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A Brave New World?

Environment Protection and Biodiversity Conservation Act 1999

Louise Blazejowska, Policy Director, EDO(NSW)

"Suddenly, from out of the Synthetic Music Box a Voice began to speak. The Voice of Reason, the Voice of Good Feeling. The sound-track roll was unwinding itself in Synthetic Anti-Riot Speech Number Two (Medium Strength). Straight from the depths of a non-existent heart, "My friends, my friends!" said the Voice so pathetically, "...what is the meaning of this? Why aren't you all being happy and good together? Happy and good," the Voice repeated. "At peace, at peace."

[Extract from *Brave New World*, by Aldous Huxley]

In his opening address to the audience at the EDO's *'A New Green Agenda'* Conference in October 1999, Senator Robert Hill, Commonwealth Minister for the Environment and Heritage, exhorted environment groups to stop debating the merits of the new regime created under the Commonwealth's recently passed *Environmental Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) and move on:

> "In my view, because it reflects an appropriate division of powers between the Commonwealth and the States, and because it contains numerous other significant advances, the new legislation represents an enormous improvement in the Commonwealth's environmental law regime. It will enhance the protection of the environment and promote the development of nationally consistent standards; it will reduce intergovernmental duplication, and it will provide a more timely and efficient assessment and approval process for proponents. I am pleased to say that a wide range of commentators, internationally and nationally, have supported my assessment of the Act. However, I suspect that some speakers today will not support my view, and argue about the merits of the legislation. As I said at the outset, I think that - an interesting debate though it might be - it is really time to move on."

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In this edition: The *Environment Protection and Biodiversity Conservation Act 1999* came into force on 16 July 2000, but it is still a work in progress, with amendments to the regulations foreshadowed and bilateral agreements between the Commonwealth and States yet to be finalised. In this edition of *Impact* we present several articles on the new legislation.

The articles by Jamie Pittock, and John Connor and Michael Kerr, reflect differing views within the conservation movement about the legislation. They do not represent the views of the National EDO Network.

Inside...

4 Pros and cons of the new Commonwealth environment laws

8 Public participation in action

9 Access to flying fox licences granted

11 Regulating Australian companies operating overseas

and more.....

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The Commonwealth's brave new world of environmental regulation was heralded into Federal Parliament in June 1999. With Australia's environmental future at stake, the passing of the EPBC Act was, as one would expect, not without its birth-pangs. Likewise the transition to the new era, which began on 16 July 2000, is turning out to be just as controversial. Despite the Minister's pleas, the process of implementing the EPBC Act is plagued by the same issues that were debated during its passing.

Triggers under the Act

The main cause for concern is whether the EPBC Act reflects an appropriate division of powers between the Commonwealth and the States and Territories, in particular, whether the Commonwealth is demonstrating sufficient leadership to ensure the protection of our national environment. In the Second Reading Speech to the Bill, Senator Kemp declared that:

> " …the bill enables the Commonwealth to join with the States in providing a truly national scheme of environmental protection and biodiversity conservation recognising our responsibility to not only this, but future generations. It does so by building upon the strengths of our Federation and the primary responsibility of the States for delivering on-ground natural resource management…..By accepting Commonwealth leadership, respecting the role of the States and providing best process for users, the bill provides a framework within which to build public confidence and support for its vitally important objectives."

On the positive side, the environmental responsibilities of the Commonwealth are now formally set out in legislation. Instead of the indirect triggers for Commonwealth environmental assessment under the previous scheme, the EPBC Act relies upon direct environmental triggers (called matters of national environmental significance), which are consistent with the Commonwealth's international responsibilities under various treaties, to activate Commonwealth involvement in environmental matters.

These are declared World Heritage properties, Ramsar wetlands, nationally listed threatened species and ecological communities, internationally protected migratory species, the Commonwealth marine environment and nuclear actions.

Conspicuously absent, are the critical national issues of greenhouse gas emissions, genetically modified organisms, land clearing and salinity. In rivers and on land throughout the Murray-Darling Basin, for example, salt levels are rising dramatically. In some rivers, such as the Condamine-Balonne, it is estimated that the water will be undrinkable in 20 years time. Dryland salinity currently affects about 2.5 million hectares of land in Australia, and may increase to 15 million hectares in the next 20 years. These are clearly cross-border issues that require national leadership to resolve.

Fortunately, the EPBC Act provides for the easy addition of further triggers in the future by regulations. On 16 November 2000 the Minister announced the publication of draft regulations establishing a greenhouse trigger. If adopted, the EPBC Act would be triggered by any major new development that is likely to result in greenhouse gas emissions of more than 0.5 million tonnes of carbon dioxide equivalent in any 12 month period. In addition, the Commonwealth has indicated that a heritage trigger is likely to be added. This will be associated with the repeal of the *Australian Heritage Commission Act 1974*.

The question of 'significant impact'

The test for determining whether the EPBC Act applies to a development is whether the activity in question is likely to have a 'significant impact' upon one or more of these matters of national environmental significance.

Neither the EPBC Act, nor the Regulations which were tabled in August this year, seek to define what is meant by 'significant impact', thereby leaving this assessment to the subjective discretion of the Minister for the Environment. Instead, decisions are made by reference to Administrative Guidelines, published in July 2000, which have no statutory force and which provide the Minister with a broad discretion in making determinations.

Bilateral Agreements

The EPBC Act also envisages the establishment of a 'carefully balanced partnership' between the Commonwealth and State and Territory Governments on environmental issues through the use of bilateral agreements. These agreements, it is hoped, will guarantee Commonwealth leadership on environmental matters by, for example, working with the States to set national environmental impact assessment standards, while at the same time respecting the primary role of the States in relation to on-ground natural resource management.

The first illustration of this 'carefully balanced partnership' came in July this year with the release by the Commonwealth of draft assessment bilateral agreements. Surprisingly, the drafts were accompanied by a rider that they were not endorsed by the respective States and Territories prior to their release. It is not known at this stage when, or in what form, the final bilateral agreements will be released.

Under the EPBC Act, the assessment of a proposal must

occur by the Commonwealth in accordance with the requirements of Part 8 of the EPBC Act, or by a State in accordance with an assessment bilateral agreement under Part 5 of the Act. The EPBC Act sets out five different levels of assessment mechanisms: one-off assessment; preliminary documentation; a public environmental report; an environmental impact statement; and a public inquiry. Where a bilateral agreement has been entered into, it is up to the State or Territory to decide what level of assessment is appropriate.

The EPBC Act also sets out a process for determining the appropriate level of assessment that a particular development should be subject to. If an assessment bilateral agreement has been entered into, the State will conduct the assessment but the Commonwealth will still be responsible for granting or refusing an approval.

Without rigorous initial assessment of the impacts of a proposal, it will not be possible for the Commonwealth to make a fully informed decision as to whether a proposal should be granted approval, refused approval, or granted approval subject to conditions.

