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Journal of

Legal Knowledge Matters.

Volume 1. 1990 - 1993

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Contents

Index

Index (cont'd)

Index (cont'd)

Index (cont'd)

Index (cont'd)

Table of Legislation

Commonwealth

New South Wales

Queensland

Table of Legislation (cont'd)

Queensland (cont'd)

Victoria

Table of Cases

Citizen participation in environmental management

Ian Wright

This article discusses the role of citizen participation in environmental management decisions by examining the different forms of citizen participation developing a model for citizen participation and assessing the extent to which existing legal rights and opportunities facilitate appropriate forms of citizen participation

August 1990

In brief

The 1990s will undoubtedly see an increasing demand for a greater degree of citizen participation in environmental management.

The role and purpose of this participation is dependent upon the ideological perspectives of the participants to the notion of democracy. In this paper traditional consensus and conflict models of citizen participation are discarded in favour of a cooperative bargaining model.

This model sees citizen participation as a means of resolving conflict which arises from the under-representation of certain social groups in the decision making process. The form of participation is therefore determined by the nature and objectives of the environmental management decision from which the conflict has arisen.

Environmental management is a relatively new conceptual approach to public policy which comprises both urban and regional planning and conservation (Bowman, 1974). This ecological approach rests on the assumption that the earth's resources are finite and that there is a limit to the amount of change that can be accommodated by the biosphere.

As a result it challenges "*the dominant doctrine of modern western society that continuing economic and industrial growth is not only inevitable but also highly desirable*" (Boyden, 1974).

Such a viewpoint assumes that there are other values than economic growth, such as social, physical and ecological to be taken into account when acting to effect environmental change (Band, 1976).

One of the many challenges facing environmental management in the 1990s is how to accommodate the increasing demand for a greater degree of citizen participation. Whilst this challenge is not new, it has become increasingly intense during the latter part of the 1980s and is being experienced throughout the world.

The aim of this paper is to explore citizen participation in environmental management decisions. I propose to do this by:

- examining the role, purpose and problems of different forms of citizen participation;
- developing a model to establish appropriate forms of citizen participation in environmental decision making; and
- assessing the extent to which existing legal rights and opportunities facilitate appropriate forms of citizen participation.

Definition and rationale

Citizen participation can best be broadly defined as the involvement of the public in social decision making through a series of formal and informal mechanisms (Glass, 1979).

The primary objective of citizen participation is to establish productive dialogue between the public and their various decision making agents. The effectiveness of this dialogue, that is the degree to which it influences decisions, is determined by the role and purpose of participation itself (Robertson, 1978).

The purpose of citizen participation cannot be resolved in abstract terms. Purposes can only be understood in the context of specific social conditions which give rise to them (Thornley, 1977). Purposes are subsequently articulated, within specific social conditions in terms of specific principles. These are not abstractions but imply very real structural mechanisms built into the system of public administration.

Citizen participation is never finally settled as such, but defines the evolving character of democratic societies. For example, in western democracies citizen participation is articulated in terms of the principle that people should be involved in decisions that affect their own interests (Sandercock, 1975; James, 1978). This is often described in terms of giving a person their day in court or of a person's right to be heard (Edmond, 1975). Citizen participation may also be based on the principle that persons who have contributed to a decision will cooperate in the execution of that decision (Sandercock, 1975; Robertson, 1978).

The character of citizen participation will vary according to the ideological perspectives of the participants (Wengert, I - 13). Thus demands for more public participation may be underpinned by a desire to alter the power structure in society or by a desire to ensure that public reaction and hence planning processes are more manageable.

These ideological perspectives or models can be seen as points on a scale of democracy with participatory systems of democracy lying at one end of the scale and representative systems of democracy lying at the other. (Thornley, 1977).

Systems of participatory democracy assume that society is constituted by opposing groups who are in continual conflict due to incompatible interests and the unequal distribution of resources. As a result, some social groups are subordinated by others. Protagonists of participatory democracy therefore see it as necessary to re-distribute power within society on an egalitarian basis.

Systems of participatory democracy are seen as a mechanism to raise the consciousness of all social groups to recognise inequities in the existing system. The raising of consciousness is then assumed to lead to the transfer of power from one group to another. Such re-distribution of power may be used to achieve legislative and political support for particular programmes. This perspective can be referred to as a conflict or strategic model of citizen participation.

Systems of representative democracy, on the other hand assume that the interaction of individuals within society is regulated by a common social consciousness or value consensus. This is often referred to as the 'public interest'. The character of that consensus is determined by socialisation from institutions such as family, schools, church and media.

Within systems of representative democracy the decision making process is assumed to be stable and citizens are assumed to be generally apathetic. Changes are managed solely by elected representatives through adjustments to the accepted norms. Change is seen as a process of settling into a new state of equilibrium.

Participation within representative systems is concerned with maintaining the legitimacy of the representative system. This is seen to be achieved by improving communications, coordination and understanding between elected representatives and the public. This perspective can be referred to as a consensus model of citizen participation.

An alternative to this polemic is to incorporate both representative and participatory mechanisms towards democratic ends (Thornley, 1977). The representative system of government provides virtually no control over decisions of non-elected officials whilst in respect of elected officials, citizens are forced to condense their views on diverse issues in a single vote (Edmond, 1975).

The representative system of government must therefore be supplemented by organised interest groups linked in various ways into the decision making process. Participation is thus seen as a conflict management process involving elected representatives and organised interest groups. This perspective can be referred to as a bargaining model of citizen participation.

It is apparent that the role and purpose of citizen participation in a particular area of public policy will be determined by the ideological perspective of participants. In the case of environmental management, the choice of participation model must recognise that various actors are in conflict due to their simultaneous desire for scarce resources, incompatible interests and opposing goals and world views. As a result, the consensus model of citizen participation based on a monolithic social consciousness or public interest is inappropriate.

The form of participation in particular circumstances must provide an adequate framework for considering the validity of competing groups interests. Additionally, decisions ought to consider the interests of unrepresented groups. These would include those who are geographically or culturally isolated from the decision making arena as well as those who are temporarily isolated such as potential immigrants and future generations. Thus the environmental movement has raised the problem of the legal status of future generations.

Decisions concerning the validity of competing groups interests involve questions of policy and value judgment which cannot be effectively made in the participatory system envisaged by the strategic model. The bargaining approach to environmental decision making, involving both elected representatives and organised interest groups allows the public to take a role that is complementary to that of elected members.

Problems of citizen participation

Citizen participation can be seen as a means of harnessing potential conflict and re-directing it into rational allocation and management decisions. However, citizen participation poses both conceptual as well as practical problems. Three of the most critical are equality of access, cost and the unrealistic expectations of competing parties (Robertson, 1978).

Historically, participation techniques have attracted the wealthy, well-educated and articulate groups to the exclusion of the poor, the ill-educated and the apathetic (Day, 1978: Fogg, 1981). It is therefore necessary to ensure that both legal and planning aid is made available to those who are affected or aggrieved by the environmental management process but cannot afford professional help (Mordey, 1987).

In respect of the problem of apathy, it should also be recognised that this is not so much a problem of citizen participation, but a problem of representative democracy itself (Thornley, 1977). Exclusion from participation

socialises citizens towards blind faith in the efficiency of the system. Therefore, while the political system is based solely on representative mechanisms, apathy cannot be eliminated. Apathy will only be reduced as far as resources will allow (Robertson, 1978).

