorised officer (s.131).

Transitional provisions

Licences obtained under the Clean Air Act and the Clean Water Act continue until such time as they are cancelled by the Department of Environment and Heritage under the provisions of the new Act (s.161).

Under section 165 an unhealthy, offensive or unsightly condition caused by noise is not an environmental nuisance. Section 165 will cease on the repeal of the *Noise Abatement Act 1978* (s.165A))

Part B – Contaminated Land Act 1991

Administration

The *Contaminated Land Act 1991* (**Act**) was assented to on 11 December 1991 and commenced operation on 1 January 1992. The *Contaminated Land Regulations 1991* (**Regulations**), which were made pursuant to the Act, also commenced operation on 1 January 1992.

The Act and the Regulations are administered by the Chief Executive of the Department of Environment and Heritage.

The major objectives of the Act are to publicly identify contaminated land, assess and, where appropriate, remediate the contaminated land at the expense of the polluter so as to ensure that land is not a hazard to human health or the environment and restrict the future use of contaminated land.

Application

The Act applies to persons who cause or permit land contamination ("polluters"), owners, occupiers, local governments and the State Crown.

Land contamination is defined to mean any action that results in land becoming contaminated land. Contaminated land is defined to mean land, a building or structure on land, or matter in or on land, that, in the opinion of the Chief Executive, is affected by a hazardous substance so that it is, or causes other land, water or air to, be, a hazard to human health or the environment.

A hazardous substance is defined to mean a substance that, because of its quantity, concentration, acute or chronic toxic effects, carcinogenity, teratogenicity, mutagenicity, corrosiveness, flammability or physical, chemical or infectious characteristics, may pose a hazard to human health or the environment when improperly treated, stored, disposed of or otherwise managed.

The Chief Executive has issued guidelines specifying thresholds for various substances beyond which land will be considered to be contaminated.

Occupier is defined to include the person in actual occupation or control of the place or if there is no person in actual occupation or control, the owner. A lessee, licensee, mortgagee in possession, receiver, liquidator and trustee in bankruptcy would all be occupiers for the purpose of this definition.

Owner is defined to mean the person who has the freehold estate in the land or is entitled to possession of the land. A mortgagee who is entitled to enforce a mortgage as a result of a default by a mortgagor would be entitled to possession of the land and accordingly, would be an owner for the purpose of this definition.

The Act does not apply to land which is subject to the Radioactive Substances Act or a mining or petroleum tenement which provides for rectification or remediation of contaminated land in accordance with the Mineral Resources Act or the Petroleum Act.

Notification

The Chief Executive must be notified of the existence or the likely existence of contaminated land by:

- the polluter within 30 days of becoming aware of the contamination; or
- the owner, occupier, local authority or the State Crown within 30 days of becoming aware of the contamination.

In respect of local authorities and the State Crown, land is deemed to be contaminated and therefore must be notified to the Chief Executive if it has been used for any of the purposes set out in the schedule to the Regulations.

It is an offence under the Act to fail to notify the Chief Executive of land contamination.

The information received by the Chief Executive is placed on a Contaminated Sites Register. The Register classifies contaminated land into six categories:

- *possible site* – reported to be contaminated or use may have caused contamination;
- *probable site* – a use prescribed in the Regulations or that is known to cause contamination;
- *confirmed site* – assessment shows a health or environmental hazard;
- *restricted site* – contamination allows limited use as specified;
- *former site* – remediated site;
- *released site* – investigated and no contamination.

The Register is open to inspection and information can be obtained in respect of all categories except possible sites. In addition, probable, confirmed and restricted sites are required to be notified on the Titles Register.

Assessment, remediation and validation

The Chief Executive may order the preparation of a site investigation report in respect of the contaminated land and where necessary, the remediation of the contaminated land by:

- the polluter; or
- the owner if, the contamination occurred before 1 January 1992, the contamination happened after the acquisition of the land or the land was recorded on the Contaminated Sites Register at the date of the acquisition of the land; or

- the local government if, the contamination arose because of an approval that the local government should have known would result in contaminated land or the land is recorded on the Contaminated Sites Register and the approved use is either contrary to the restriction or is a prescribed purpose in the Regulations that results in a hazard to human health or the environment.

The Chief Executive may also order the preparation of a validation report by the polluter, owner or local government to ensure that the contaminated land has been successfully remediated.

The Chief Executive has indicated that the process of assessment and management of contaminated sites is conducted in four stages:

- Stage 1 involves the preparation of a preliminary site investigation report. The investigation would involve the preparation of a site history and the undertaking of sampling and chemical analysis to determine whether the threshold levels as prescribed by the Chief Executive have been exceeded.
- Stage 2 involves the preparation of an environmental and health risk assessment where the preliminary investigation reveals contaminants at levels above investigation threshold values. The risk assessment is intended to provide a quantifiable assessment of the risk of human exposure and environmental impact.
- Stage 3 involves the remediation of the land where the environmental and health risk assessment reveals unacceptable levels of human exposure or unacceptable environmental effects.
- Stage 4 involves the undertaking of a validation survey to ensure that the land has been successfully remediated.

If a site investigation report is not provided or contaminated land is not remediated, the Chief Executive may cause a report to be prepared or the contaminated land to be remediated at the expense of the polluter, owner or local government.

If the costs of the report or the remediation are not paid, the Chief Executive can take action to recover the sum as a debt. In respect of remediation costs, the Chief Executive can execute against the property to recover the costs in priority to all other persons other than the local government in relation to unpaid rates and charges and a mortgagee registered before the recording of the land on the Contaminated Sites Register.

A person receiving a notice from the Chief Executive requiring the preparation of a report, the undertaking of work or the payment of costs may appeal to the Planning and Environment Court in respect of that notice.

Enforcement powers

The Act attempts to prevent further land contamination in Queensland through the creation of offences and the vesting of enforcement powers in the Chief Executive.

Penalties are imposed in respect of the following offences:

- the contamination of land not expressly authorised by the Chief Executive or a statute;
- rejection by local government or other person of contaminated soil or hazardous substance at an approved place of disposal;
- disposal of contaminated soil or hazardous substance other than at an approved place;
- use of contaminated soil, hazardous substance or other contaminated matter without the Chief Executive's approval;
- use of a restricted site contrary to a restriction recorded on the Contaminated Sites Register;
- local government approval of the use of a restricted site contrary to the restriction recorded on the Contaminated Sites Register.

Persons authorised by the Chief Executive have power to:

- direct any person to take steps to abate imminent danger of death or injury to persons or grave risk to the environment;
- enter any premises pursuant to a warrant to ensure compliance with the Act or to gather evidence;
- search, sample, monitor, inspect and copy.

It is an offence for a managing director, manager or other governing officer to fail to ensure that a body corporate complies with the Act. It is a defence to a prosecution if the non-compliance occurred without the person's consent or connivance and all reasonable steps were taken to prevent the failure. Therefore, in order to escape liability, corporate officers will have to put an appropriate due diligence programme in place. An essential element of any due diligence programme is the undertaking of an audit of the company's operations to ensure compliance with the provisions of the Act.

Relationship to Local Government (Planning and Environment) Act 1990

Section 8.3A(2) of the *Local Government (Planning and Environment) Act 1990* requires an applicant for rezoning, town planning consent and subdivision of land that has been used for a purpose prescribed by the *Local Government (Planning and Environment) Regulation 1991* to apply to the Chief Executive for a site contamination report.

References

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Department of Environment and Heritage (1994) Enforcement Guidelines, Queensland Government Printer Brisbane.

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Contaminated Land Regulations 1991.

COLIN BIGGERS & PAISLEY LAWYERS

What's instore for Natural Resource Management?