If the draft bilateral agreements are anything to go by, the ability of this model to engender community confidence "*that the matters of national environmental significance are being protected by processes [which] meet best practice*" (Sen. Hill, *A New Green Agenda* conference) is somewhat doubtful. Despite the fact that section 50 of the EPBC Act clearly empowers the Parliament to set benchmarks for the establishment of assessment bilateral agreements, the scheme currently proposed in the Regulations fails to ensure that assessments by States of proposed actions are as rigorous as assessments made by the Commonwealth under the Act.

For these reasons and others, the Australian Labor Party and the Australian Greens passed motions in the Senate, on 4 October 2000, to disallow the Regulations under the Act. These motions were lost after the Democrats accepted an undertaking by Senator Hill to introduce further Regulations, by 30 June 2001, that will impose additional benchmarks on bilateral agreements. It remains to be seen whether these amendments will ensure that State assessments are as rigorous as Commonwealth assessments.

Furthermore, the Commonwealth will not be requiring States to amend their legislation to comply with Commonwealth standards for assessments. The draft bilateral agreements indicate that where State legislation is inadequate, the Commonwealth will be satisfied if the State legislation is supplemented by administrative guidelines.

Other flaws in the proposed bilateral assessment scheme include:

- Allowing the States to determine the level of assessment which should be applied to an action.
- Allowing decisions to be made under an assessment bilateral agreement by bodies (e.g. a local council) that may not have the resources, expertise or national perspective necessary to ensure that the assessment meets the objectives of the Act.
- Allowing State processes under an assessment bilateral agreement to be a mixture of State legislation and administrative guidelines. In order to comply with the Act it will be necessary to have an effective understanding of not only the Act, but also the bilateral agreements, Commonwealth Administrative Guidelines, accredited State assessment approaches and State administrative guidelines. This will only add to the complexity and uncertainty of the process for developers and conservation groups.
- The failure of the scheme to adequately protect Indigenous cultural heritage and ensure the involvement of Indigenous people in the assessment process.

No States have yet signed an assessment bilateral agreement with the Commonwealth. South Australia has indicated it does not intend to sign an assessment bilateral agreement at all. Instead, it has prepared the Statutes Amendment (Avoidance of Duplication of Environmental Procedures) Bill "to ensure that assessment activities undertaken to satisfy the Commonwealth requirements under the EPBC Act can be recognised by State and local government authorities for their purposes under State legislation".

Conclusion

The matters raised above are not just the apprehensions of the gloom and doom merchants. Already, a significant number of activities which have been referred to the Commonwealth Environment Minister for consideration are being assessed on the most basic level provided for under the EPBC Act - preliminary documentation. More evidence, it would seem, that the Commonwealth and States are adopting a minimalist approach to the implementation of the Act.

There is still much work to be done to ensure that Australia has an effective national scheme of environmental regulation: additional triggers and listings under the categories of matters of national environmental significance; the establishment of a solid best practice framework of environmental assessment; and courageous implementation.

Environment groups cannot allow the implementation process to become a catalogue of lost opportunities. They must continue to challenge the Commonwealth to take a strong leadership role in relation to these issues and, with them, the protection of Australia's national environment.

EPBC Act - A Dramatic Improvement

Jamie Pittock, Program leader - Nature Conservation and Murray Darling Basin,
World Wide Fund for Nature

On 16 July 2000, the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) came into force. It replaced previous Federal legislation, including the *Environmental Protection (Impact of Proposals) Act 1974* (**EPIP Act**), *World Heritage Properties Conservation Act 1983, Endangered Species Protection Act 1992, National Parks and Wildlife Conservation Act 1975* and the *Whale Protection Act 1980.*

The controversial new legislation was greeted with alarm by some academics and conservation organisations. It was claimed that the EPBC Act would 'hand back' environmental decision making to State Governments. It was also argued that the legislation favoured biodiversity conservation at the expense of sound environmental impact assessment procedures. These arguments are unfounded.

In practice, the old Commonwealth environmental impact assessment legislation was completely inadequate. The EPBC Act provisions, by comparison, extend the exercise of Commonwealth environmental powers and are significantly better than the legislation it replaces.

Deficiencies of the *Environmental Protection (Impact of Proposals) Act 1974*

The EPIP Act provided no substantive protection for the environment, merely a procedural safeguard. To illustrate:

- The EPIP Act only applied where an indirect trigger occurred, such as foreign investment approval or a Commonwealth funding decision. It did not apply to many projects which occurred in or in relation to such attributes as world heritage areas or Ramsar wetlands, or to projects which affected threatened species in State jurisdictions.

- The industry 'Action Minister' decided whether to trigger the EPIP Act. Consequently, many environmentally significant projects were not referred to the Environment Minister.

- Even if the EPIP Act was triggered, the Environment Minister had broad discretion to determine whether further assessment was warranted without public consultation. Less than 4% of projects that triggered the EPIP Act process were subject to public Commonwealth assessment (see Table 1 below). Federal Government officials did not keep statistics, but have indicated that many projects were assessed in confidence based on preliminary documentation, often on State statutory assessment documents (including State public submissions). They estimate that around 50% of referrals were determined to be not significant under the EPIP Act and were therefore assessed entirely by the States.

Year	No. of proposed projects referred	No. of public assessments: PERs, EISs, and inquiries completed under EPIP Act
1997-1998	235	9 (4%)
1998-1999	240	5 (2%)
1999-2000	314	10 (3%)

Table 1. Number of public assessments under the EPIP Act.

- Under the EPIP Act, the Minister for the Environment made non-binding recommendations to the Action Minister. These recommendations only had to be 'taken into account' and were enforceable only by the industry Action Minister under the industry legislation if adopted as a condition of approval.

- Few projects were ever held to be environmentally unacceptable and approval refused under the EPIP Act. In twenty-five years, I can only identify two that did not proceed after EPIP Act inquiries, namely, sand mining at Fraser Island and at Shoalwater Bay. Federal Government officials say other proposals were modified through EPIP Act assessment or abandoned by proponents, but again, no statistics are available to demonstrate this.

The effectiveness of the EPIP Act relied largely on the goodwill of the government of the day. For example, a Government could decide not to trigger the EPIP Act in relation to a uranium mine until a Commonwealth export approval was sought at the time of the first shipment, well after the mine became operational. The State or Territory process could be relied upon by the Environment Minister and no assessment would be required.

Relying upon 'indirect' controls meant the Commonwealth government using the EPIP Act had minimal influence over environmental assessment because:

- the Commonwealth was seen as having limited direct environmental responsibility,
- the Act was often triggered after the State process had commenced and, realistically, there was little political scope for change, and
- the Environment Minister had no capacity for ongoing enforcement.

Deficiencies of other repealed legislation

Similarly, the repealed world heritage, national parks, endangered species and whale protection legislation had inherent and political flaws that dramatically reduced their conservation effectiveness.