Citizen participation also imposes additional costs on the various actors in the management process. For example, project budgets are adversely effected by increased delays. Additionally, the conduct of participatory mechanism escalates costs through the deployment of skilled actors (Robertson, 1978). On the other hand however, lack of public participation can also result in high administrative costs and social disbenefits (James, 1978), A balance must therefore be reached between efficiency and democratic demands (Thornley, 1977).

Finally, it should be noted that citizen participation is a means as well as an end in itself and that both decision makers and the public should not expect results beyond its capabilities (Robertson, 1978). The primary objective of participation is to facilitate dialogue to improve the process as well as the product of decision making. Although a system based on the bargaining model cannot resolve a conflict where the interests of the parties are irreconcilable, it can relocate a dispute to an earlier decision stage in the planning process. As a result it thereby avoids polarizing groups which leads to additional costs.

Model for citizen participation in environmental management

It is a fundamental premise of this paper that environmental conflict arises from the lack of representation of certain organised interest groups in the decision making process. Citizen participation is therefore seen as a means of resolving the environmental conflicts that arise from competing resource interests.

This bargaining model of citizen participation is based on the principle that ecological harm will be minimised where the interests of those proposing harmful environmental actions are balanced against the interests of those who suffer (Gardiner, 1989). Thornley (1977) has identified three pre-conditions necessary to the effective operation of the model:

- The parties must accept the legitimacy of the conflict situation and believe that there is some justice in the opponent's cause. Without this basic agreement, the bargaining process will revert to a battle of force and sheer stamina.
- The interests of all affected parties must be organised into groups which are represented in the bargaining process.
- The parties must agree on certain rules of the game to provide a framework for regulation.

Environmental management

The form of dispute resolution process which is most appropriate depends upon the nature and objectives of the particular decision generating the conflict. Edmond (1975) recognises three types of decisions:

- *Legislative* – these decisions involve the formulation of policy. Choices are required to be made between conflicting social values, such as liberty, equality, justice and community.
- *Management* – these decisions involve the interpretation of general policy goals into specific plans, guidelines and strategies and the application of these standards to particular cases. The former process is essentially legislative in nature, while the latter is adjudicative or technical.
- *Adjudicative* – these decisions involve the enforcement of pre-existing standards. They include determinations as to the breach of standards and determinations as to responsibility and liability for environmental problems.

The bargaining model proposes the use of different dispute resolution processes, each involving a different form of citizen participation. Thornley (1977) recognises three institutional forms of dispute resolution:

- *Negotiation* – this process involves the use of discussion and persuasion between the parties to attain agreement. Participation is therefore based on pre-decision bargaining and compromise. This is most effective within specially created institutions such as parliaments and local government.
- *Mediation* – this is the process by which the parties agree to consult a neutral party for the purpose of assisting them to arrive at an agreement. Participation in this context involves the presentation of proofs and arguments to the neutral party, as well as direct bargaining and negotiation between the parties. This may occur through some mediation procedure, or if the problems are particularly large, with broad policy implications for a substantial number of people through a representative advisory council.
- *Arbitration* – this is the process by which a neutral person makes a decision that is binding on all parties. The decision is made on the basis of material presented by the parties in the light of rational and pre-established criteria. Participation in this context therefore involves the presentation of proofs and arguments to the neutral decision maker. This process may be agreed to by the parties or it may be institutionalised in the form of an appeal to a court or tribunal.

The efficacy of participatory mechanisms will be based on their utility as a means towards resolving environmental conflicts. The form which citizen participation takes will be determined by the role and purpose of environmental decisions.

Conflicts involving legislative decisions are effectively resolved through a conciliation process based on bargaining and compromise. This is institutionalised in representative bodies such as parliaments and local councils where the opportunity to participate is restricted to representative voting.

Conflicts inherent to adjudicative decisions are best resolved through arbitration processes designed to enable impartial decisions. Such processes are institutionalised in courts and tribunals which arbitrate between the competing claims of a limited number of people on the basis of pre-established criteria. Arbitration is a suitable process for resolving these conflicts as enforcement decisions are typically made on the basis of pre-established criteria and involve a limited number of people.

Mediation processes are unsuited to enforcement conflicts, as participation from other parties tends to divert the decision maker from the essential issues. It thus prejudices the fair trial of the principal contestants (Edmond, 1975). Similarly, the conciliation process of bargaining and compromise institutionalised in representative bodies is sometimes based on matters peripheral to the particular dispute. Under these conditions dispute resolution lacks the fair and unbiased application of pre-established criteria to the arguments of the parties.

Clearly the legislative and adjudicative levels of decision making outlined above require different forms of citizen participation. Unlike legislative and adjudicative decisions, managerial decisions involve diverse roles and purposes. As a result, there is no one appropriate means of resolving the diverse kinds of conflict which are likely to eventuate.

Sense can be made of this milieu if we again distinguish between legislative and adjudicative kinds of decisions. The interpretation of general goals to specific plans, guidelines and strategies is a legislative function. Conflicts arising from such decisions are therefore best resolved either through a negotiation or mediation procedure or if the problems are substantially large, with broad policy implications for a substantial number of people, through a representative council or advisory public hearing.

The arbitration process, with its ability to reach a compromise decision and to cope with a large number of participants is unsuited to policy conflicts arising from legislative type decisions. However, the arbitration process is suited to resolving conflicts arising from other management decisions such as the application of pre-established plans, guidelines and strategies to particular cases. These adjudicative decisions involve a limited number of people and are based on pre-established criteria. Conflicts are resolved either through some informal mediation or arbitration procedure or if the problem is irreconcilable, through a formal hearing before a court, board, tribunal or commission.

From this analysis it is possible to produce a model for citizen participation in environmental management decisions. This model is based on the premise that environmental conflict arises from under-representation of certain organised interest groups in the decision making process. Citizen participation is therefore seen as a means of resolving costly environmental conflicts. The form of such participation is determined by the mechanisms of conflict resolution adopted. These in turn are determined by the nature and objectives of the environmental management decision from which the conflict has arisen. The elements of the bargaining model are depicted graphically in Table 1.

Table 1 Model of citizen participation in environmental management

Environmental Decision Making Objective	Conflict Process Nature	Citizen Resolution Process	Participation
Formulation of Policy Goals	Legislative	Negotiation (Bargaining and Compromise)	Representative Bodies (Parliaments and Local Councils)
Translation of policy goals into plans, guidelines and strategies	Managerial (legislative)	Negotiation / Mediation	Negotiation / Mediation or representative advisory committees / advisory public hearings
Application of plans, guidelines or strategies to a particular case	Managerial (adjudicative)	Mediation / Arbitration	Representative / advisory committees / advisory public hearings or formal hearings (court, tribunal, board or commission)
Enforcement of plans, guidelines and strategies	Adjudicative	Arbitration (determination by a neutral decision maker)	Formal hearings (court, tribunal, board or commission)

Based on Edmond, P. (1975) *Participation and the Environment: A strategy for democratizing Canada's environmental protection laws*. Osgoode Hall Law Journal. V.13 No. 3 783-837 put p. 797.

Assessment of citizen participation in environmental management in Australia

As stated above, the efficacy of participatory mechanisms will be based on their utility as a means towards resolving environmental conflicts. The form which citizen participation takes will be determined by the role and purpose of environmental decisions.

To this end, the bargaining model divides environmental decision making into four steps, the formulation of general policy goals, the translation of these policy goals into specific plans, guidelines and strategies, the application of these standards to particular cases and the enforcement of those standards. The remainder of this paper focuses on the extent to which legal rights and opportunities for participation are available at each of these four stages.