Ian Wright | Robert Wruck

This article discusses the Department of Primary Industries discussion paper which provides the basis for new Natural Resource Management (NRM) legislation. The paper identifies notable challenges for NRM in Queensland and Regulatory Strategies for NRM. The article further considers topical planning and environment policies, guidelines and legislation

December 1994

Natural resource management

Introduction

A discussion paper has been prepared by the Department of Primary Industries (**DPI**) with significant contributions from industry, the community and other State government departments. It defines the key challenges and brings together new and existing policies and strategies for the sustainable use of State and privately controlled natural resources in Queensland.

The discussion paper together with any feedback will provide the basis for new Natural Resource Management (**NRM**) legislation.

The key challenges addressed by the discussion paper are to:

- provide for the efficient and equitable allocation of State owned or controlled water, forest and fisheries resources;
- maintain the availability of Queensland's natural resources for the economic development of rural industries;
- maintain and enhance the quality of natural resources and protect them from degradation;
- minimise or prevent the environmental impact of natural resources use; and
- enhance the economically efficient and effective use of natural resources.

The NRM policy places major emphasis on voluntary individual and community responsibility and action supported by a number of non-regulatory strategies.

Regulatory intervention will only be used as a last resort, for example where a natural resource user is using management practices which are clearly unsustainable, is adversely affecting others, and is not willing to take action. The NRM policies are aimed towards the ecologically sustainable use and management of natural resources.

Non-regulatory strategies

Extension, education and awareness

The discussion paper recognises that the success of NRM policy depends on strong emphasis being placed on individual and local community awareness of the principles and application of ecologically sustainable use. The DPI aims to achieve this through property management planning, support for community groups and school based programs, and through awareness activities such as Treecare, Landcare and Waterwise.

Research, assessment and monitoring

The discussion paper acknowledges the need for natural resource assessment in order to determine the potential for sustainable use of natural resources. Strategies for natural resource assessment will include targeted research, development and information based decision support systems, ongoing programmes to monitor and assess conditions and trends, development of integrated and assessable information systems, co-ordination of data collection with other organisations, involvement of natural resource holders and users in determination of priorities, and obtaining contributions from the beneficiaries towards the costs of the natural resource assessment.

Market incentives, financial support and industry adjustment schemes

In order to provide real rewards for natural resource holders who adopt sustainable management practices sustainability indicators which can be readily measured will be developed which provide a clear signal to the market place of the quality of the natural resource. Where economic hardship or social problems prevent natural resource holders from using sustainable practices, State, Federal and local government may contribute financially to the implementation of community planning processes. Industry adjustment and efficiency schemes which can

improve the economic viability of rural industry will be developed for the purposes of supporting more sustainable management practices.

Local community planning and action

The discussion paper notes that the most effective way of addressing local strategic issues in an integrated fashion is through a community and government partnership approach. In Queensland this is achieved through two major programs – Landcare and Integrated Catchment Management (**ICM**). ICM provides for strategic planning through catchment co-ordinating committees which prepare catchment management strategies. These strategies will form the basis for addressing significant issues in local areas and provide guidance on the use and management of natural resources.

NRM consultative committees comprised of natural resource holders and users, the community, industry and government will advise the Minister on State wide natural resource issues.

Codes of Practice

Codes of Practice for the sustainable use of natural resources will be developed by natural resource users, industry, community and government. The Codes of Practice and associated guidelines will define:

- the criteria or standards on which the practices are based;
- the suitability of natural resources for various uses;
- suitable management practices for protection of natural resources from degradation; and
- protection of the environment from the operation of rural industries.

Development of natural resource enhancement programs

Natural resource enhancement programs will protect scarce "*native*" natural resources by providing additional or alternative sources for consumption and by rehabilitating degraded natural resources.

State and regional policy development

Natural resource policies will be developed which address State and regional natural resource issues of a strategic and long term nature. State policies for natural resources will be prepared by the State government on a whole of government basis through a process that involves industry and community participation. Policies will be implemented through voluntary mechanisms and where appropriate, NRM legislation, NRM plans and other existing legislative means.

Regulatory strategies

Natural resource management plans

NRM plans will:

- detail the allocations of State owned or controlled water, forest and fisheries resources in a local area;
- define use and management practices for water resources, State forests and fisheries; and
- define use and management practices for Special Management Areas (see below).

These plans will be prepared following consultation with affected natural resource holders, rural industry, rural community groups and the wider community. The plans will provide for objection and review mechanisms as well as mediation mechanisms. They will authorise the issuing of NRM notices where NRM plans have not been complied with. The plans will also make provision for compensation where appropriate.

State owned or controlled natural resources

In the case of State owned or controlled water, forests and fisheries, NRM plans would be used for:

- bulk allocation and multiple use planning and management of natural resources;
- extraction and removal of natural resources;
- allocation of natural resources and their associated entitlements and obligations to individuals; and
- protection of natural resources from degradation.

Special management areas

NRM plans will be prepared to detail management/use practices where voluntary, individual and community action will not be adequate to protect privately controlled natural resources from degradation or to provide for sustainable use. For example:

- **Critical areas**: Areas where development of the natural resource has the potential to lead to its irreversible degradation including land at high risk of soil erosion, soil salinity, re-growth and weed invasion, mass movement, riparian lands, water storage.

- **Responsibilities not being met**: Where an individual natural resource holder or user is using management practices which are unsustainable resulting in severe degradation of the natural resource and community interest being adversely affected.
- **Co-ordination areas**: Where co-ordinated action amongst separate holders would enhance capabilities for sustainable use, eg where natural run-off from a property is adversely affecting other properties.
- **Flood plains**: Where there is a need to address natural resource events which affect the broad interests of the community such as flooding or fire.

Licences and permits

Licences and permits which are currently issued by the State government to allow use of the State's natural resources subject to conditions will be issued within the framework of agreed NRM plans of management. In order that the entitlements of holders and users of natural resources may be continually reviewed, the NRM policy proposes to:

- clearly define entitlements and responsibilities of holders and users;
- review the link between investment conditions and entitlements;
- determine appropriate ownership and tenure conditions for licences;
- further develop market trade of natural resource entitlements; and
- consider existing pricing mechanisms for State owned or controlled natural resources.

NRM agreements

Where an individual wishes to protect privately owned or managed natural resources from degradation or to enhance the management of those resources, NRM policy may provide protection through binding voluntary agreements.

Minor regulatory strategies

NRM notices

Provision will be made for the issue of NRM notices by the Director General to prevent or reduce degradation of natural resources specified in the notice. The notice would be issued where a natural resource holder or user had failed to implement measures specified in an approved NRM plan. Interim restraining notices will be issued by the Minister for Primary Industries where urgent action is required to avoid severe natural resource degradation and a NRM plan has not been approved.

NRM statutory bodies

It is proposed that bodies for which there is existing legislative provision such as River Improvement Trusts and Drainage Boards become NRM statutory bodies. NRM statutory bodies may assume responsibility for the implementation of catchment management strategies or NRM plans in the local area. They will be established where there is a need to provide for equitable cost sharing to implement a plan or where voluntary co-ordination has failed and local landholders, the local community and government support the establishment. These bodies will have specific responsibilities including constructing, operating, managing and maintaining works, generating revenue and entering into cost share arrangements.

Relationship to other policy and legislation

The discussion paper recognises that NRM policy will have to link closely with other policy and legislation of government affecting the sustainable use of natural resources. The allocation decisions for State owned or controlled natural resources under NRM policies will need to account for integrated development approval principles, environmental and nature conservation standards, Native Title and local government planning schemes and strategic plans. In addition, it would be appropriate to provide for the incorporation of the principles and policies of NRM into planning and other natural resource related legislation. It is understood that a RAPI sub-committee is preparing a submission critically reviewing some of the implications of the discussion paper in this regard.

Resource management legislation

The Queensland government has released a discussion paper entitled "*Sustainable Use in Management of Queensland's Natural Resources – Policies and Strategies*".