The *World Heritage Properties Conservation Act 1983* was applied to 6 actions in 17 years. This demonstrates that there was almost insurmountable political resistance to making a proclamation to trigger the Act because of the lack of early and graduated response mechanisms to potential damaging developments. By contrast, three controlled actions have been designated based on World Heritage values in the first three months of the EPBC Act's operation.

The *National Parks and Wildlife Conservation Act 1975, Whale Protection Act 1980*, and *Endangered Species Protection Act 1992* applied only to Commonwealth areas. In 25 years, there was not a single prosecution under these laws, or under the EPIP Act or *World Heritage Properties Conservation Act 1983*. One prosecution occurred under the *Whale Protection Act 1980* in twenty years.

Advantages of the EPBC Act assessment regime

Jurisdiction

The EPBC Act has extended Commonwealth power to regulate previously unprotected environmental assets, including Ramsar wetlands and threatened species outside Commonwealth areas, and by providing up-front protection for World Heritage areas. The EPBC Act applies to actions that are likely to have a significant impact on matters of national environmental significance, being:

- threatened species and ecological communities,
- World Heritage properties,
- Ramsar wetlands,
- internationally protected migratory species,
- the Commonwealth marine area,
- Commonwealth land, and
- nuclear actions (eg, uranium mining).

Further, the jurisdiction of the legislation can be increased by the addition of new triggers and by listing new threatened species and ecological communities, new Ramsar and new World Heritage sites. Already new greenhouse gas emission and heritage triggers are mooted. However, the purported exemption of forestry activities in Regional Forest Agreement areas is a flaw in the Act.

Triggering and approval

The Environment Minister now decides whether Commonwealth environment legislation is triggered and makes approval decisions. The EPBC Act also imposes considerations that must be taken into account. While some will argue that the tests in the EPBC Act do not limit the Minister's discretion to the extent desirable, there were no tests at all in the EPIP Act. For example, the principles of ecologically sustainable development, including the precautionary principle, must now be taken into account.

Conditions and enforcement

For the first time, the Commonwealth Environment Minister is empowered to set, monitor, and enforce environmental conditions on approvals. It is an offence to breach conditions, and third parties with standing can seek injunctions if conditions are breached. The EPBC Act provides for criminal penalties (up to 7 years in jail) and, as an alternative, civil penalties of up to $5.5 million. For the first time, personal liability extends to executive officers of corporations.

Other new enforcement powers include the power to remedy environmental damage and to vary, suspend or revoke approvals and conditions.

It is now an offence to provide false and misleading information. There is the power to remedy environmental damage if a person provides false and misleading information leading to an approval. This could have a profound effect on the development and consulting industry and improve the quality of environmental impact assessment documentation.

Greater transparency

The EPBC Act provides for far greater transparency in the assessment process than under the EPIP Act. For example:

- public consultation is required before triggering,
- restricting commercial in confidence claims,
- publishing key decisions/information on the internet, and
- publication of reasons for key decisions.

Under the EPBC Act, assessment on preliminary documentation requires mandatory public consultation, unlike the EPIP Act.

Bilateral Agreements between the Federal Government and a State Government

The bilateral agreement mechanisms under the EPBC Act for the Federal Government to accredit State processes are a significant improvement over the EPIP Act in relation to transparency of assessments and requiring higher State standards. Far from 'handing back' powers, they are an opportunity to improve State environmental impact

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assessment standards.

Bilaterals accrediting assessment processes

Under the EPIP Act, over 96% of all assessments were carried out by defacto accreditation of State processes (a 'no Commonwealth PER/EIS decision'), or confidential assessment based on preliminary documentation. There was no direct public notification or input into this decision.

State assessment processes could be accredited under the EPIP Act but without formal public input or regulatory standards. The Commonwealth or third parties could only 'enforce' State performance under these arrangements under the relevant Commonwealth industry legislation.

Under the EPBC Act:
- Bilateral agreements can provide a transparent, formal framework within which State processes that meet appropriate criteria can be accredited.
- The EPBC Act contains some minimum criteria (eg. ss 47, 48A, and 51-56). The Commonwealth has developed regulations setting out more detailed benchmarks (s 50). While these regulations are less stringent than hoped, they require higher standards than the status quo in most States. Legislative improvements are now mooted in most States to achieve the higher Commonwealth benchmarks.
- Draft bilateral agreements are subject to public consultation.
- The Commonwealth can enforce bilateral agreements by fully or partly suspending or revoking relevant provisions in relation to particular actions.
- Third parties can indirectly enforce bilaterals by seeking an injunction to prevent a Commonwealth approval from being given on the basis that:
  a) s 83 does not apply if the accredited process is not complied with, and
  b) therefore, an assessment must occur under Part 8 before any approval can be given.

Bilaterals accrediting approval processes

The inherent and political failures of the previous legislation that I have outlined suggests that even if all approval decisions under the EPBC Act were delegated, the position would be little worse. However, the EPBC Act prevents the delegation of all approvals. In addition, the Commonwealth may fully or partly suspend or cancel a bilateral agreement if a State is not complying with it (ss 59, 60).

There are many safeguards in the EPBC Act in relation to approval bilateral agreements, which provide for the accreditation of State approval decisions:

- Some criteria are specified in the EPBC Act (eg, ss 46, 48A, 49, 51-56).
- Draft bilaterals must be subject to public consultation.
- A State 'approval decision' can be accredited only if the action is approved by the State in accordance with a 'bilaterally accredited management plan' that must:
  a) be approved by the Commonwealth Environment Minister and is disallowable by either house of Commonwealth Parliament,
  b) be in force under a State or Territory law and the relevant law, and
  c) meet criteria specified in regulations.
- The Minister may accredit a plan only if satisfied that:
  a) an adequate assessment will occur (s 46(3)),
  b) relevant actions will have no unacceptable or unsustainable impacts (s 46(3)), and
  c) the management plan is not inconsistent with Australia's obligations under the World Heritage and Ramsar Conventions (ss 50-56).

It is my view that, in most instances, Commonwealth delegation of approvals is undesirable. However, this process is onerous and transparent - so much so that State Governments are unlikely to seek accreditation without dramatically improving their processes.

Third parties will be able to indirectly enforce approval bilateral agreements if an action is inconsistent with an accredited management plan, by seeking an injunction on the basis that s 29(1)(e) is not satisfied and, accordingly, approval is required from the Commonwealth under Part 9 of the EPBC Act.

Under the EPBC Act, the Minister may not enter into bilateral agreements with provisions relating to World heritage properties or Ramsar wetlands unless the Minister is satisfied that the provision is not inconsistent with Australia's obligations under the relevant conventions. This means that the claim made by EPBC Act critics that dams could be constructed on rivers in World Heritage areas in Tasmanian is unsustainable, although such a dam could have been built under previous legislation.