Formulation of policy

Under our political system of representative democracy, elected members are responsible for formulating policy. As discussed above, these decisions are made within forums such as parliaments and local councils.

Public participation at this level of decision making is limited to triennial elections where citizens are forced to condense their complex views on diverse issues into a single vote. This is further limited by the two party system of government which has failed to comprehend or represent the multifarious interests of a pluralistic society. As Carew-Reid (1981, p.247) states "*there is something very wrong with a process which creates a mindless polarisation of the community every 3 years*".

It is therefore necessary to move towards a democracy where the pure form of representative government based on value consensus is replaced by one within which both representative and participative processes might operate. Participatory mechanisms may encompass inclusion of policy questions on election ballots for a binding or non-binding vote. (Carew-Reid, 1981). Other more direct democratic devices may include allowing a certain number or percentage of citizens to propose and enact legislation or to cut short an elected representative's term of office. The balance between these participatory and representative mechanisms will depend upon social needs and the level of community awareness.

Formulation of standards

Whilst elected representatives are able to define broad social goals, they do not have the time, or the expertise to translate these policy goals into specific plans, guidelines and strategies. As a result more specific policy formulation must be delegated to subordinate bodies such as administrative departments and statutory authorities.

In Australia, the tendency has been to devise statutory corporations to manage such functions (Logan, 1981). This has led to a plethora of legislation creating statutory bodies with functions impinging on environmental management. The proliferation of statutory bodies has led to fragmentation and duplication of functions. Competition for resources thus exacerbates the lack of coordination between bodies. This diffusion of responsibilities gives rise to inconsistent decision making and absence of direct political accountability to both the public and the parliament (Logan, 1981: Day, 1978: Day, 1981: James, 1978).

Under environmental management legislation Australians have no right to initiate or participate in the formulation of standards. These roles are reserved exclusively to the agency itself. Public pressure must therefore be applied outside the statutory process where ensuing battles are more likely to be won through the informal networks of influence. These networks however are inaccessible to many interest groups (Logan, 1981: Carew-Reid, 1981).

At this level of public administration citizen participation is only permitted after the standard has been prepared by the agency and members of the public are formally invited to make representations, submissions or objections in relation to an exhibited proposal. This procedure is inadequate as a means of resolving conflict for numerous reasons:

- The legal obligation of publicity and the right of objection are not participatory (Sandercock, 1975: James, 1978). They are intended to inform members of the public likely to be affected by a proposal rather than involving those publics in the decision making process. (Lucas, 1976). Day (1978) has described this as "*participation after the event*".
- The right of citizens to comment is sometimes limited by their age, proprietary entitlement, voting entitlement or vague notions of "*affected interests*".
- The opportunity to comment can effectively be denied by limiting public access to relevant and accurate information. Without access to the written surveys and analyses which underpin a proposal the right to participate can be no more than mere tokenism (Carew-Reid, 1981: Day, 1981).
- Public comment is received and dealt with by the agency that prepared the plan in the first instance. Although the body is obliged to consider public comment, the duty is minimised and difficult to prove. (Fogg, 1981). Further, members of the public are not generally able to present their case to an independent hearing such as an advisory public enquiry (Logan, 1981).

- The substance of objections may relate to environmental or legal questions so professional advice can place some members of the public at an advantage (Logan, 1981).
- Citizens are not notified of the outcome of their input until the standard is published in the Government Gazette. This publication not only has a very limited circulation (James, 1978) but it militates against establishing productive dialogue.

In order to avoid environmental conflicts arising, citizens must be involved in the preparation of the proposed standards. Consequently, public notice of the intention to prepare a new standard should be made and public input sought (Day 1978). The public should also be entitled to comment on draft proposals resulting from public input before such proposals are adopted by the particular agency (RTPI 1982).

It is also essential that publicly defensible mechanisms be established to resolve subsequent conflicts. This should be achieved between the agency and the affected parties either through a suitable negotiation or mediation procedure or, if the problems are particularly large with broad implications for a substantial number of people, through a representative advisory committee or advisory public hearing (Edmond, 1975).

Representative advisory committees are bodies established at a regional or metropolitan level with representatives of groups in the area having an interest in environmental management issues. An advisory public hearing on the other hand is conducted by an independent agent who hears public submissions and provides advice to the executive agency.

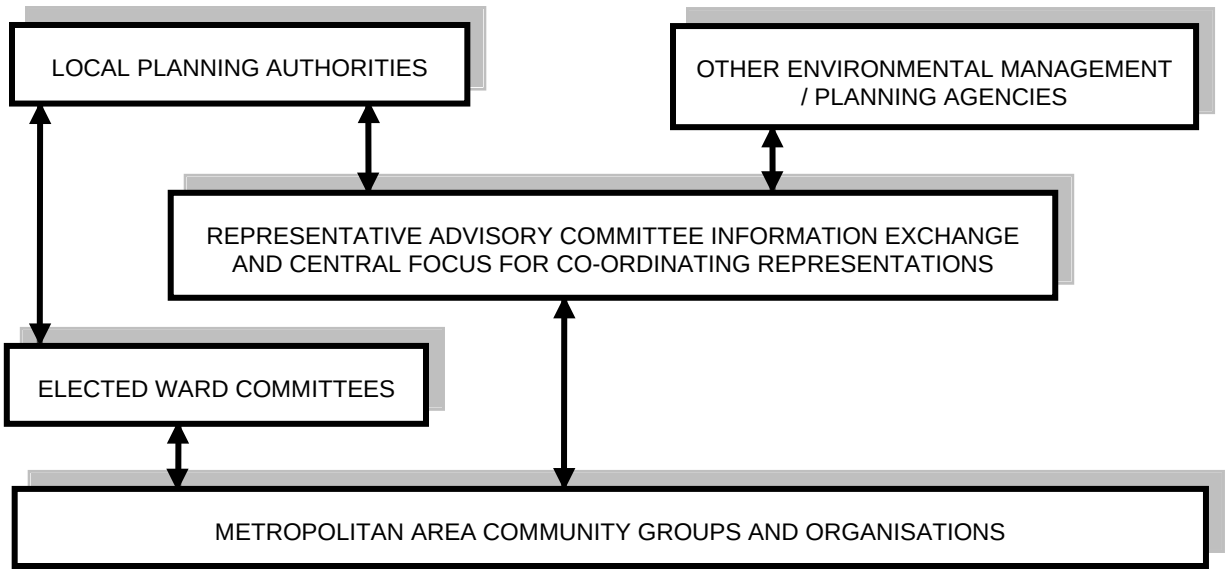
The representative advisory committee could provide a more effective mechanism for resolving environmental conflicts if three conditions are met. These are as follows:

- The committee has a statutory right to be consulted by environmental agencies over a specified range of issues.
- The committee has access to all information (subject to confidentiality constraints) held by the agency which is reasonably required to develop a position on such issues.
- The committee is established with a communications policy for dissemination and exchange of professional and technical information among community groups and organisations as well as between the public and their environmental agencies.

Although a public hearing format is recommended by many writers (Day, 1978: James, 1978) and is frequently adopted in more specific policy formulation (Edmond, 1975), a representative committee can be seen as a more appropriate mechanism.

The operations of advisory committees can also be enhanced by establishing local ward or divisional committees (Heywood, 1990). These would be comprised of councillors and elected representatives (Day 1978, Day 1988). The resulting politico-administrative framework may be illustrated graphically in Figure 1.