The discussion paper proposes that the existing nine natural resources Acts (including the Water Resources Act, Forestry Act and Soil Conservation Act) be integrated into one Act together with new regulatory strategies. The discussion paper outlines regulatory and non-regulatory principles and strategies for both State owned or controlled water, forest and land resources and privately owned or managed natural resources. The discussion paper recommends that an integrated catchment management approach be adopted to enable the planning use

in management resources, the reduction of conflict over the use of resources and to provide better definition of entitlements including the market trading of resources.

Sustainability

The New Zealand government has sought to define the critical elements of sustainability agreed to at the Earth Summit in Rio de Janeiro in 1992. These elements include:

- a long term perspective which looks at how decisions affect people and their environment over a longer time frame (10-20 years) as well as in the short (up to 3 years) and medium (3-10) term;
- an integrated approach that considers social, economic and environmental objectives when making decisions;
- a precautionary approach that manages risk through explicit consideration of uncertainties and setting priorities and making decisions;
- the impact of policies and practices in different sectors or groups in geographical areas are considered in terms of equity and social justice principles;
- policy options and trade-offs based on research and information;
- the progress towards stated objectives and goals are monitored and evaluated according to their social, economic and environmental implications;
- a policy process which responds to changing needs and circumstances and priorities based through a flexible and adaptable decision making process; and
- emphasis on consultation and participation by all interested parties.

Victorian Environment Protection Act

The Victorian Parliament has passed the *Environment Protection (General Amendment) Act 1989*. This Act makes significant changes to the *Environment Protection Act 1970* including:

- the introduction of a system of accredited licences whereby the EPA accredits corporations who can demonstrate high levels of environmental performance thereby resulting in fee reduction and some relaxation of works approvals;
- the clarification of responsibility of lenders for environmental management;
- permitting of certain uses in contaminated sites following the preparation of environmental audit statements;
- integration of works approval and environmental assessment procedures;
- reduction of works approval time from six to four months;
- the preparation of an impact assessment in respect of new procedures for State environmental protection policies; and
- reduction in R&D approval projects to 30 days and the payment of fees by instalments where financial hardship can be shown.

Contaminated sites

The Australian and New Zealand Environment and Conservation Council (ANZECC) Position Paper Financial Liability for Contaminated Site Remediation has been released. The Position Paper sets out agreed national principles for attaching financial liability for the remediation of contaminated sites. The liability regime in Queensland is generally consistent with the recommendations of the ANZECC Position Paper.

White paper

On 27 May 1994 the New South Wales Premier released a white paper outlining changes to the management of New South Wales rivers and waterways in order to protect water quality and future water supplies. The white paper sets out definitive environmental goals for each of the State's major waterways as well as a new administrative framework. Key points of the white paper are:

- the establishment of a small independent Catchment Assessment Commission (**CAC**) to recommend to government the water quality objectives for waterways and the bulk users of water, balancing the needs of various users and the environmental needs of the river system under review;
- the establishment of an Office of Water with primary responsibility for water policy. The office will report to the Minister for Land Water Conservation and will forge closer links between land and water management; and
- stronger accountability of government agencies by replacing the Water Resources Council with a Council of Chief Executive Officers of government agencies with responsibilities for water management. The new council will be directly accountable to the Premier.

Caravan park guidelines

The Department of Housing, Local Government and Planning has released guidelines on good design for caravan parks and relocatable home parks. The guidelines are intended to:

- identify current best practice in planning design and servicing matters;
- provide a performance based approach that could blend with current planning and building practices;
- provide local government decision makers with a degree of flexibility in developing and managing residential parks;
- promote high quality facilities for long term and/or tourist residents living in residential parks; and
- help park planners, local government and managers to respond to the needs of people living in residential parks.

National quality strategy

ANZECC has released two more papers helping to set the direction for a National Water Quality Management Strategy. The policy papers entitled "*Policies and Principles: A Reference Document*" and "*Water Quality: An Outline of Policies*" have the objective of ensuring that water quality throughout Australia is managed in a consistent and sustainable way.

Catchment and Land Protection Act 1994 (Vic)

The *Catchment and Land Protection Act 1994* (Victoria) received royal assent on 15 June 1994. The Act provides for a revised system advisory and co-ordinating bodies for catchment management and land protection. These bodies are intended to be responsible for overseeing the preparation of catchment strategies and area plans. This includes the control of pest, plants and animals. The Act repeals the *Soil Conservation and Land Utilisation Act 1958* and the *Vermin and Noxious Weeds Act 1958*. Importantly, the Act also places a legal duty of care on land owners and public land managers to take all reasonable steps to avoid causing or contributing to land degradation on land owned by another party. The Secretary of the Department of Conservation and Natural Resources is also given power to issue land management notices to require a land owner to undertake remedial action.

Environmentally preferred paper purchases

In December 1992, the Prime Minister in his environment policy speech stated that the Commonwealth government would introduce criteria for its paper purchases to give them an environmentally preferred status. The Commonwealth Environment Protection Agency has produced an environmentally preferred paper purchase scheme based on giving preferred status to recycled paper, discriminating against native forest based suppliers and setting mandatory recycled content for Australian government purchases.

Law of the sea

On 16 November 1994 the Law of the Sea Treaty came into effect. The 1982 United Nations Convention of the Law of the Sea (**UNCLOS**) consists of 320 articles and nine technical annexes. One of the most important steps in the process of implementing the treaty was the creation of Australia's Exclusive Economic Zone (**EEZ**) as from August 1, 1994. This extends out for 200 nautical miles and is a zone in which Australia may explore, exploit, conserve and manage the living and non-living resources. Australia has now increased substantially the area of the globe for which it is responsible. Australia's EEZ is one of the largest in the world. By this simple declaration the Commonwealth government has increased Australia's marine rights and responsibilities thereby increasing the importance of the Law of the Sea.

Drinking water guidelines

The National Health and Medical Research Council and the Agricultural and Resource Management Council of Australia and New Zealand have released guidelines for Australian drinking water. The guidelines define drinking water as "*water intended primarily for human consumption in whatever form but which has other domestic uses*". Appearance, taste and odour are generally the only way in which the public judges water quality. The guidelines relate to reuse and need specification. They are intended to provide the Australian community and the water supply industry with guidance on what constitutes good quality drinking water as distinct from water which is acceptable. The guidelines are concerned with the safety of water from a health point of view and with its aesthetic quality. The guidelines are applicable to any water intended for drinking (except bottled or packaged water) irrespective of its source or where it is used.

The guidelines provide:

- an authoritative Australian reference on good quality drinking water and a framework identifying acceptable quality waters through community consultation;
- information on the significance of a range of water born micro-organisms which can cause disease;

- guideline values for a wide range of chemical and radiological substances and physical properties which affect water quality to ensure that drinking water does not pose any significant health risk to the consumer and is aesthetically of good quality;
- advice to operators of water supply systems on the significance of water quality characteristics for the operation of a system;
- procedures for developing monitoring programmes; and
- procedures for assessing performance of a water supply stem and advice on reporting performance to the public and health authorities.

The guidelines do not address:

- packaged water and ice, which are regulated by standard s5 of the Food Standards Code; or
- water for specialised purposes such as renal dialysis and some industrial uses where water of a higher quality than that specified by the guidelines may be required.

Integrated catchment management

The Department of Primary Industries has prepared a survey on integrated catchment management to determine local government understanding of ICM and to identify and prioritise environmental issues. The survey is intended to provide an up-to-date picture on natural resource management issues and actions councils have to take to address these.

This paper was published as a Planning Law Update in the Queensland Planner 34:4, 46-48, December 1994.

Planning law: Review of various planning and environment legislation and guidelines

Ian Wright

This article discusses topical planning and environment policies, guidelines and legislation

December 1994

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This paper was published as a Planning Law Update in the Queensland Planner 34:4, 14-16, December 1994.