Conclusion

There is room for improvement, but the *Environment Protection & Biodiversity Conservation Act 1999* is a dramatic improvement over the legislation it replaces.

Sources and acknowledgements

The author acknowledges the additional research by Sophie Chapple (WWF-HSI EPBC Unit) used in this article and the considerable input of a number of Federal Government officials. Data is drawn from the annual reports of Environment Australia and its predecessors, and Environment Australia's EPBC website: www.environment.gov.au/epbc.

What role should the Commonwealth play in protecting the environment - leadership or crisis management?

John Connor, Campaigns Director, Australian Conservation Foundation, and Michael Kerr, Australian Conservation Foundation Legal Advisor

How did we get here?

Fraser Island, Franklin Dam, the Queensland Wet Tropics. Struggles to protect these places have played a crucial role not only in the emergence of the environment movement but also on the law's approach to the powers of the Commonwealth Government to protect the environment. The idea that such a power rests only with the States has by now been thoroughly discredited. The *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) threatens to undo this.

Depending on your mindset, the expansion of national environmental powers provides either a platform for leadership in the great challenge of ecological sustainability, or a stage for risky political tussles. The wrestle with this responsibility has produced varied responses including ecologically sustainable development strategies, a Resource Assessment Commission, concepts of resource security and an Intergovernmental Agreement on the Environment (**IGAE**). The latter spawned the National Environment Protection Council and accreditation mechanisms for State processes. In a subtle shift, recent efforts have been championed under the banner of "cooperative federalism", a curious collective niceness that oddly never appears between State and local governments.

The current Federal Coalition Government's first contribution to this was an agreement with the States about how to identify or limit the areas of possible intervention. In 1997, behind closed doors, a list of matters of 'national environmental significance' was drawn up. This list identified some thirty matters, but it was decided that only seven of these were to trigger Commonwealth assessment and approval. Amazingly, this smaller list did not include obvious global or national issues such as greenhouse pollution, vegetation clearance, water allocation, forests, land degradation or genetically modified organisms. Internationally listed wetlands, world heritage areas and nationally threatened species did make it on to the list of seven 'triggers'.

The Government determined that this secret agreement should be legislated for. What resulted was the enactment of the EPBC Act, the biggest rewrite of Commonwealth environmental laws for 25 years.

Two steps forward, many steps back

Whilst the Australian Conservation Foundation (**ACF**) recognised the need to reform our outdated laws, in the ACF's opinion the EPBC Act, as it stands, is two steps forward and many steps back. It is true that the Environment Minister is to play a more central role and that there is room for greater involvement in wetland, world heritage and threatened species issues. Despite this, the Act remains deeply flawed. Some of the major shortcomings include:

- The matters of national environmental significance that trigger the operation of the Act do not encompass the major environmental problems facing Australia as a nation. For example, the legislation is not triggered in relation to greenhouse gas emissions, vegetation clearance, water allocation, and actions concerning genetically modified organisms.
- The legislation allows the Commonwealth to divest its environmental approval and assessment responsibilities to the States through what are known as bilateral agreements. In establishing the bilateral agreement framework, the Act has failed to ensure that the States carry out their EPBC Act responsibilities according to the same standards expected of the Commonwealth.
- Forests covered by Regional Forest Agreements, which cover a substantial part of Australian forests - home to almost half of our biodiversity - are exempted from the operation of the Act.
- The Act's standing provisions limit the public's right to use the law to protect the environment.
- The legislation introduced a new 'values' approach to world heritage management and protection. The values approach, a narrow interpretation of Australia's world heritage obligations, permits such activities as mining in World Heritage properties so long as there is no significant impact on the values of the property.

The way forward

ACF has been working with other national and State environment groups who oppose the EPBC Act in its current form. The Act must cross crucial thresholds before it can be said to be an advance in this country's environmental laws for, at least, the next decade. Improvements to the Act must include:

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- adding triggers for greenhouse, land clearing (or even salinity), genetically modified organisms and water projects,
- removing the provisions that exempt areas subject to Regional Forest Agreements from the operation of the Act,
- removing the capacity for Commonwealth approval powers to be divested to the States (s 46) or to other Commonwealth agencies (s 33),
- either the removal of the provisions that allow Commonwealth assessment powers to be divested to the States, or the establishment of a framework that will ensure that the States carry out this important responsibility according to best contemporary standards and at a level the Commonwealth would expect of itself,
- ensuring declarations that allow assessment by other Commonwealth agencies (s 84) expire and are reviewed after five years, similar to the expiry of bilateral agreements after 5 years,
- introducing a power to enable the Commonwealth Environment Minister to call in actions that are of national environmental interest (a reflection of the power to exempt actions according to an undefined national interest, s 158(4)),
- amending the approach to world heritage from a values only approach to one which protects World Heritage properties and their associated values,
- introducing an independent Commissioner of Ecological Sustainable Development with powers to independently audit State performance under bilateral agreements, and
- including an assessment of all environmental impacts once the Act is triggered.

On the eve of a new century of Australian federalism, the Commonwealth's role in protecting our environment must be underpinned by a spirit of leadership, not crisis management. It is clear that the EPBC Act is in need of a dramatic overhaul if it is to provide the legislative framework upon which Australia as a nation can rise to the challenges of ecological sustainability.

Go to the ACF web site, www.acfonline.org.au, for further information on the EPBC Act .

Public participaption in the referrals process under the EPBC Act

Sophie Chapple, World Wide Fund for Nature/Humane Society International EPBC Unit*

Since it came into force on 16 July 2000, some 60 actions have been referred to the Federal Minister for the Environment and Heritage ('**the Minister**') under the *Environment Protection and Biodiversity Conservation Act 1999* (**'EPBC Act'**)[1].

Referral is the first step in the environmental assessment process under the EPBC Act. The purpose of the referral stage is to determine whether a proposed action is likely to have a significant impact on matters of national environmental significance (**NES**)[2] and therefore requires assessment and approval under the Act. This is called deciding whether the project is a 'controlled action'.

A list of current referrals, and opportunities to comment on those referrals, is available on the Environment Australia website, www.environment.gov.au/epbc. This site has useful information about the EPBC Act, including guidelines for determining 'significant impact' and detailed lists of the matters of NES.

Analysis of referrals

Of the 60 projects referrals so far, 13 have been found to be controlled actions and will require assessment and approval under the EPBC Act[3].