Figure 1 Elements of a public consultation system



Based on: Day P.D. (1988) *The Big Party Syndrome: A Study of the Impact of Social Events and Inner Urban Change in Brisbane*, Department of Social Work, The University of Queensland, St Lucia at p.51.

Application of standards

Environmental agencies are not only required to set standards but are also required to enforce these standards through licensing or approval schemes. Such schemes generally provide citizens with limited scope for participation. This can be related to at least four factors:

- Environmental agencies do not have adequate financial and technical resources to administer their licensing schemes. As a result, agencies are forced to seek the assistance of those subject to their regulation. Schemes are therefore implemented incrementally on a case by case basis through processes of negotiation to which interested publics do not necessarily have access.
- Environmental agencies are vested with broad discretionary power in relation to the implementation of their schemes. Members are under no duty to perform anything more than minimal housekeeping functions. The writ of mandamus is therefore unavailable to aggrieved citizens. Additionally, decisions may be based on advice from staff or consultants outside any formal hearing or other process to which the public has access.
- Environmental agencies view their responsibility in terms of benefitting the public at large rather than protecting the private rights of individuals. This is despite the fact that the notion of the public interest has never been clearly defined by statute, is narrowly defined by the common law and is based on the specious assumption that a pluralistic society has a monolithic social conscience.
- Government policy has been concerned primarily with the idea of reducing constraints in the private sector, partly at the expense of participatory involvement.

As a result of these factors, citizen participation in the permit approval system has generally been limited to administrative review of agency decisions through objections and hearings. As a consequence citizens have no significant involvement in the decision making process.

While the rights of publicity and objection are not participatory the right to present ones case to a hearing does afford an opportunity for citizen participation. However the validity of different forms of participation will again depend on the role and purpose of the decision making process. There are essentially three systems for resolving disputes arising from the application of standards to particular races:

- A ministerial or inspectorial system in which disputes are resolved by a qualified expert appointed by the relevant Minister. Although the system is quick, flexible, informal and relatively inexpensive, the arbitrators are political appointments owing ideological allegiance to the government.
- A judicial system in which disputes are resolved by a court of law. Whilst the system ensures impartiality its cost and formality tend to discourage any real citizen participation (Day, 1978).
- A tribunal system in which disputes are resolved by an independent panel of acknowledged experts. These tribunals have a technical competence and are less encumbered by the conservative bias and procedure of the judicial system.

Success before each of these three systems is heavily dependent on the engagement of legal counsel and expert witnesses (Logan, 1981). As a result members of the public may be deterred from exercising their rights because they cannot afford the legal and technical experts that are essential for success. It is therefore necessary to ensure that both legal and planning aid is made available to those who are affected by the decision of an environmental agency but cannot afford professional help. As Amos (1971 p. 339) has stated "*it is a curious and discreditable anomaly ... that a man can obtain free legal aid to defend himself in a court of law yet a community or group threatened with extinction or disaster can get no assistance for its defence*."

Whilst citizens may have a right to review an agency decision in a court or tribunal they have no legal right to participate in the decision making process itself. However there are several public participation techniques that can be applied to this purpose. One is simply to ensure that the membership of the agency represents as many interests as possible (Edmond, 1975). A second more effective technique is the representative advisory committee previously discussed.

Enforcement of standards

While citizens may have a legal right to review agency decisions in a court or tribunal they generally have no legal right to participate in the enforcement of environmental decisions by an agency. Statutes rarely contain formal complaint procedures and citizens have no rights to initiate a hearing in respect of proposed breaches (Edmond, 1975). Additionally, citizens cannot rely on the writ of mandamus to compel agencies to enforce environmental standards. The range of broad discretionary powers vested in such bodies means that they are often under no duty to enforce standards.

If an agency declines to enforce environmental standards or licence conditions the scope for citizen participation is severely restricted. Private prosecutions must contend with the common law rules of standing, the cost and formality of judicial proceedings and restricted access to necessary information. Together these matters impose substantial constraints on the enforcement of environmental standards by private citizens.

Conclusions

Citizen participation in environmental management is currently based on the twin assumptions that representative democracy works effectively and that all sections of the population have equal access to knowledge and resources (Mordey, 1987). As a result citizen participation has generally been limited to administrative review of agency decisions by way of objections and hearings.

However both assumptions are generally recognised to be unrealistic. Elected members are unable to represent the conflicting views of their constituents on diverse issues. Similarly, they are unable to effectively control the decisions of non-elected officials to whom legislative power has been delegated.

Experience has also shown that equality of access is not synonymous with equity and that the rich and articulate sections of society are most successful in having their views accepted (Mordey, 1987).

Lack of representation of certain social groups in the decision making process has led to conflict in environmental management. It is therefore argued that the system of representative government must be supplemented by organised interest groups which are linked into the decision making process.

Citizen participation is thus seen as a conflict management process involving elected representatives and organised interest groups within a given set of rules. The form of participation is determined by the mechanism of conflict resolution adopted. This is in turn affected by the nature and objectives of the decision from which such conflicts have arisen.

Thus, citizen participation, in the formulation of policy goals, should proceed through representative advisory bodies such as parliaments and local councils. Participation in the translation of policy goals into specific standards should proceed through some negotiation or mediation procedure, or if the problem has broad policy implications through a representative advisory committee or advisory public hearing. Participation in the application of these standards to particular cases should be through representative advisory committees or formal hearings. Finally, participation at the enforcement level should be made through a hearing before a court tribunal, board or commission (Edmond, 1975).

The restructuring of existing decision making and participatory processes along these lines implies not only legislative reform but also cultural change. Environmental managers and elected representative must acquire a broadly based planning awareness that fosters a spirit of cooperation with members of the public. Without this integration environmental management decisions will be hardly worth the paper they are printed on.

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This paper was presented at the National Environmental Law Association conference, Gold Coast, August 1990.

New environmental laws in Queensland

Ian Wright

This article discusses the new environmental laws in Queensland. This article considers the growth of environmental regulation by way of conservation movement. It provides a brief discussion on environmental law and how it has been applied at common law and through legislation. It lastly examines the state of the art and reform of environmental laws in Queensland by specifically looking at heritage legislation, development control and pollution control

March 1991

In brief

This paper is concerned with new environmental laws in Queensland. It addresses four topics:

- First, the growth of environmental regulation is examined.
- Second, a brief analysis of environmental law is provided.
- Third, the state of the art of environmental legislation and reform in Queensland is analysed.
- Finally, recent proposals for new heritage environmental planning, and pollution control legislation are examined.

The growth of environmental regulation

The conservation movement has become a world-wide 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 and recreational opportunities.
- The medium of television has increased public awareness of environmentally related issues.

The environmental movement must therefore rank 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. Whilst some critics have contended that this new public sensitivity to environmental issues is merely a passing fad, recent events suggest otherwise.

Internationally, 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. For example, the *World Heritage Properties Conservation Act 1983*.

In Australia, commonwealth and State governments have introduced pollution control and other environmental coordination and protection legislation. Together these developments indicate that environmental problems will continue to rank high among the concerns of our legal system.

Environmental law

The conflict between development and conservation has become a source of social disruption. Law is the civilised way of resolving such disputes. Environmental law has therefore emerged to balance the conflicting interests of development and conservation.