Environmental Protection Act: Review of legislation and its implications for local government

Ian Wright | Allison Stanfield

This article discusses the Environmental Protection Act 1994 (EPA). It considers the EPA's objective, administration and operation. The article further discusses how the EPA addresses environmental offences and details the policies, duties, evaluation mechanisms, licences and implications on the Planning and Environment Court and local governments which the EPA imposes

December 1994

Introduction

Scope of EPA

The *Environmental Protection Act 1994* (**EPA**) was passed by the Queensland Parliament on 15 November 1994. It has not yet been assented to or proclaimed. When the EPA commences, it will repeal the *Clean Air Act 1963*, *Clean Waters Act 1978*, *Noise Abatement Act 1978* and *Litter Act 1971*.

The objective of the EPA is ecologically sustainable development which is defined as development that improves the total quality of life both now and in the future in a way that maintains the ecological processes on which life depends.

This objective is intended to be implemented through the adoption of environmental management systems by industry and development interests. The adoption of environmental management systems is encouraged through:

- the specification of offences and penalties in respect of various acts or omissions giving rise to environmental degradation;
- the introduction of legally binding Environmental Protection Policies (**EPPs**) concerned with the setting of standards for specific issues such as water, air quality, noise and waste disposal;
- the imposition of a general environmental duty and a duty to notify;
- the obtaining of environmental authorisations (licences and approvals) for what are called level 1 and level 2 environmentally relevant activities to be prescribed by regulation;
- environmental evaluations being an environmental audit and environmental investigation:
  - the preparation of Environmental Management Programmes (**EMPs**) setting out a plan for achieving gradual compliance with environmental standards;
  - the issue of Environmental Protection Orders (**EPOs**) to enforce the provisions of the Act; and
  - the issuing of non-legally binding guidelines to advise industry, local government and the public about how best to minimise environmental impact.

Administration of the EPA

The EPA provides that the Department of Environment and Heritage (**DEH**) will be the lead agency for environment protection but that the day to day administration of much of the EPA will be handled by other bodies such as local governments and other State government departments.

The EPA is intended to be administered, as far as practicable, in consultation with and having regard to the views and interests of (s.6):

- industry;
- interested groups;
- Aborigines and Torres Strait Islanders under Aboriginal tradition and island custom; and
- the community generally.

Operation of the EPA

The EPA is intended to bind the State and so far as is possible the Commonwealth and the other States (s.19). The EPA is also intended to have an extra territorial operation in that a person who causes environmental harm within Queensland by conduct engaged in outside of Queensland will be guilty of an offence if the conduct would have constituted an offence if engaged in within Queensland (s.22).

The EPA has no application in relation to matters regulated by the *Ambulance Service Act 1991*, *Fire and Emergency Services Act 1990*, *Pollution of Waters by Oil Act 1990*, *State Counter Disaster Organisation Act 1975* and *Radioactive Substances Act 1958*. However, the *Local Government Act 1993*, *Local Government (Planning and Environment) Act 1990*, *Contaminated Land Act 1991* and *Nature Conservation Act 1992* are not affected by the EPA (s.20).

Environmental offences

Offences

The EPA introduces an extensive range of environmental offences including:

- breach of the general duty to notify the administering authority of environmental harm (s.37);
- wilfully and/or unlawfully causing serious environmental harm (s.119);
- wilfully and/or unlawfully causing material environmental harm (s.120);
- wilfully and/or unlawfully causing an environmental nuisance (s.122);
- contravening, wilfully or otherwise, an environmental protection policy (s.123);
- releasing a prescribed contaminant into the environment (s.124);
- allowing a contaminant to be placed in a position where it could reasonably be expected to cause serious or material environmental harm or environmental nuisance (s.125); and
- interfering with any monitoring equipment (s.126).

Environmental harm

The offences of wilfully causing material or serious environmental harm give rise to penalties of $100,000 or two years imprisonment and $250,000 or five years imprisonment respectively.

"*Material environmental harm*" is defined as environmental harm (other than environmental nuisance) that:

- is not trivial or negligible in nature, extent or context;
- causes actual or potential loss or damage to property of an amount of or amounts totalling more than $5,000 but less than $50,000; or
- results in costs of more than $5,000 but less than $50,000 being incurred in taking action to prevent or minimise the harm or rehabilitate or restore the environment to its condition before the harm.

"*Serious environmental harm*" is defined in the same manner as material environmental harm except that in this case the threshold amount is $50,000 or a greater amount prescribed by regulation. Serious environmental harm also extends to environmental harm (other than environmental nuisance) that:

- causes actual or potential harm to environmental values that is irreversible, of a high impact, or widespread; or
- causes actual or potential harm to environmental values of an area of high conservation value or special significance.

The term "*environmental harm*" is defined as any adverse effect or potential adverse effect on an environmental value (whether temporary or permanent and of whatever magnitude duration or frequency) (s.14(1)). Environmental harm may be caused by an activity whether the harm is a direct or indirect result of the activity or whether the harm results from the activity alone or from the combined effects of the activity and other activities or factors (s.114(2)).

The phrase "*environmental value*" is defined as (s.9):

- a quality or physical characteristic of the environment that is conducive to ecological health or public amenity or safety; or
- another quality of the environment identified and declared to be an environmental value under an environmental protection policy or regulation.

Environmental nuisance

The offence of wilfully causing an environmental nuisance gives rise to a penalty of $50,000. An environmental nuisance is defined to be an unreasonable interference or a likely interference with an environmental value caused by noise, dust, odour, light or an unhealthy, offensive, or unsightly condition because of contamination (or any other way prescribed by regulation) (s.15).

Contamination of environment

The EPA also has specific offences and penalties in respect of the contamination of the environment. The "*contamination*" of the environment occurs where a contaminant is released (whether by act or omission) into the environment (s.10).

The term "*contaminant*" is defined very broadly as including a gas, liquid or solid; an odour; an organism (whether alive or dead) including a virus; energy, including noise, heat, radioactivity and electromagnetic radiation; or a combination of contaminants (s.11). This is broader than the definition of "*hazardous substance*" under the *Contaminated Land Act 1991* which relates to a hazard to human health or the environment.

The term "*environment*" is defined in the same manner as the *Local Government (Planning and Environment) Act 1990*. The definition is extremely broad and includes (s.8):

- ecosystems and their constituent parts, including people in communities;
- all natural and physical resources;
- the qualities and characteristics of locations, places and areas however large or small, that contribute to their biological diversity and integrity, intrinsic or attributed scientific value or interest, amenity, harmony and sense of community; and
- the social, economic, aesthetic and cultural conditions that affect or are affected by matters mentioned above.

Proof of offences and defences

An authorised officer may give evidence (without the need to call further opinion evidence) that the authorised officer formed the opinion based on the authorised officer's own senses that noise, smoke, dust, fumes or odour was emitted from a place occupied by the defendant and travelled to a place occupied by another person or constituted an unreasonable interference with the person's enjoyment of the place (s.180(2)).

It is a defence to each of the offences of material or serious environmental harm, environmental nuisance or contamination of the environment to prove (s.118(2)):

- the harm happened in the course of a lawful activity; and
- the defendant complied with the general environmental duty.

Offences by corporations

Where a corporation is charged with an offence and it becomes necessary to establish the state of mind of a person in relation to an act or omission of a corporation, it is sufficient for the administering authority to show that:

- the act or omission was done or omitted to be done by a representative of the person within the scope of the representative's actual or apparent authority; and
- the representative had the necessary state of mind (s.181(1)).

It is a defence for the person however to show that they took all reasonable steps to prevent the acts or omissions (s.181(2)).