Of the matters of NES triggering the Act (see Table 1), listed migratory species have proven to be a key trigger, with migratory species triggering 9 out of 13 of the 'controlled actions'. Mining related activities and energy infrastructure projects constitute a large proportion of the activities referred under the EPBC Act so far. The remainder include a proposed tourism facility, a constructed wetland, a magnesium smelter and a port expansion. Urban

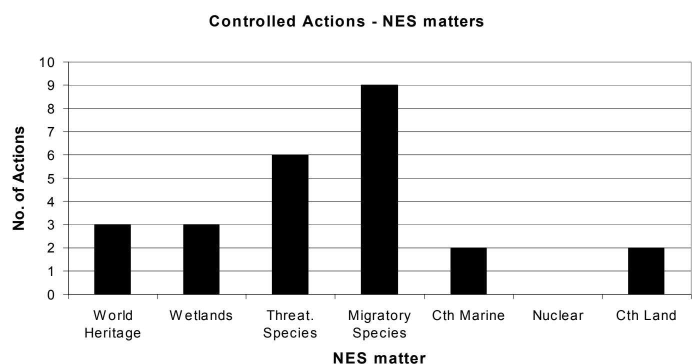

Table 1: Matters of NES triggering the EPBC Act

developments have also featured heavily in the referrals received under the Act.

It is surprising that more agricultural activities have not been referred under the Act. The only agriculture-related referral so far is related to a stormwater drainage channel in an irrigation area in NSW. With matters of NES including listed threatened species and communities, and Ramsar wetlands, the EPBC Act has the potential to capture agricultural activities including land clearing, irrigation developments, and water infrastructure projects (such as weirs, channels, levee banks or dams).

Role of the public

The public can play an important role in alerting the Minister or Environment Australia to projects that may trigger the Act – that is, proposed actions that may have a significant impact on a matter of NES. Under the EPBC Act, only project proponents, State governments or Commonwealth agencies can refer proposed actions for assessment. However, there is nothing in the Act to prevent a member of the public bringing a project to the Minister's attention and asking the Minister to request a referral.

For example, the Wetlands Association of Concerned Citizens wrote to the Minister to bring his attention to a proposed sand extraction operation near Moreton Bay in Queensland, and its possible impacts on the Moreton Bay Ramsar listed wetland, listed migratory species and threatened species. Environment Australia has now written to the proponent suggesting the proposal be referred under the EPBC Act.

If a proposed action that may trigger the EPBC Act has not been referred, the public can:

1. Contact the Monitoring and Compliance Section at Environment Australia, Ph: (02) 6274 1474 or email: compliance@ea.gov.au. This Section is responsible for ensuring all proposed actions that are likely to have a significant impact on a matter of NES are referred to Environment Australia for assessment.
2. Write to the Minister to bring the project to his or her attention and ask the Minister to request referral.
3. As a last resort, consider applying to the Federal Court for an injunction to prevent the action from being taken.

Comments on referrals

Once a project has been referred to the Minister, and before the Minister decides whether it is a controlled action, there is generally a 10 day period for the public to comment on whether the project is likely to have a significant impact on an matter of NES.

Opportunities to comment on referrals are notified on the Environment Australia website. Comments may be provided to the Referrals Section at Environment Australia by mail: GPO Box 787, Canberra ACT 2601, fax: (02) 6274 1789, or email: epbc.referrals@ea.gov.au.

The Minister must take public comments into account in deciding whether or not the project will trigger the EPBC Act. This decision must be made within 20 business days of the referral. The Minister must then publish notice of the decision on the website within 10 business days of making the decision. These tight timeframes for Ministerial decision-making have been met in almost all decisions made under the Act to date.

Unfortunately, very few public comments have been received on referrals so far. The importance of providing comments is illustrated by the referral of a proposed magnesium smelter in South Australia. In the referral documents, the proponent stated "there have been no internationally protected migratory species detected in the vicinity of the site or in the immediate vicinity of the site". The Conservation Council of South Australia (**CCSA**) provided comments pointing to six listed migratory species using the area that could be impacted by the proposed development. Senator Hill later decided that the proposal was a controlled action as it could have a significant impact on listed migratory species. By raising the presence of the migratory species, CCSA helped ensure that this project will undergo environmental assessment under the EPBC Act.

Conclusion

Although the EPBC Act has only been in force for only a few months, decisions are being made which may set precedents for the future operation of the Act. It is important that the public become involved in the referral and assessment process under the EPBC Act, particularly by identifying relevant projects that may trigger the Act, and by providing comments on referrals.

* Sophie Chapple works on a joint project of the World Wide Fund for Nature (Australia) and the Humane Society International (HSI) - the 'EPBC Unit'. The Unit aims to support the implementation of the EPBC Act for the benefit of the environment. Further information is available on the EPBC Unit website: www.hsi.org.au/epbcunit.html, ph: (02) 6257 4010, or email: schapple@wwf.org.au.

Endnotes:

[1] The analysis of referrals in this article is based on the notices published on the Environment Australia website, www.environment.gov.au/epbc as at 30 October 2000.

[2] At present the following are matters of NES: World Heritage properties; Ramsar wetlands; Listed threatened species and endangered ecological communities; Listed migratory species; the Commonwealth marine environment; and nuclear actions.

[3] At the time of writing, decisions are pending on 15 referrals.

Access to flying fox shooting licences granted

Casenote: Humane Society International v National Parks & Wildlife Service and others [2000] NSWADT 133

Marc Allas, Solicitor, EDO(NSW)

Under the *National Parks and Wildlife Act 1974* (NSW) (**NP&W Act**), the National Parks and Wildlife Service (**NPWS**) can issue licences to harm native fauna, including flying foxes.

In late 1998, the Humane Society International Inc (**HSI**) applied to NPWS under the *Freedom of Information Act 1989* (NSW) (**FOI Act**), for disclosure of any licences issued in October-November 1998 to harm flying foxes, following the lifting of a State-wide moratorium on the issue of such licences.

NPWS disclosed limited information about the 60 or so licences issued, but refused to disclose the locations of the licences, on the basis that the locations were 'personal affairs'. HSI appealed this decision to the Administrative Decisions Tribunal ('**the Tribunal**').

On 19 September 2000, the Tribunal upheld HSI's freedom of information appeal, rejecting NPWS' claims that the information was protected from disclosure by the 'personal affairs' and the 'business affairs' exemptions.

Background to the case

HSI needed the licence information to conduct a scientific assessment on the impact of the licensed shooting on flying fox management, and to examine horticultural practices surrounding the shooting, such as netting of orchards. For this assessment, HSI needed the location-specific information on the licences. HSI argued that, even if the licence locations did constitute personal information, disclosure in these circumstances would be reasonable

HSI's application to the Tribunal was opposed by NPWS. NPWS argued that the particular licence information sought was personal information which could be used by conservationists to harass orchardists and interfere with their business, and should therefore not be released.

The decision

The NPWS was ordered to give HSI full access to the licences permitting shooting of flying foxes in NSW, including the locations where licences had been issued.

The Tribunal indicated that the address of a place to which a licence relates does not necessarily constitute 'personal affairs'. In this case, as most of the orchardists lived on the property to which the licences related, the licence address did constitute personal affairs.