It is difficult to define the boundaries of environmental law as the subject is still in its infancy. However it is suggested that environmental law can be divided into three classes:

- Natural resources law which is concerned with the relationship between man and the resources available to him.
- The law of the natural environment which is concerned with the conservation and protection of the natural environment.
- The law of the cultural environment which is concerned with preservation of the built, cultural and heritage environment.

As with other branches of the law, environmental control may be achieved through the common law (ie. case law) or it may be regulated by statute.

The common law courts have applied three broad categories of legal principles to environmental problems:

- The Torts of negligence, nuisance and trespass have provided legal causes of actions to persons harmed by environmental problems.
- Administrative law has provided remedies where statutory authorities have refused to carry out their functions or made decisions contrary to law.
- The criminal law has provided sanctions in respect of the contravention of statutes.

Whilst the common law courts have played a significant role in the development of environmental law, it has principally been the legislature which has extended the frontiers of this area.

Environmental legislation can be divided into five broad categories:

- Resource development legislation which provides primarily for the development of natural resources and includes "*fast track*" legislation, public development indenture and franchise agreements.
- Resource allocation legislation which is concerned with the exploitation or use of natural resources such as minerals, fisheries, water, land, energy, soil and forests.
- Conservation legislation which introduces an element of conservation into the development of natural resources. Examples include soil conservation, beach protection, pasture protection, marine conservation and wildlife conservation.
- Preservation legislation which provides for the preservation of the cultural and artificial environment and includes such matters as the protection of the Aboriginal heritage of Australia.
- Protection legislation which is concerned with the protection of particular elements of the natural environment from identifiable harm. Examples include 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 fertilizers.

Figure 1 in Appendix 2 attempts to classify environmental legislation in Queensland into these five broad categories.

In addition to the common law and legislation, environmental law is also derived from two further sources: the decisions of statutory courts and tribunals and informal rules.

In Queensland statutory courts and tribunals are of two basic types:

- Firstly, there are those statutory bodies which are vested with administrative power to determine applications. Examples include the Licensing Court and the Mining Wardens Court which are given power to attach environmental conditions to applications.
- Secondly, there are statutory appeal courts such as the Land Court and the Local Government Court, to be renamed the Planning and Environment Court, which are vested with jurisdiction to consider afresh by way of appeal an administrative decision. This contrasts with the administrative law function of the common law courts such as the Supreme and District Courts which are only concerned with the legality of a decision.

The final source of environmental law is the informal rules and procedures which govern the conduct of administrative bodies. These memoranda, guidelines, procedures and directives are designed to implement government policy. They are not legally binding and their legal status is uncertain should it be alleged that the administrative body has disregarded them.

The state of the art and reform of environmental laws in Queensland

Introduction

When the Goss Labor government came to power in December 1989, it inherited a environmental management system that was based on a deliberate policy of decentralised decision making.

This policy was manifested in in at least three respects:

- The responsibility for ensuring that adequate consideration was given to environmental matters was placed on the government instrumentality empowered to grant approval for development proposals or to undertake works in its own right. There was no focal point for environmental issues and each responsible agency tendered to establish its own criteria.
- Regulatory powers with respect to land use and environmental protection were exercised by a number of administrative bodies whose activities were coordinated by the Coordinator General under the Bjelke-Petersen government and then by the Under-Secretary of the Department of Environment and Heritage under the Ahern and Cooper governments.

- Environmental management was based on specific issue-oriented statutory controls and on overall assessment, prior to approval, of the effects of new developments. Statutory requirements on specific issues such as air, water and noise pollution and resource extraction were imposed on new developments where appropriate.

A summary of existing environmental legislation in Queensland is provided in Appendix 1 to the paper.

Reform

It was against this background that the Goss government commenced its program of reform. Since its election, the government has initiated a mind boggling number of reviews which will affect the environmental management system. They include:

- The Department of Housing and local government's review of the development approval process.
- The Electoral and Administration Review Commission's review of local authority boundaries and a proposed system of administrative review.
- The Department of Environment and Heritage's review of heritage legislation, environmental impact legislation, environmental protection authority, coastal protection strategy, energy strategy and conservation strategy.
- The Department of Land Management's review of land policy and administration.
- The Fitzgerald Inquiry into Fraser Island and the Great Sandy Region of Queensland which is examining, amongst other things, a system of dispute resolution for environmental conflicts.
- The Department of Primary Industries land care and tree planting programs of degraded land.
- The Department of Resource Industries review with the environmental implications of mining encompassing issues of land access, environmental impact and rehabilitation of mine sites.
- The Department of Police and Emergency Service's review of contaminated land.

Although these reviews have not yet been completed, it is almost certain that the existing system of environmental management in this State will be dramatically altered.

Accordingly, the remainder of this paper will concentrate on current proposals for heritage development control and pollution control legislation.

Heritage legislation

Following the demolition of the Commonwealth Bank building in Queen Street, Brisbane in March 1990 the Minister for Environment and Heritage, the Honourable Pat Comben announced the government's intention to introduce legislation to protect buildings and other places of heritage significance.

The minister foreshadowed that this objective would be achieved in three stages:

- Stage 1 would involve the introduction of interim protection legislation;
- Stage 2 would involve the release of a green paper for public review and comment; and
- Stage 3 would involve the preparation of a draft bill.

Stage 1 – Interim protection

On June 5, 1990 the Queensland government implemented stage 1 when it passed the *Heritage Buildings Protection Act 1990*.

The Act expires on 10 March 1992 unless comprehensive heritage legislation is introduced sooner.

The essential characteristics of the Act are as follows:

- A heritage committee comprising persons qualified in building, planning and conservation is established.
- Properties and places that have been recognised by the National Trust and the Australian Heritage Commission as being of heritage significance are listed in a schedule to the Act.
- An owner, including the Crown, who wishes to demolish, develop or subdivide a heritage property must apply to the Heritage Committee for a certificate authorising the action unless that application was made before 11 March 1990 or in the case of the Crown an exemption is granted by the minister.
- The committee has power to approve unconditionally, approve subject to conditions or refuse the application. The committee is deemed to have refused the application if a decision is not made within 30 days or such further time not exceeding 30 days as is approved by the minister.
- A person dissatisfied by the decision of the committee can request the committee to review its decision. There is a further right of appeal to the minister within 30 days of receiving the committee's reviewed decision. The minister's decision is final.

- Local authorities are prohibited from approving any application in respect of a heritage property which is not accompanied by a certificate. Applications not accompanied by a certificate must be referred to the Heritage Committee.
- It is an offence either to demolish, develop or subdivide any heritage property without having obtained a heritage certificate or to fail to restore a heritage property pursuant to an order of the minister.
- These offences are punishable by fines not exceeding $1.2 million.
- Where the offence is committed by a corporation every executive officer of the corporation is deemed to have committed the offence unless it can be demonstrated that they had no knowledge of the offence or did not consent to the offence, or having exercised a reasonable degree of diligence, they were not able to prevent the commission of the offence.

Stage 2 – The Green Paper

In October 1990, the government commenced stage 2 of the review process with the release of a Green Paper on proposed heritage legislation.

The Green Paper suggests that comprehensive legislation should be introduced in Queensland and that the legislation comprise a number of core components.

Heritage Authority

The Green Paper suggests the creation of a Heritage Authority to administer the legislation. The Authority would be comprised of persons either representing a range of organisations or qualified in assessing the heritage significance of places.

Heritage agreements

The Green Paper also identifies the advantages of heritage agreements between the Heritage Authority, local authorities and land owners.