Furthermore, the executive officers of a corporation are required by the EPA to ensure that the body corporate complies with the EPA (s.182(1)). If the body corporate commits an offence each of the executive officers of the body corporate also commits an offence, namely the offence of failing to ensure that the body corporate complies with the EPA (s.182(2)). However, it is a defence for the executive officer to prove that the officer:

- took all reasonable steps to ensure the corporation complied with the provision if the officer was in a position to influence the conduct of the corporation in relation to the offence; or
- was not in a position to influence the conduct of the corporation in relation to the offence (s.182(4)).

Environmental Protection Policies

Preparation of EPPs

Central to the EPA is the preparation of Environmental Protection Policies (**EPPs**) which set the standards of environmental quality and provide a framework for achieving those standards. The maximum penalty for failing to comply with an EPP is $100,000 or two years imprisonment (s.123(1)).

The EPA prescribes a procedure for preparing EPPs:

- The Minister must give public notice of the proposal to prepare the draft EPP (s.26(1)) by advertising the draft EPP once a week for two consecutive weeks in a newspaper circulating throughout the State (s.26(2)(a)(i)) or if the EPP applies only to a particular area of the State, then in a newspaper circulating in that area (s.26(2)(a)(ii)). The notice must specify whether the EPP relates to an aspect or part of the environment and if so, what aspect or part (s.26(2)(b)). Section 26 does not apply to a draft EPP prepared by the Minister before the commencement of Chapter 2 of the EPA.

- Public submissions may be made within a 40 day period (s.26(3)) and the Minister is obliged to consider the submissions in preparing the draft EPP (s.27).
- Once formulated the Minister must give public notice of the draft EPP in the same manner as in respect of the proposal to prepare a policy (s.28). Again, the Minister must consider all submissions properly made to the Minister on the draft EPP (s.29(1)).
- Once approved by the Governor-in-Council, the EPP becomes subordinate legislation (s.30(1)).
- Once approved, there is a positive obligation on the administering authority (the relevant State government department or local government) to give effect to the EPP (s.31).

The Minister must review the EPP within seven years after its commencement (s.33(1)). In addition an EPP may be amended by the Governor-in-Council by following the same procedures for public consultation in respect of a draft EPP (s.32).

Types of EPPs

The DEH has indicated that the first four EPPs under the EPA will relate to noise, air, water and waste management. The first stage of the two stage process of public consultation has been completed and the draft EPP's are presently being prepared for further public consultation prior to being submitted to the Minister for approval.

Environmental duties

Types

The EPA imposes upon persons a general environmental duty as well as a duty to notify the administering authority of environmental harm.

General environmental duty

Under the general environmental duty a person must not carry out an activity that causes or is likely to cause environmental harm unless the person takes all reasonable and practicable measures to prevent or minimise the harm. In deciding the measures required to be taken regard must be had to the following factors (s.36):

- the nature of the harm or potential harm;
- the sensitivity of the receiving environment;
- the current state of technical knowledge for the activity;
- the likelihood of successful application of the various measures that might be taken; and
- the financial implications of the various measures as they would relate to the type of activity.

Duty to notify

In addition, a duty is imposed on persons who have become aware of an event or condition involving a serious or material environmental harm (or the threat of same) to give written notice to the administering authority of the event or condition, its nature and the circumstances in which it happened as soon as is reasonably practicable (s.37).

If the person is an employee or agent, the person must tell the employer of the event or condition. If the employer cannot be contacted, the employee or agent must give written notice to the administering authority (s.37(3)). Such a notice is not admissible in evidence against the person in a prosecution for an offence against the Act (s.37(8)).

Environmental authorisations

Environmentally relevant activities

The EPA provides for the licensing and control of environmentally relevant activities. An activity can be prescribed as an environmentally relevant activity by regulation if the Governor-in-Council is satisfied that a contaminant will or may be released into the environment when the activity is carried out and the release of the contaminant will or may cause environmental harm (s.38(1)). Depending on the level of risk to the environment the activity may be classified as a level 1 or level 2 activity (s.38(2)).

A person is prohibited from carrying out a level 1 environmentally relevant activity without a licence (s.39) and a regulation may provide that a level 2 environmentally relevant activity may not be carried out without an approval (s.40).

Application for approval or licence

The EPA specifies the procedure to be followed for an application for an environmental authorisation whether it be an approval or a licence (s.41).

- It must be made in the approved form (s.41(1)(a)).

- The application must be supported by enough information to enable the administering authority to properly decide the application. The administering authority is empowered to seek further information from the applicant (s.41(1)(b)).
- It must be accompanied by the appropriate fee (s.41(l)(c)).
- After the application is lodged with the administering authority, the applicant must give public notice of the application by (s.42):
  - placing an advertisement in a newspaper circulating in the area in which the environmentally relevant activity to which the application relates is proposed to be carried out;
  - placing a notice on the premises to which the application relates; and
  - serving a notice on the occupiers of all premises adjoining the premises to which the application relates.

Submissions must also be invited from government departments, public authorities, local governments, landholders, industry, interested groups and persons and members of the public (s.42(2)(b)). Submissions may be lodged within 10 business days (s.42(2)(c)).

- The administering authority is required to consider the following matters prior to determining the application (s.44):
  - the standard criteria (as defined in the dictionary attached to the EPA) being:
    - the principles of ecologically sustainable development as set out in the National Strategy for Ecologically Sustainable Development;
    - any applicable environmental protection policy;
    - any applicable Commonwealth, State or local government plans, standards, agreements or requirements;
    - any applicable environmental impact study, assessment or report;
    - the character, resilience and values of the receiving environment;
    - all submissions made by the applicant and interested parties;
    - the best practice environmental management for the activity under the authorisation, programme or order;
    - the financial implications of the requirements of the authorisation, programme or order as they would relate to the type of activity or industry carried on under the authorisation, programme or order;
    - the public interest; and
    - any other matter prescribed by regulation.
  - additional information given in relation to the application;
  - any report about the applicant's suitability to hold or continue to hold, an environmental authority; and
  - the views expressed at a conference held in relation to the application.
- The administering authority must determine the application for an environmental authorisation within 28 days from the application date (s.43). If the administering authority decides to refuse an application, the administering authority must give written reasons for refusal within 10 days of making its decision (s.45(2)).
- All licences and approvals granted by the administering authority are required to be entered into a publicly available register (s.212(1)).

The decision to grant or refuse a licence is an "*original decision*" and the applicant is entitled to apply for a review of the decision under the terms of s.201.

Provisional licences

The administering authority is empowered to issue a provisional licence if, in the authority's opinion, the applicant is not able to give enough information about the application to permit the authority to issue a licence but the authority is satisfied the applicant will be able, and the applicant gives the authority an undertaking, to comply with all relevant environmental protection policies (s.47). A provisional licence remains in force for the period specified in the licence but in any event, for not more than five years (s.47(3)(b)).

Licence conditions

Conditions which the administering authority can impose on a licence include that an applicant:

- install and operate stated plant or equipment in a stated way within a stated time;
- take stated measures to minimise the likelihood of environmental harm being caused;

- carry out and report on a stated monitoring program;
- prepare and carry out an Environmental Management Programme (**EMP**);
- give relevant information reasonably required by the administering authority for the administration or enforcement of this EPA.

The administering authority may prohibit the licensee from changing, replacing or operating any plant or equipment installed in the licensed place if the change, replacement or operation of the plant or equipment increases, or is likely to substantially increase, the risk of environmental harm.

Further, conditions of an approval may require the approval holder to take stated measures to minimise the likelihood of environmental harm being caused.

The requirement that an EMP be prepared is subject to review under s.201.

Financial assurance may also be required by way of a licence condition (s.114) provided a notice is first served upon the applicant (s.115).

Amendment of licences

An application may be made to the administering authority to amend the licence (s.49). Public notice of the application must be given on the same basis as that of an application for a new licence if the administering authority is satisfied that there is likely to be a substantial increase in the risk of environmental harm because of a substantial change in (s.49(3)):

- the quantity or quality of a contaminant licensed to be released into the environment; or
- the results of the release of a quantity or quality of contaminant licensed to be released into the environment.