The relevant test under the FOI Act is whether the release of the documents would involve the unreasonable disclosure of personal affairs. In applying this test, the Tribunal had to balance the public interest of the orchardists' alleged privacy concerns against the public interest in allowing full public disclosure of the information.

The Tribunal held that the motive of an applicant in attempting to obtain access to documents under freedom of information law is a relevant factor for the decision-maker. The Tribunal accepted HSI's submissions that it wanted the information for conservation reasons, and that there was legitimate public interest in the conservation of flying foxes, some of which are listed as vulnerable under the *Threatened Species Conservation Act 1995* (NSW).

In finding that the release of the information would not be unreasonable, the Tribunal relied on *Simons and Victorian Egg Marketing Board (1985) 1 VAR 54*, where it was held disclosure of names and addresses of free-range egg producers was permissible. A journalist had applied for this information under the Victorian FOI laws, motivated by concerns that some farmers using the free-range egg label were not providing proper 'free range' conditions for their produce.

Based on the edidence before it, the Tribunal rejected arguments that HSI would use the locations to mount public campaigns against orchardists as unfounded and without evidence.

The Tribunal also held that it could not impose conditions on the release of information under the FOI Act, placing the Tribunal in a similar position to government authorities, who are likewise not able to impose conditions.

Conclusions

This case demonstrates that government agencies should give greater weight to conservation concerns in deciding whether to release information under FOI. The case also supports the general principle that licences that affect the environment should be publicly available. Claims of privacy or business affairs over information can allow a de facto private licensing system over the environment, without public scrutiny, transparency and accountability.

In response to the decision in this case, the EDO (NSW) has called upon the NSW Government to amend the NP&W Act by introducing a public register for all licences issued by NPWS to harm native fauna.

HSI was represented in the matter by the EDO (NSW), and barrister Ms Louise Byrne.

When is a development consent not a development consent?

Casenote*: Townsend and anor v Evans Shire Council and ors [2000] NSWLEC 163*

Chris Norton, Senior Solicitor, EDO(NSW)

A recent NSW Land and Environment Court case has clarified the power of a consent authority to rescind its own decision to grant development consent.

Facts

The Townsends owned a 400 hectare property called 'Willow Vale'. In 1980, 'Willow Vale' was subdivided, and a new 40 hectare allotment (an area of land under a separate title) created, called 'Willow Grove', which is owned by Mr and Mrs Brennan.

Under the relevant planning instrument, it was possible to create a third allotment from land that formed the original 'Willow Vale' property. On 8 April 1999, the Brennans lodged a development application with Evans Shire Council seeking to create a new allotment on 'Willow Grove'. On 28 April 1999, Mr Townsend lodged a development application seeking to create a new allotment on 'Willow Vale'.

On 6 September 1999, the Council considered both applications, and resolved to approve Mr Townsend's application. However, before the Council had sent a letter of determination to Mr Townsend informing him of the decision to grant development consent, the Council rescinded its resolution, and resolved instead to approve the application made on behalf of the Brennans.

The Townsends brought an action in the NSW Land and Environment Court seeking a declaraton that the development consent to subdivide the Brennans' land was invalid, and that the Council's resolution rescinding the grant of development consent was also invalid.

Findings

Lloyd J held that the consent granted to subdivide 'Willow Grove' was invalid, as a proper construction of the relevant planning instrument meant that a new entitlement could only lawfully be granted if land was subdivided from 'Willow Vale', the original land. This was because the instrument allowed lots to be subdivided from an 'existing holding', and 'Willow Vale' was an 'existing holding' whereas 'Willow Grove' was not.

However, Lloyd J also held that the Council's resolution to rescind the consent granted to the Townsends was valid. His Honour indicated a clear distinction in the *Environmental Planning and Assessment Act* 1979 ('**EP&A Act**') between the granting of development consent (under s 80(1)), and notifying an applicant of its determination to grant consent (s 81(1)). Since a consent only becomes effective upon notification to the applicant (s 83), the consent had not become effective at the time the Council resolved to rescind its earlier decision to grant consent, and so that decision could be validly rescinded.

Comment

Section 96A of the EP&A Act provides that the Director-General of the Department of Urban Affairs and Planning, or a Council which has granted a development consent, may revoke or modify a development consent. However, that power can only be exercised in limited circumstances; is subject to appeal to the Land and Environment Court; and when exercised gives rise to a right to compensation for the holder of the consent that has been revoked or modified. The power to rescind a resolution to grant consent prior to notification is much broader, and does not give rise to any right to compensation.

Clause 69 of the Environmental Planning and Assessment Regulation 1994 requires a consent authority to notify its determination of a development application to the applicant within 14 days of the date of determination.

However, even if that notice is given late, or not at all, a development consent remains inoperative until the notice is in fact given (see Townsend at para 19). Consent authorities therefore have what might be called a 14-day 'cooling off period' before sending a notification that activates a development consent.

Members of the public who are dissatisfied with a decision of a consent authority to grant a development consent can therefore keep lobbying the consent authority to rescind its decision up to the time that notification is given.

Visit the EDO webpage at www.edo.org.au for:

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The long arm of the law: extra-territorial regulation of Australian corporations

Lisa Ogle, Director, EDO (NSW)

In Australia, and internationally, transnational corporations are exposed to increasing risk for the environmental and social impacts of their overseas operations. This article describes the provisions of the Corporate Code of Conduct Bill 2000, which has recently been tabled in Federal Parliament. It also briefly considers some recent developments in case law of the principles for determining the appropriate forum in which cases concerning foreign torts should be heard (forum non conveniens).

The Ok Tedi copper and gold mine in Papua New Guinea, majority owned by The Broken Hill Proprietary Company Ltd (**BHP**), continues to dump approximately 80,000 tonnes of mine tailings a day into the Fly River system. It has done this since it first commenced operations without a tailings dam in the mid-1980's[1]. The Tisza River in Romania is still recovering some eight months later from a serious cyanide spill from the tailings dam of the Australian-operated Baia Mare gold mine. The spill also contaminated the drinking water of millions of people downstream in Hungary[2]. In March this year, a helicopter accidentally dropped a tonne of cyanide pellets into rugged terrain 85 kms north of Port Moresby, while it was en route to the Tolukuma Gold Mine. The mine is operated by the Sydney-based, Dome Resources.

These recent incidents have highlighted the poor environmental performance overseas of some Australian companies. Activities which would not be acceptable in Australia, such as the dumping of mine waste directly into a river or the sea, or failing to carry out any environmental assessment of a proposal, are often allowed in developing countries which have less stringent environmental regulation and enforcement regimes.

Non-government organisations, environmentally focused shareholder groups, and some consumer groups are starting to demand greater corporate accountability on the part of Australian-based transnational corporations. This reflects the increasing global pressure to hold transnational corporations accountable in their home jurisdictions for their environmental, labour and human rights performance. The international legal system has so far shown itself to be ill-equipped with adequate legislative or enforcement mechanisms to address the cross-border impacts of transnational corporations operating in the new global economy.