These agreements could provide the opportunity for the land owner to negotiate incentives for the conservation of their property. Incentives could include reduced or deferred rates and land tax payments, grants and loans, technical advice and the transfer of development rights to other properties.

These agreements will be endorsed on the title and will run with the land in perpetuity subject to periodic review by consent between the parties.

The Cultural Heritage Register

The green paper also recommends that a cultural heritage register be established and administered by the Heritage Authority.

The registry is to be in addition to any register that currently exists or may be established by local authorities pursuant to their planning instruments. For example the Brisbane City Council maintains a list of heritage buildings under section 22 of the Brisbane Town Plan.

The register would provide a listing of Queensland's cultural heritage. Cultural heritage is defined as:

> *Those places being components of the cultural environment of Queensland (and associated components of the natural environment of Queensland) that have aesthetic, historic, scientific or social significance or other special value for the present community and for future generations*.

Place is defined as:

- a site, precinct, area or region;
- a building or other structure or part thereof;
- a group of buildings or other structures;
- an item or items associated or connected with a site, precinct, area or region where the primary importance of the item or items derives at least in part from its or their association with that site, precinct, area or region; or
- the land, the use or condition of which, is necessary for the protection of the item or place.

The terms "*precinct*", "*area*" and "*region*" are to be defined in accordance with terms used in town planning legislation.

A place will be deemed to be a component of the cultural environment of Queensland if it:

- demonstrates the evolution or pattern of Queensland's history;
- demonstrates rare, uncommon or endangered aspects of Queensland's heritage;
- contributes to the understanding of Queensland's history;
- demonstrates the characteristics of a broader class of cultural places;

- exhibits aesthetic characteristics valued by the community or by a cultural group;
- demonstrates a high degree of creative or technical achievement;
- has a strong or special meaning for the community or a cultural group because of social, cultural or spiritual associations;
- has a special association with a person group or organisation that was important in Queensland's history.

Although the Heritage Authority will be empowered to maintain and administer the register, the Authority will have power to delegate certain powers to local authorities having requisite financial and technical resources.

At present only the Brisbane City Council and perhaps the Maryborough City Council would be capable of assuming these powers. However the Heritage Authority will retain a residual power of control to be exercised where the local authority is either unwilling or unable to make a decision in accordance with the Act.

Listing procedures

The procedure for including a place on the register is set out in the green paper and is included in Figure 2.

The process comprises five stages:

- Any person or organisation may nominate a place for registration.
- The place is put on an interim register and the owner is notified of the nomination and provide with a full citation of the grounds on which registration is sought. The owner becomes bound by the Act from the date of notification.
- The nomination is considered by the Heritage Authority which can either accept or reject the nomination. The Heritage Authority is required to notify the owner of its decision.
- If the nomination is accepted the owner can either consent to the place being included on the register or can object to the Heritage Authority's decision. This objection is limited to heritage grounds and does not include issues of financial hardship to the owner.
- If the owner lodges an objection against the Heritage Authority's acceptance of the nomination, the authority is required to review its decision and make a final determination. If the objection is accepted the nomination is terminated.
- It the Heritage Authority rejects the objection, the owner can appeal against the authority's decision. If the appeal is upheld the nomination is terminated.
- However if the appeal is rejected the place is then included on the register.
- As soon as the place is entered on the register the owner and all relevant local government and planning authorities are notified of the entry.

Works affecting listed places

Once a place is included on the register, no work can be done to the property without the consent of either the local authority or the Heritage Authority.

The procedure for dealing with work applications is shown in Figure 3.

It comprises five stages:

- An application is lodged with the local authority together with other necessary applications such as town planning, building or subdivision.
- All applications are referred to the Heritage Authority.
- If the local authority has delegated powers it must consider the applications in accordance with its own planning, building and subdivisional regulations as well as the guidelines issued by the Heritage Authority. The local authority can make three possible decisions:
  - firstly, if the regulations and guidelines do not conflict the local authority can deal with the matter in the usual manner. That is, it can approve unconditionally, approve subject to conditions or refuse the application;
  - secondly, if the regulations and guidelines do conflict but the local authority has a discretion under those regulations it must exercise that discretion in accordance with the guidelines; and
  - thirdly, if the regulations and guidelines conflict but the regulations are mandatory, the local authority can either refuse the application or if it supports the application, can refer it to the Heritage Authority which can request the minister responsible for the Heritage Act to vary the local authority's regulations.
- If the local authority has no delegated power the heritage application must be made to the Heritage Authority whose decision is binding on the local authority.
- Even where the local authority has delegated power the Heritage Authority can require that all applications in respect of a place including planning, building and subdivision applications be referred to it for determination.

The Heritage Authority processes the heritage application in accordance with its guidelines and the planning, building or subdivisional applications in accordance with the local authority's regulations.

Stop work orders and conservation orders

In order to protect places of cultural heritage whether on the register or not, the Green Paper recommends that the Heritage Authority be given power to make stop work orders and conservation orders.

Stop work orders would prevent the taking of actions such as demolition or major alterations of a place of cultural heritage for two weeks. This would give the Heritage Authority time to nominate the place on the interim register or issue a conservation order. The power to issue stop work orders would also be delegated to local authorities.

Conservation orders would prevent the carrying out of any substantial work on a place of cultural heritage without the approval of the Heritage Authority.

The owner would be entitled to object to the making of a stop work order and a conservation order. If the objection is rejected by the Heritage Authority the owner may appeal. The appeal procedure is shown in Figure 4.

Appeals

An appeal system, independent of the Heritage Authority will be required to review:

- the listing of places on the register;
- the decision of the local authority or the Heritage Authority in respect of applications to do works to places; and
- the making of stop work and conservation orders.

The Green Paper also recommends that the grounds of any such appeals be limited. In the case of appeals against the listing of places, the only ground would be the heritage value of the place. In the case of other appeals, the only ground would be the absence of a prudent or feasible alternative to the work proposed or being undertaken.

Offences and penalties

The Green Paper also recommends the creation of offences and the imposition of penalties for contravention of the legislation.

These offences are not intended to be offences of strict liability. It will therefore be necessary to show intentional negligence on the part of the offender. However the Green Paper does suggest that the neglect of commercial or non-residential properties could be an offence of strict liability.

The Green Paper also recommends that the directors or employees of a corporation which commits an offence under the Act should be guilty of the same offence unless they can show that they were not in a position to prevent the commission of the offence.

Penalties for contravention of the legislation could include:

- fines up to $1 million with continuing fines of $10,000 per day;
- loss of development rights for a period of 10 years;
- restoration of places; and
- forfeiture of items excavated or removed without approval.

Stage 3 – Draft legislation

The period for making written submissions in respect of the Green Paper closed on 31 December 1990. It is currently anticipated that draft legislation will be introduced into the parliament early in the new year.

Although the Green Paper was primarily concerned with policy issues there are a number of detailed problems which will have to be addressed in the legislation:

- The citation setting out the grounds on which the place is nominated for inclusion on the register must include an assessment not only of the heritage value of the place but also its current use and the cost of all maintenance and restoration works necessary to ensure the conservation of the place.
- The decision to list the place should be made on the basis of all factors including financial hardship as well as the heritage value of the place. It would be an inefficient use of the community's resources to conserve a place when other places of similar cultural value can be conserved with less expenditure.
- The criteria to be used in listing places should be set out in the Act to prevent blanket listing and to ensure public discussion of proposed amendments.
- The guidelines to be used in determining .applications for work in respect of listed places should also be set out in the Act. These guidelines are no different to development standards included within planning instruments.