An increase of 10% or more in the quantity of the contaminant to be released into the environment is deemed to be a substantial change (s.49(4)). A decision to grant or refuse an application to amend a licence is subject to review under s.201.

The administering authority is also empowered to amend a licence where the licensee consents to the amendment or the administering authority considers it necessary or desirable as a result of (s.50):

- a contravention of the EPA by the licensee;
- the licence was issued on the basis of a false or misleading representation or declaration, made either orally or in writing;
- the licence was issued on the basis of a miscalculation of the quantity or quality of contaminant licensed to be released into the environment;
- the licence was issued on the basis of a miscalculation of the effects of the release of a quantity or quality of contaminant licensed to be released into the environment;
- a change in the way in which, or the place where, contaminants are, or are likely to be, released into the environment;
- the approval of an environmental protection policy or the approval of the amendment of an environmental protection policy;
- an environmental report; or
- another circumstance prescribed by regulation.

An amendment made by an administering authority is subject to review under s.201.

Transfer of licences

Where the business of carrying on an environmentally relevant activity is to be transferred, the licensee must give written notice to the buyer that the buyer must make application under the EPA for the transfer of the licence or a new licence. This applies where the licensee proposes to sell or dispose of the licensee's business to another person (s.53).

The administering authority must decide an application for transfer within 28 days after the application date (s.56). The administering authority must give written notice to the applicant of its decision to grant or refuse an application and the reasons for any refusal within 10 days after making its decision (s.57(1) and s.58(2)).

The administering authority may refuse a transfer if the applicant is not a suitable person to hold the licence, has been convicted of an offence against the EPA or has had a licence cancelled or suspended under the EPA. If the applicant is a corporation, then offences of executive officers will be relevant (s.58(3)). Any refusal of an application for transfer under s.47 is subject to review under s.201.

Cancellation and suspension of licence

A licence can be suspended or cancelled if the administering authority is satisfied on reasonable grounds that the licensee has been convicted of an offence against the EPA or the licence was issued because of a false or misleading representation (s.59). A show cause procedure must be followed prior to cancellation or suspension (s.60). A decision to suspend or cancel a licence is subject to review under s.201.

Environmental evaluation

Environmental audits and investigations

The EPA empowers the administering authority to require an environmental evaluation to be undertaken. The decision to require an evaluation can be the subject of a request for internal review and appeal under s.201.

An environmental evaluation may take the form of either an environmental audit or an environmental investigation. An audit may be required where it appears to the administering authority that a licensee is not complying with licence conditions, an EPP or an EMP (s.71). An environmental investigation may be required where an activity is causing or is likely to cause serious or material environmental harm but there is no apparent breach of conditions or want of compliance with an EPP or EMP (s.72).

Content of environmental evaluation report

Failure to undertake the evaluation is an offence, the maximum penalty for which is $6,000. The evaluation must be accompanied by a declaration from the person required to conduct the evaluation and the auditor who in fact carried out the evaluation. The owner's declaration is to state that no false or misleading information has been given to the auditor and no relevant information has knowingly been withheld. The auditor's declaration must certify the report is accurate (s.74).

Review of environmental evaluation report

Following the receipt of an environmental evaluation report the administering authority may amend licence conditions, require the recipient to prepare and submit an EMP, serve an environmental protection order on the recipient or commence proceedings against the recipient for an offence under the Act, or take any other action it considers appropriate (s.75). The cost of conducting or commissioning an evaluation report is to be met by the recipient (s.76).

Environmental management programme

Purpose of EMP

An environmental management program is a specific program that when approved achieves compliance with the Act by reducing environmental harm or detailing the transition to an environmental standard (s.79).

Application for EMP

The EPA specifies the procedure by which applications for EMPs are made and determined by the administering authority:

- A person may at any time submit for approval a draft EMP to the administering authority for an activity which the person is carrying out or proposes to carry out (s.82).
- Where the draft EMP specifies a period longer than three years over which the programme is to be carried out, public notice of the submission must be given within two days after the application date by (s.84):
  - advertisement published in a newspaper circulating in the area in which the activity to which the draft programme relates is carried out; and
  - placing a notice on the premises to which the draft programme relates; and
  - serving a notice on the occupiers of all premises adjoining the premises to which the draft programme relates.

The notice is required to invite submissions on the draft programme from government departments, public authorities, local governments, landholders, industry, interested groups and persons and members of the public (s.84(3)(b)).

Protection from prosecution

The EPA specifies a procedure whereby a person who has caused or threatened environmental harm during the course of an activity that would be lawful but for the EPA may gain protection from prosecution in respect of a continuing offence. A three stage procedure is specified:

- A programme notice must be given to the administering authority stating that an act or omission that has caused or threatened environmental harm during the course of an activity carried out by the person is lawful but for the Act (s.100). The programme notice and other documents submitted are not admissible in evidence in any prosecution for the original offence (s.101).

- Within 14 days of receipt of the programme notice the administering authority must give written notice to the person of its receipt and specify the day by which a draft EMP must be submitted for approval (s.102).
- A draft EMP must be submitted to the administering authority within three months after the authority's receipt of the programme notice (s.102(2)).

The person giving the programme notice cannot be prosecuted for a continuation of the original offence that happens after the administration authority's receipt of the notice until the person submitting the notice (s.103(2)):

- receives from the administering authority a certificate of approval of the EMP for the relevant event;
- receives from the administering authority a notice of refusal to approve the EMP for the relevant event; or
- a draft EMP for the relevant event is not submitted to the administering authority within the specified time.

However the protection from prosecution is also lost if the holder of a certificate of approval for an EMP under a programme notice does not comply with the EMP (s.104). The administering authority may also apply to the Planning and Environment Court for an order that the protection from prosecution should be removed because of the nature and extent of the environmental harm caused or threatened by the continuation of the original offence (s.105). In deciding whether to make such an order the court will have regard to the following (s.106(2)):

- the nature and extent of the environmental harm caused or threatened by a continuation of the original offence under the programme notice;
- the resilience of the receiving environment;
- the circumstances in which the relevant event happened;
- the previous environmental record of the person who gave the programme notice; and
- whether an environmental management programme or protection order is in force for the relevant event.

The court may also make an order which the court considers appropriate pending a decision of the application for an EMP. For example the court may (s.107(3)):

- direct the person who gave the programme notice to do or stop doing anything specified in the order to prevent a continuation of the original offence under the notice; or
- make an order appropriate to prevent or minimise environmental harm.

A person who contravenes an order of the court commits an offence against the EPA attracting a maximum penalty of $180,000 or imprisonment for two years (s.70H).

Disclosure of EMP

Where a certified holder of an approved EMP wishes to sell or dispose of the place of business to which the programme relates the certificate holder must give written notice to the proposed buyer of the existence of the programme and within 14 days of making the agreement to sell give written notice of the sale to the authority. Failure to do so is an offence, the maximum penalty for which is $3,000 or two years imprisonment (s.107(5)).

Environmental Protection Orders

The administering authority may issue an Environmental Protection Order (**EPO**) where there is (s.108):

- non-compliance with a requirement to conduct or commission an environmental evaluation;
- a failure to prepare an EMP if required;
- serious or material environmental harm being or likely to be caused by an activity; or
- non-compliance with the general environmental duty, a condition of a licence, or an environmental protection policy.

A decision to issue an EPO can be the subject of a request for internal review (s.201). Failure to comply with an EPO is an offence, the maximum penalty for which is $120,000 (s.111(1)). The existence of any EPO must be disclosed to an intending purchaser of a business before making the agreement to sell (s.112).