The incidents described above have provided the catalyst for new legislation requiring Australian companies to meet baseline environmental and human rights standards in Australia in their overseas operations.

Corporate Code of Conduct Bill 2000

In October 2000, the Australian Democrats tabled the Corporate Code of Conduct Bill 2000 ('**Code of Conduct Bill**') in Federal Parliament[3]. It seeks to impose environmental, employment, health and safety and human rights standards on the conduct of Australian corporations which undertake business activities outside Australia.

The notion of regulating the extraterritorial criminal activities of Australians and Australian companies is not new. Indeed, it is a well accepted principle of international law that a state may prosecute its nationals for crimes committed anywhere in the world (active nationality principle)[4]. By way of example, there are already two laws in Australia which seek to regulate the behaviour of Australians and Australian companies outside Australia's borders: the *Criminal Code Amendment (Bribery of Foreign Public Officials) Act* 1999 and the *Criminal Code Amendment (Slavery and Sexual Servitude) Act* 1999.

The Code of Conduct Bill applies to the overseas operations of companies which:

- employ or engage the services of 100 or more persons in a country other than Australia, and
- are trading or financial companies incorporated within Australia, including any holding company or subsidiary of such a corporation ('overseas corporation').

The Code of Conduct Bill also binds the Crown in so far as the Commonwealth carries on a business, either directly or by a Commonwealth authority. In particular, the Bill provides as follows:

Environmental standards: An overseas corporation must take all reasonable measures to prevent any material adverse effect on the environment. It must also report locally in the area of its overseas operations to its employees and the public on its actual and potential environmental impacts, and undertake environmental impact assessment of all developments.

Health and safety standards: An overseas corporation must provide a safe and healthy workplace for its employees, not require its employees to work more than 12 hours each day, and provide policies, education and training for responding to accidents in the workplace.

Employment standards: An overseas corporation must not use forced or compulsory labour, or employ any child

under the age of fourteen. It must pay as a minimum a living wage, and respect the freedom to associate and to bargain collectively.

Human rights standards: An overseas corporation must not discriminate on the basis of race, colour, sex, sexuality, religion or political opinion in its employment of people.

Consumer protection and trade practices: An overseas corporation must not engage in conduct which is deceptive or misleading, or which is likely to be so. It must also refrain from entering into any anti-competitive agreement.

The Bill expressly provides that it does not require corporations caught by the Bill to meet more stringent requirements for its operations in a foreign country than it would be required to meet in Australia (cl. 3(2)).

Reporting requirements

The Bill provides for extensive reporting requirements. Overseas corporations must lodge an annual Code of Conduct Compliance Report with the Australian Securities and Investment Commission disclosing the number of persons employed overseas, their remuneration and a statement of any contravention of the standards set out in the Bill (cl. 14).

Civil penalties

The Bill provides for enforcement through the use of civil penalties of up to $1.1 million (cl. 16). Executive officers of overseas corporations may incur personal liability for a breach of the legislation.

Damages claims by foreign plaintiffs in Australian courts

Over the past decade, there have been some significant developments in Australian case law which have had the effect of making Australian courts more accessible to foreign plaintiff claims.

For example, in *Voth v Manildra Flour Mills* (1991) 65 ALJR 83, the High Court held that, in applying the principle of forum non conveniens, a court should only exercise its discretion to stay proceedings if the defendant can prove that the Australian court is so inappropriate a forum for their determination that their continuation would be "oppressive" and "vexatious" to the defendant. In recent years, a number of plaintiffs from New Zealand have sued James Hardie & Co Pty Ltd in Australian courts for negligence, alleging that they contracted mesothelioma as a result of exposure to asbestos while working in James Hardie's related operations in New Zealand during the 1950's to 1970's. Following the decision in *Voth*, the plaintiffs have successfully defended applications by the company to dismiss their actions on forum non conveniens grounds[5].

This approach of whether the Australian court is an 'inappropriate forum' for the case to be heard, and should therefore be stayed pending hearing in the foreign jurisdiction, is a more difficult test for a defendant to satisfy than its UK equivalent, which asks whether the overseas court is the 'more appropriate forum'[6].

Despite the more restrictive approach in the UK courts, there are two notable cases over the past few years where foreign plaintiffs have successfully defeated stay applications by defendants. In 1997, the House of Lords allowed a plaintiff from Namibia to sue a UK based corporation for damages for injuries sustained in working in the company's uranium mine in Namibia (*Connelly v RTZ Corporation Plc* [1998] AC 854) primarily because funding was not available for a trial in Namibia. Similarly, on 20 July 2000, the House of Lords delivered judgment in *Lubbe and Ors v Cape PLC*, declining to grant an application by the company to stay the UK proceedings on the basis of forum non conveniens, thereby permitting over 3,000 plaintiffs from South Africa to pursue their damages claims for exposure to asbestos in South African mines against the UK based parent company in the UK courts[7].

Damages for foreign plaintiffs under the Corporate Code of Conduct Bill

If passed, the Code of Conduct Bill would make it easier for a foreign plaintiff to sue Australian-based companies in Australian courts for damages incurred in a foreign jurisdiction. This is because, in addition to providing for enforcement through the imposition of financial penalties, the Bill also purports to extend the civil liability of overseas corporations for damages, creating a new cause of action[8].

This can be found in Clause 17 of the Bill, which provides that any person who suffers or who is reasonably likely to suffer, loss or damage as a result of a breach of the Bill may bring an action in the Federal Court of Australia. 'Person' is defined to include any person, whether resident in Australia or elsewhere, and any body corporate. If the Federal Court is satisfied that loss or damage has occurred, then the Bill provides that the Court may grant an injunction and make an order for compensation.

Although a defendant company could still apply to the Court to stay or dismiss an action for damages brought under the Bill on the basis of forum non conveniens, that defence is likely to be more difficult to establish. This is because, in addition to the tort of negligence or nuisance which is likely to have been committed in the foreign jurisdiction, the plaintiff would have a further or alternative cause of action arising squarely within the Australian jurisdiction, namely,

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Court fees postponed for NSW CLC clients

Chris Norton, Senior Solicitor, EDO(NSW)

From 1 July 2000, clients of community legal centres in the Local, District, Supreme and Land and Environment Courts of NSW will no longer have to pay court fees up front.

New regulations relating to fees provide generally as follows:

- A person receiving legal assistance from a community legal centre is defined to be a "legally assisted person".
- A legally assisted person does not need to pay court fees (such as fees for commencing proceedings, or issue of subpoenas) at the start of or during a case. Payment is postponed until after judgement is delivered.
- If the legally assisted person loses the case, or wins but no costs order is made, then the fees do not have to be paid; or if they have already been paid are to be paid back to the legally assisted person.
- If the legally assisted person wins and an award of costs is made in his or her favour, the fees become payable at that time. The fees should be recoverable from the party against whom the costs order is made.