- There should be a right of appeal where a local authority rejects a nomination to list a place.
- The circumstances in which stop work and conservation orders can be made should be specified.
- The existence of registers at both State and local government levels will lead to confusion and duplication and is contrary to the current trend of inter-governmental reform.
- Once a place is registered all applications in respect of that place should be made to and determined by local authorities. The Heritage Authority should provide guidelines in respect of the assessment of that application. These guidelines should not override planning instruments and should be considered in a similar manner to guidelines produced in respect of air, water and noise pollution.
- The implementation of the incentives listed in the Green Paper will require the coordination of Federal, State and Commonwealth governments. Income tax is the responsibility of the Federal government. Land tax is the responsibility of the State government whilst local authorities are responsible for rates and transferable development rights.

Development control – An attempt to integrate planning and environmental functions

Introduction

In 1985, the Bjelke-Petersen government commenced a review of the land use planning system established by section 33 of the *Local Government Act 1936* and the *City of Brisbane Town Planning Act 1969*.

That review culminated in the passing of the *Local Government (Planning and Environment) Act 1990* in September 1990 by the Goss labour government.

The commencement of this Act has been delayed to mid-April 1991 to enable the preparation of regulations and to allow local authorities to become familiar with its requirements.

Land use planning

Although the Act retains the core elements of the existing land use planning system it does introduce a number of important changes:

- Persons are permitted to enforce the failure of an applicant to comply with a planning scheme irrespective of whether their rights have been infringed or not. Previously this enforcement function was limited to local authorities and as such was constrained by finances and political considerations.
- The conditions imposed on a rezoning, consent and subdivisional approval attach to the land and are binding on successors in title. This overcomes the necessity for local authorities to enter into complex deeds of agreement with applicants in respect of planning conditions.
- Land can be rezoned and subdivided in stages.
- The existing practice of "*in principle*" approvals has been formally recognised.
- Elected representatives must be served with copies of notices of applications for rezoning and town planning consent in order to improve public accountability.
- The time period for the giving of public notice and the lodgement of objections has been amended to 20 working days.
- Once an application for a town planning permit has been rejected by the local authority, it is not possible to submit another application unless it is substantially different for 12 months.
- On an appeal to the Local Government Court (which has now been renamed the Planning and Environment Court) each party bears its own costs unless the court considers the appeal to be frivolous or vexatious.
- The onus of proof has been reversed in the case of appeals lodged by objectors. The applicant must establish that the approval should be allowed or the appeal dismissed.

Environmental considerations

However by far the most important changes have occurred at a policy level. The Act is intended not only to provide a code for the proper planning of an area but also to ensure the protection of the environment. This objective is stated explicitly in section 1.3.

The Act therefore attempts to integrate planning and environmental considerations within the one system. This is attempted in a number of ways:

- A broad and somewhat amorphous definition of "*environment*" is adopted in order to overcome the decision in *DA Murphy & Co. House Australia Pty Ltd v The Crown* No. 339 of 1986 delivered on 11 August 1989.

  In that case the full court of the Supreme Court of Queensland held that the meaning of the word "*environment*" in section 32A of the existing Local Government Act was limited to the inanimate conditions in which organisms live but did not include those organisms.

Although this decision was subsequently overturned by the High Court the new definition would appear to overcome the restrictive interpretation of the Full Court.

- The preparation of strategic plans and development control plans must be supported by a planning study which must include amongst other things an assessment of the natural and built environment (or both).
- Local authorities must take into account the deleterious effects on the environment of any proposal for which local authority approval, consent, permission or authority is sought.
- Applications for local authority approval must be accompanied by an environmental impact statement where the proposal is either a designated development or where the local authority otherwise considers that an environmental impact statement is necessary.

  Designated developments can be specified in either the regulations to the Act or in local authority planning policies.

  Although these have yet to be publicly released it is anticipated that developments such as heavy industry with high pollution potential, cattle feed lots, piggeries, extractive industries, marinas and heliports will be designated.
- The environmental impact statement must be prepared in accordance with terms of reference prepared by the director of local government in the case of designated developments and by the local authority in respect of other developments requiring an environmental impact statement. The environmental impact study procedure process is shown in Figure 5.
- Rezoning applications of contaminated land must also be accompanied by site contamination reports. The reports do not form part of the application and are not open to public scrutiny.

  The reports are prepared at the direction of the local authority and by the director of the Chemical Hazards and Emergency Unit who is to specify the tests to be carried out on the land by a suitable accredited laboratory.

  The local authority is to give consideration to the site contamination reports prior to making a decision on the rezoning. The procedure for the preparation of a site contamination assessment is shown in Figure 6.
- The interrelationship between the planning process and the environmental impact and site contamination assessment processes is shown in Figures 7 and 8. Figure 7 provides a flow chart of the new rezoning application process while Figure 8 provides a flow chart of the new town planning consent application process.

Policy conflict: Environmental planning versus environmental management

The integration of environmental considerations into the planning process represents a political victory for land use planners and a defeat for ecologists. This outcome is perhaps reflective of the political clout of the current Minister for Housing and Local Government, Mr Tom Burns within cabinet.

The Department of Housing and Local Government has successfully argued that environmental effects should be controlled through planning approval mechanisms.

Environmental impact assessment has therefore been integrated within the development control process embraced in the new Local Government (Planning and Environment) Act.

This does have a number of advantages: simple known effects can be managed pro-actively, developers believe such a system expedites approvals and approvals are given by one agency.

However there are a number of disadvantages of an environmental planning system:

- Where scientific knowledge is incomplete or uncertain so that valued judgements cannot be made on the basis of expert opinion, there is a tendency for economic considerations to dominate environmental considerations.
- Such systems only apply to development. They ignore other impacts on the environment such as the impact of government purchasing power or the introduction of a potentially environmentally harmful consumer product.
- Land use systems use environmental impact assessment as a planning tool and generally rely on planners to enforce decisions. It is difficult for the planning profession to provide expert witnesses on matters of a scientific nature; consultants become necessary and are costly.
- Land use planning systems commonly require external arbitration; they do not manage conflict well because they tend not to be able to satisfactorily reconcile social, economic and environmental goals.

The Department of Environment and Heritage has therefore argued albeit unsuccessfully to date that environmental issues should be addressed through a programme of environmental management.

The philosophy underlying this approach is the concept of sustainable development discussed by an earlier speaker. Ecologists have interpreted the concept of sustainability to mean ecologically sustainable development. That is development must be compatible with the continued functioning of ecological processes.

On this basis the Department of Environment and Heritage has argued that both public and private institutions should be required to demonstrate the consequences of human actions (or inactions) and their activities on the environment.

The department has therefore allocated funds for the development of comprehensive environmental impact and pollution control legislation, a Queensland conservation strategy, a waste minimisation and recovery strategy, an energy strategy and a coastal protection strategy.

The apparent policy conflict between the Department of Housing and Local Government and the Department of Environment and Heritage has been resolved at least in the short term in favour of the land use planners.

The question of whether the planners will prevail over the ecologists in the long term however will be determined by a lawyer when Mr Tony Fitzgerald makes his recommendations on an environmental conflict resolution procedure.

Pollution control

Introduction

Subject to the findings of the Fitzgerald Inquiry it would appear that the new environmental planning system will be complemented by a wide range of pollution control legislation.