Investigation and enforcement

Authorised officers

Officers of the public service, an employee of the Department of Environment and Heritage, an employee of the local government or a person in an "*approved class*" may be appointed an "*authorised officer*" for the administration and enforcement of the EPA (s.127).

Authorised officers are to be issued with photo ID cards (s.130) which the authorised officer must produce for inspection when exercising a power under the EPA (s.131(1)), unless the authorised officer is uniformed (s.132(2)).

An authorised officer is immune to civil liability if an act done or an omission is made honestly and without negligence (s.132(2)). Instead, civil liability will attach to the local government, or the State, whichever is the body giving directions to the official (s.132(3)).

Powers of authorised officers

An authorised officer may enter land to ascertain if environmental harm has been caused by the release of a contaminant into the environment (s.135(3)). The entry must be at a reasonable time (s.134(2) and must be subject to the following conditions:

- the occupier consents to the entry;
- the entry is authorised by a warrant;
- if the place is a public place, it must be open to the public at the time of entry;
- if the place is licensed, it must be open for the conduct of business or otherwise open for entry and the authorised officer must believe on reasonable grounds that the environmentally relevant activity is being carried out;
- if industry is conducted on the land, the authorised officer must be entering to establish the place from which a contaminant causing an environmental nuisance has been released and the authorised officer must believe on reasonable grounds that the place is open for the conduct of business or is otherwise open for entry (s.134(1)).

If a vehicle is suspected of being used in the commission of an offence against the Act or of providing evidence of the commission of an offence against the Act or is being used to transport waste (to be prescribed by regulation), the authorised officer may board it (s.138(1)), stop it or order it not to be moved (s.138(2)). Failure to stop or move a vehicle as requested by an authorised officer is an offence with a maximum penalty of $3,000 (s.159(1)). It is a reasonable excuse however where compliance with the request would have posed a danger to a person and the request was complied with as soon as was reasonably practicable (s.159)(2)). An authorised officer may require the person in the vehicle to give reasonable help (s.138(3)). Failure to render such help is an offence, the maximum penalty for which is $3,000 (s.160(2)).

In relation to a place or vehicle, an authorised officer has power to (under s.139(1)):

- search any part;
- inspect, examine, test, measure, photograph or film anything;
- take samples of any contaminant, substance or thing;
- record, measure, test or analyse the release of contaminants into the environment;
- take extracts from, or make copies of any document;
- take any equipment and materials the officer reasonably requires with him/her;
- install or maintain any equipment and materials the authorised officer reasonably requires.

In carrying out the authorised officer's powers listed above, the authorised officer may require the occupier to render help (failure to do so is an offence (s.116) or require the person in control of a vehicle to bring it to a specified place and to remain in control of the vehicle for a reasonable time.

Authorised officers are also empowered to seize evidence (s.140). They are also required to issue a receipt of the seizure or damage to the person from whom the thing was seized (s.141(1)).

An authorised officer can require a person to state their name and address if that person is committing an offence against the Act or the authorised officer has reasonable grounds to suspect the person is committing an offence against the Act (s.143). Failure to provide name and address is an offence, the maximum penalty of which is $3,000 (s.163(1)).

Similarly a person can be required to answer a question by the authorised officer. The authorised officer must first warn the person that it is an offence not to answer unless the person has a reasonable excuse for not doing so (s.144). The maximum penalty for failing to answer is $3,000 (s.164).

Authorised officers have powers to require production of documents and to take copies of same (s.145). The failure to produce documents carries a maximum penalty of $3,000 (s.165).

Warrants

An application can be made to the Magistrates Court for the issue of a warrant for an authorised officer to enter a place (s.136). If the warrant is required urgently or if an authorised officer is on a remote location, a warrant can be applied for by telephone, facsimile, radio or another form of communication (s.137). Similarly the warrant can be faxed to the authorised officer (s.137(4)). If it cannot be faxed then the Magistrates Court must tell the authorised officer the terms of the warrant and the authorised officer is to fill out a form of warrant (s.137(5)).

Noise complaints

The EPA is intended to apply to the abatement of environmental nuisance caused by excessive noise that is audible in any residential or commercial premises and is emitted from a place by a musical instrument, an amplifier, a motor vehicle that is not on a road or a party, celebration or the like. Noise emitted by an open-air concert or commercial entertainment or a public meeting under permit is excluded from the application of the EPA.

Complaints in respect of excessive noise may be made to the police who are then obliged to investigate (s.148). The police are given power to investigate without a warrant (s.149) and may issue a "*noise abatement direction*" against the person. Failure to comply with such direction is an offence, the maximum penalty for which is $600 (s.166).

Emergency powers

If an authorised officer is satisfied on reasonable grounds that a serious or material environmental harm has been or is likely to be caused and urgent action is necessary to prevent or minimise the harm, or rehabilitate or restore the environment because of the harm the authorised officer may enter the property without a warrant (s.155). Authorised officers can use such help and force as is necessary and reasonable in exercising their emergency powers (s.155(6)). However steps must be taken to cause as little inconvenience and damage as is practicable (s.155(8)).

An authorised officer can authorise in writing the emergency release of a contaminant into the environment, if the release of the contaminant is necessary and reasonable and there is no other practicable alternative to the release (s.156). If a person fails to comply with a direction for the emergency release of a contaminant, the person commits an offence, the maximum penalty for which is $3,000 (s.169).

Failing to answer a question in an emergency is an offence, the maximum penalty for which is $600 (s.161(3)). Self-incrimination is not an excuse (s.161(4)), however, if the person objects to answering the question on the basis that it may be self-incriminating, then the answer may not be used in evidence against the person (s.161(2)(c)).

General offences

Apart from the specific environmental offences and other offences mentioned in this paper the EPA also specifies a range of other offences including:

- impersonation of an authorised officer – maximum penalty of $3,000 (s.173);
- obstruction of an authorised officer – maximum penalty of $6,000 (s.172);
- giving false or misleading documents – maximum penalty of $9,900 (s.170);
- giving false or misleading information to an authorised officer – maximum penalty of $9,900 (s.171); and
- attempting to commit an offence is an offence for which the maximum penalty is half the maximum penalty for committing the offence.

Internal review and appeal

Internal review by administering authority

Internal review is available in respect of "*original decisions*" which are set out in Schedule One of the EPA.

An application by a dissatisfied person for a review of an original decision under the EPA must be made to the administering authority within 14 days after the day on which the person receives notice of the original decision or such longer period as the authority, in special circumstances, allows (s.201(2)).

If the administering authority does not decide the application for review and notify the person of its decision within 14 days of receiving the application the authority is taken to have made a decision affirming the original decision (s.201(10)).

Appeal by Planning and Environmental Court

Following internal review an aggrieved person may appeal to the Planning and Environment Court if they are dissatisfied with the review (s.203). That appeal to the court must be commenced in the case of the chief executive within 45 days and anyone else within 30 days from the day on which the person receives notice of the review decision or such longer period as the court in special circumstances allows (s.204(2)).

Where the administration and enforcement of an EPP, the issue of environmental authorisations or any other matter under the EPA has been devolved by regulation to a local government the local government is empowered to make by-laws or ordinances with respect to that devolved matter.

Powers of court

If the appeal concerns a licence, the appeal may be heard conjunctively with a planning or development matter for the premises the subject of the licence (s.210).

A proceeding for a restraining order may be brought to restrain or remedy an offence against the EPA by:

- the Minister;
- the administering authority;
- someone whose interests are affected by the subject matter of the proceeding; or
- someone else with the leave of the court (even though the person does not have a proprietary, material, financial or special interest in the subject matter of the proceeding) (s.193(1)).