The precise requirements vary from court to court, so the provisions of the individual regulations should be checked in each case. Similar provisions apply to pensioners, and to persons represented under the Law Society or Bar Association's Pro Bono schemes.

This fee change is a welcome move. As the EDO (NSW) is a community legal centre, its clients will be greatly assisted by these provisions.

See: ***District Court Regulation 2000 cl 7; Land and Environment Court Regulation 2000 cl 6; Local Courts (Civil Claims) Regulation 2000 cl 5; Supreme Court Regulation 2000 cl 8.***

Book Review: "*Water Law*"

D.E. Fisher, LBC Information Services, Sydney 2000

Tim Holden, Policy Officer, EDO (NSW)

Given the significance of water to agricultural production, the reliance by many regional communities on freshwater sources and, of course, the very health of our aquatic ecosystems, a text focussing on water law is long overdue.

One of the challenges of a book such as this is the fluid nature of water law. As a component of the general National Competition Council review of legislation, water laws have been reviewed in all States and Territories. This process resulted in new laws being recently passed in Queensland and NSW. In light of this challenge, the objective of the author is to "*identify the structure of water law in Australia, so that the details of the law can be understood and applied within ... a meaningful yet simple framework.*" The structure of the book is straightforward and the extensive examples of legislation from various States are used to good effect.

The book does attempt to provide an exhaustive analysis of water law in all Australian jurisdictions. This ensures the book will retain its relevance, notwithstanding legislative change, but may disappoint those readers who were hoping for an explanation of the mechanics of water law in their State or Territory.

The early chapters provide important context for the discussions later in the book, beginning with a discussion of the international context. It provides an overview of relevant international documents, including the 1992 Rio Declaration, Agenda 21, the UN Convention on Biological Diversity, the Ramsar Convention on Wetlands of International Importance and the Draft International Covenant on Environment and Development.

The book then focuses on the Australian context. In relation to the Australian Constitutional framework, issues such as responsibility for coastal waters and the legislative capacity of the Commonwealth are covered. There is also a useful discussion of the management of cross border rivers.

The development of the common law concepts of property in water, and rights to access water, that provided the foundation for the regulation of water resources are discussed. There is also an overview of the development of water legislation in Australia in relation to watercourses surface and underground water. This contextual information is an extremely useful analysis for those seeking to understand why water law is in its current form.

The book discusses issues such as the structure of the water industry, management systems and other new directions in water resource management, access to water and water rights, and the conservation and protection of water resources. In addition to focussing on legislation specific to water, broader catchment management issues are addressed.

This book is a comprehensive and well-written account of the historical context, institutional frameworks and policy responses to the questions of how best to manage Australia's water resources through legislative means. While some of the references to some legislation will soon be outdated, the book will still provide a valuable introduction to the themes and structure of Australia's water law, and should be a useful resource for anyone with an interest in water policy formulation and development.

Code of Conduct Bill....cont' from page 13

breach of statute giving rise to damages. This would create an additional connecting factor to the Australian jurisdiction, rendering the Federal Court even less likely to be found to be an 'inappropriate forum'.

The Senate has referred the Corporate Code of Conduct Bill 2000 to a Parliamentary Joint Statutory Committee on the Corporations and Securities provisions of the Bill. The Committee is due to report by 31 March 2001. Submissions must be lodged by 15 December 2000 (email: corporations.joint@aph.gov.au)

Endnotes:

[1] See The Ok Tedi Settlement: issues, outcomes and implications for a collection of essays on the Ok Tedi litigation, Glenn Banks and Chris Ballard (eds), National Centre for Development Studies, ANU, Canberra.
[2] Sydney Morning Herald, 10 February 2000, page 1.
[3] The Corporate Code of Conduct Bill 2000 appears to be based on a similar bill also known as the Corporate Code of Conduct Act introduced by Cynthia McKinney into the US Congress in April 2000.
[4] See Malanczuk, P. "Akehurst's Modern Introduction to International Law" (7th ed), 1997, Routledge, Chapter 7.
[5] *James Hardie & Co Pty Ltd v Cameron* 12 NSWCCR 286; *James Hardie & Co Pty Ltd & Anor v Bruce* (1996) 13 NSWCCR 525; James Hardie & Co Pty Ltd v Putt, 22 May 1998, CA 40062/98.
[6] *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460.
[7] The fact that legal aid for personal injury claims was not available to the plaintiffs in South Africa, but that legal representation and funding was available in the UK, was a compelling factor for the House of Lords allowing the proceedings to continue in the UK courts.
[8] One of the first legislative attempts to provide for a foreign person to bring a civil action for a tortious wrong is the *Alien Tort Claims Act* in the US. Section 1350 of that Act provides that "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The Act was originally passed in 1789 to allow prosecution of pirates and slavers alleged to have committed torts which were also violations of international law. The *Alien Tort Claims Act* has never been successfully used for environmental claims: see *John Doe I, et al v Unocal Corp*, et al, US District Court for the Central District of California, 963 F. Supp. 880; 1997 US Dist. LEXIS 5094.

National EDO Network News

EDO NSW Conference

"I have a cunning plan......"

On **Friday, 16 March 2001**, the EDO (NSW) will hold a one day conference in Sydney on reforms to the planning system in NSW.

The Department of Urban Affairs and Planning is conducting a review of Part 3 of the *Environmental Planning and Assessment Act 1979,* and the NSW Cabinet Office is also examining integrated natural resource planning issues. As a result, there are likely to be far reaching changes to NSW's planning and resource management laws.

The conference will provide a forum for community groups, conservationists, State and local government representatives, Aboriginal groups and lawyers to learn about and discuss the proposed reforms. It will put the spotlight on government proposals and attempt to answer some challenging questions:

- What are the practical problems with planning and resource management in NSW?
- Do regional planning models work?
- How can planning decisions incorporate the principles of ecologically sustainable development?
- What has been the experience of integrated natural resource planning in other States and countries?

Mark the date in your diary, and contact the EDO NSW to register your interest in attending.
Ph: (02) 9262 6989 or natalie.ross@edo.org.au.

New ACT Solicitor

Melissa Honner is the new Solicitor at the EDO (ACT). Melissa joins the EDO having worked at the Legal Aid Commission, Women's Legal Centre and the Hobart Community Legal Centre, over the past 3 year. She was previously a privately practising family law barrister and solicitor in Tasmania.

Queensland EDO

Solicitor **Elisa Nichols** has joined EDO (Qld) in a temporary position until February 2002, while Jo-Anne Bragg is on leave. Elisa has been an active conservationist for many years and is completing a Masters degree in environmental resources law. Since she arrived at the EDO (Qld) she has worked on the first case brought under the new Commonwealth EPBC Act. Rob Stevenson is acting Principal Solicitor in Jo-Anne's absence.

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