In deciding whether or not to grant leave to a person under s.193(1)(d) the court must be satisfied that:

- environmental harm has been or is likely to be caused; and
- the proceeding would not be an abuse of the process of the court; and
- there is a real or significant likelihood that the requirements for the making of an order under this section would be satisfied; and
- it is in the public interest that the proceeding should be brought; and
- the person has given written notice to the Minister or, if the administering authority is a local government, the administering executive, asking the Minister or authority to bring a proceeding under this section and the Minister or executive has failed to act within a time that is a reasonable time in the circumstances; and
- the person is able to adequately represent the public interest in the conduct of the proceeding; and
- the court may also have regard to other matters the court considers relevant to the person's standing to bring and maintain the proceeding (s.193(2)).

However, the court must not refuse to grant leave merely because the person's interest in the subject matter of the proceeding is no different from someone else's interest in the subject matter (s.193(3)).

Claim for compensation

A court hearing a prosecution under the Act is empowered to award compensation or damages to any person who has suffered loss as a result of a contravention of the Act (s.191(2)(a)).

In addition to orders pertaining to compensation, damages and penalties the court can also order action to be taken to rehabilitate and restore the environment and require payment of the authority's investigative costs (s.191(2)(b)).

If a person is convicted of an offence against the EPA and the administering authority has reasonably incurred costs and expenses in sampling, inspecting, testing, measuring or analysing, the court may order the administering authority's reasonable costs and expenses be paid (s.192).

Transitional provisions

Licences obtained under the *Clean Air Act 1963* and the *Clean Waters Act 1971* continue until such time as they are cancelled by the Department of Environment and Heritage or one year from the commencement of the EPA (s.225(1)).

The DEH must give the licence holder 60 days' notice of any cancellation (s.225(2)). Although application for a licence is still required under the EPA, the public notice requirements do not apply to an application if an existing licence is already held (s.225(4)).

Further, if a licence application is pending yet undecided at the commencement of the EPA, that application will be deemed to have been made under the EPA (s.226(1)).

Again, the public notice requirements of the EPA will not apply to the application for licence (s.226(2)).

Those persons who did not require a licence before the commencement of the EPA but will be required to apply for a licence after the EPA's commencement have one year in which to make the application (s.235(1)). The administering authority may require the application within a certain time by written notice served upon the relevant person (s.235(2)).

Noise will not constitute an environment nuisance until the *Noise Abatement Act 1978* is repealed or one year from the commencement of the EPA, whichever is earlier (ss. 230, 231).

Implications for local government

Environmental protection policies

Local governments must ensure that Environmental Protection Policies are considered in the development assessment process as well as in the approval of applications for environmental authorisations (ie both licences and approvals). Accordingly local governments should make appropriate changes to their administrative procedures such as the:

- development of checklists based on the criteria and provisions of the Environmental Protection Policies;
- development of procedural manuals; and
- formalisation of the prescribed information that has to be submitted with applications.

Environmental offences

Local governments must also ensure that they are not in breach of the various environmental offences under the Act. Accordingly facilities such as works depots, fuel storage areas, transfer stations and sewerage treatment plants will need to be licensed as these are likely to be environmentally relevant activities. Furthermore council assets and operations should be continually audited as part of the council's corporate planning and business planning process to ensure that there is:

- no contamination of the environment;
- no serious or material environmental harm; and
- no environmental nuisance.

Environmental duty

Local governments are also subject to the general environmental duties in the Act. Therefore local governments, as corporate entities, must notify the Department of Environment and Heritage of environmental harm that has occurred irrespective of whether the information has come to the attention of the local government as an administrating authority under the Act or simply in the course of the exercise of its local government functions. Appropriate administrative procedures will therefore have to be put in place including:

- the development of questionnaires and checklists;
- internal notification procedures within local governments; and
- external notification procedures to the Department of Environment and Heritage.

Environmental authorisations

Local governments must also ensure that there are appropriate resources and expertise to assess applications for environmental authorisations whether they be approvals or licences. The Environmental Protection Act should not be treated simply as another avenue to collect revenues through licensing fees. The approval of environmentally relevant activities represents a potential source of legal liability for local governments which is much greater than the existing licensing of stalls, advertising devices, places of amusement and other matters requiring licensing under local laws.

The potential legal liability of local government is illustrated in a case involving the Armidale City Council. In that case the council approved a timber treatment plant on the outskirts of the City in 1967. During the course of operation of the plant there were numerous spillages of contaminate material containing copper, chrome, arsenic and salt. Despite this the land was rezoned for residential development in 1975. The plant subsequently closed down in 1979 and another four subdivision applications were subsequently lodged and approved by the council between 1985 and 1989. In 1990, while inspecting the site the council discovered contamination. The residents who had purchased the land commenced proceedings against Armidale City Council. The Federal Court held that officers of the council knew that substances had irregularly escaped from the timber plant and that the possible side effects on the site of industrial pollution would have been present to the mind of a reasonable town planner when considering development approvals. Accordingly the council owed a duty of care in respect of each of the development applications made in respect of the site and that it had breached that duty by approving the residential subdivisions. Accordingly a council when approving development applications must have regard to the prior use of the land when assessing whether that land is suitable for residential property development. Arguably this duty could also extend to a council making recommendations in respect to the rezoning of industrial land. Although as a matter of prudence developers and other purchasers should manage to satisfy themselves as to the history of the land, this case involving Armidale City Council makes it clear that purchasers may be entitled to rely on representations made by a council through development and building approvals as to the suitability of land for development.

Accordingly based on this authority it will be necessary for local governments to minimise their potential legal liability by ensuring that appropriate human and financial resources are brought to bear to appropriately assess applications for licences and approvals. A failure to appropriately assess licences and approvals may subsequently lead to actions for negligence in the future.

Audits and evaluations

Local governments must also focus on the implications of those provisions relating to environmental evaluations whether they be environmental audits or environmental investigations. The implementation of these provisions will require local government to:

- allocate human and financial resources to the monitoring and enforcement process thereby bringing into focus issues of multi skilling of staff and the outcomes that are now emerging out of the LARP process; and
- incorporate requirements for ongoing monitoring and reporting into environmental licence and approval conditions under the Environmental Protection Act as well as in town planning approvals under the Local Government (Planning and Environment) Act and the local government's planning scheme.

Environmental management programmes

Local governments must also be aware of the implications of the Environmental Management Programmes. In particular local governments must:

- allocate sufficient expertise and resources to assess environmental management programmes lodged by applicants;
- allocate resources to evaluate operational facilities as against environmental management programmes; and
- incorporate provisions for the preparation of environmental management programmes into the conditions of town planning approvals where appropriate.

Environmental protection orders

Local governments must also focus on the power to issue environmental protection orders and their general investigation powers under the Act. It will therefore be necessary for local governments to:

- allocate resources for enforcement and monitoring;
- develop standard site investigation and enforcement manuals; and
- consider the restricted powers of entry that are available under the Local Government Act in the exercise of their investigation powers.

Appeals to court

Local governments must also ensure that their actions are defensible as their decisions as administering authorities are now appealable to the Planning and Environment Court. It would therefore be necessary for local governments to:

- require environmental health managers and other council officers to produce written reports that are supported by a greater range of technical data and analysis than currently exists;
- increase legal budgets for Environmental Health Departments to reflect the fact that their decisions will now be appealable to the Planning and Environment Court; and
- improve the expert witness and advocacy skills of local government officers.

Compensation

Local governments must all be particularly careful in respect to the administration of the Act. If unlawful actions cause loss to a person, a local government may be held potentially liable for compensation. Local governments should also be aware of their potential liability of approving developments which may give rise to land contamination either under the *Contaminated Land Act 1991* or as a result of a common law action for negligence. It will therefore be necessary for local governments to implement total quality management and quality assurance programmes where appropriate.

Transitional provisions

Local governments must consider the transitional provisions of the Act very carefully. All existing licences and approvals are maintained and as a result local governments must be careful not to take action which derogates from those licences and approvals unless they are acting in accordance with the provisions of the Act.

References

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