The administrative responsibility in relation to these controls has been vested in the Under-Secretary of the Department of Environment and Heritage by the *State Environment Act 1988*. That Act abolished the Air Pollution Council, Noise Abatement Authority and Water Quality Council.

Unlike Victoria, the diverse types of pollution control are not governed by one Act. It is therefore necessary to consider the effect of a number of statutes dealing with separate forms of pollution. These are illustrated in Appendix 1 to this paper.

It is proposed to offer a number of general observations concerning the types of approaches to pollution control evident in Queensland than to detail certain aspects of each particular area of control.

Legislative approach

The legislative approach to pollution control in Queensland is similar to other Australian states:

- emission standards are prescribed in respect of certain pollutants;
- licences are required in respect of emissions from specified premises;
- control equipment and apparatus must be installed to reduce pollution;
- offences and penalties are prescribed in respect of statutory breaches.

Since each of these matters will vary depending on the particular piece of legislation in question it is necessary to consider each area of control in turn.

Air pollution

Air pollution is governed by the *Clean Air Act 1966* which prescribes the following controls:

- All scheduled premises must be licensed and renewals and transfers of licences must be approved.
- The occupier of scheduled premises must not alter the method of operation and the occupier of unscheduled premises cannot do any work that would cause those premises to become scheduled premises.
- Controls are imposed in respect of fuel burning equipment and control equipment, chimneys, dark smoke and air impurities exceeding licence requirements or prescribed standards.
- Licences can be revoked and conditions altered, premises shut down and discharges of air impurities prohibited or restricted. There are appeals to the District Court in respect of such decisions.
- The managing director, manager or other governing officer and every member of the governing body (ie. board of directors) can be charged with an offence under the Act. Fines can extend up to $20,000 with a continuing fine of $2,000 per day.

Water pollution

Water pollution is regulated by the *Clean Waters Act 1971* which prescribes the following controls:

- All premises discharging waste to any water or premises from which waste could cause water pollution must be licensed. Renewals and transfers of licences must be approved.
- The occupiers of any premises cannot alter the method of operation or operate premises in such a way that might cause water pollution.
- Controls are imposed on water pollution equipment.

- Licences can be suspended or cancelled and discharges can be prohibited in emergency situations or otherwise constrained by a Supreme Court order. These decisions can be appealed to the District Court.
- Managing directors or governing officers can be charged with an offence under the Act. Fines can extend up to $10,000 with a continuing fine of $1,000 per day.

Noise pollution

Noise pollution is regulated by the *Noise Abatement Act 1978* which prescribes the following controls:

- Public complaints can be lodged in respect of excessive noise.
- Excessive noise must be abated.
- Inspectors have powers to enter, examine and conduct tests.
- Show cause and noise abatement orders can be issued prohibiting an occupier from making excessive noise.
- Premises causing excessive noise must be licensed. A change in ownership or occupier of premises must be notified within 30 days.
- Licences can be revoked or amended and exemption can be sought in respect of compliance with licence conditions.
- Penalties are prescribed in respect of breaches of the Act. The general penalty is a fine of $2,500 with a continuing fine of $150 per day.

Contaminated land

Unlike air, noise and water pollution there is currently no legislation which provides a comprehensive management policy for contaminated land.

In response to the problems identified at Kingston and Mt Isa the government has recently released a Green Paper.

The Green Paper recommends that comprehensive legislation be introduced. To be known as the Clean Land Act, it is envisaged that the legislation will operate in the following manner:

- A public register of contaminated land is to be established and maintained by the Chemical, Hazard and Emergency Unit (**CHEM Unit**) within the Department of Policy and Emergency Services.

  Contaminated land is defined as:

  > *Land, including any building or structure thereupon, which is affected by a hazardous substance so that it is or it causes other land to be:*
  >
  > *(a) unsafe or unfit for habitation or occupation by persons or animals;*
  >
  > *(b) degraded in its capacity to support plant life; or*
  >
  > *(c) in any way affected to reduce the beneficial use of the land.*

- Owners, occupiers, polluters and local authorities will be required to notify the CHEM Unit of contamination or potential contamination and provide an investigation report in relation thereto.

  The CHEM Unit then conducts a health and environmental risk assessment to determine whether the land is contaminated. If contamination is shown the land will be entered on the register and remedial action will be ordered.

- The cost of remedial action is to be paid by the polluter or if the polluter cannot be located or financially unable to meet those costs, the existing owner or occupier or if the existing owner is incapable of funding the clean-up, the local authority or if the clean-up is beyond the resources of the local authority, the State government.
- After the site has been remediated, a validation survey will be conducted to determine whether there remains a health and environmental risk.
- Provision will also be made for appeals, offences and penalties but these are not specified in any detail in the green paper.

Assessment of legislation

Although pollution control legislation has existed in Queensland since the early 1970s its enforcement has proved difficult.

The number of successful prosecutions under the legislation can be counted on both hands. In fact the first successful prosecution under the Clean Waters Act was achieved in 1990, some 19 years after its enactment.

The enforcement of pollution control legislation in this State has proved difficult for several reasons:

- emission standards are subjective rather than prescriptive so as to enable environmental goals to be balanced with economic objectives;

- regulatory agencies have traditionally been under-funded. This was further exacerbated by the subjective approach of the legislation. Subjectivity has two basic problems: it is reactive and inefficient of resources;
- fines are minimal and bear no relationship to commercial reality;
- third parties are provided with no objection and appeal rights.

Proposed legislation

With the election of the Goss government, the Minister for Environment and Heritage, Mr Pat Comben announced that comprehensive pollution control legislation would be enacted.

It is currently anticipated that this legislation will involve the following:

- consolidation of pollution controls into one enactment similar to Victoria's *Environment Protection Act 1970;*
- the establishment of an environmental protection authority to administer the legislation;
- the preparation of prescriptive environmental quality criteria to ensure pro-active management of environmental issues with minimum resource usage;
- the delegation of powers to local authorities to ensure local environmental management.

In drafting the legislation it is anticipated that the government will have regard to the experience of similar legislation in other jurisdictions, in particular Victoria and New South Wales as well as the United States.

An analysis of pollution control legislation in these jurisdictions reveals the following trends:

- The Crown is expressed to be bound. The Queensland government has indicated it will be bound by the proposed Clean Land Act.
- Pollution offences have also been strengthened:
  - offences are of strict liability, that is there is no need to show intention or negligence on the part of the offender;
  - defences to pollution offences often require the defendant to demonstrate that positive steps have been taken to prevent or mitigate pollution; and
  - the onus is often reversed so that the defendant must prove that an element of culpability is not present.
- Liability has also been imposed on directors and employees of offending corporations whose only defences are:
  - that the offence was committed without the person's knowledge;
  - the person was not in a position to influence the conduct of the corporation in relation to the commission of the offence; or
  - that the person used all due diligence to prevent the commission of the offence by the corporation.
- Penalties have also been increased to ensure that they cannot be absorbed by business as a minor cost to production.
- Conditions have also been imposed on pollution licences providing for increased fees, financial assurances and bonds, self-monitoring and certification of results and the adoption of the best available technology.
- The funding of government agencies has also been increased to ensure proper enforcement of pollution controls.

Conclusions

In conclusion it would appear that we are currently in the middle of a phony war where the rhetoric is not matched by the reality.

The rhetoric of corporations being liable for large fines and in the case of directors, imprisonment is yet to be matched by reality at least in Queensland.

Environmental legislation in this State is currently ad hoc and ineffective. Since its election in December 1989, the Goss government has embarked on a review of Queensland's environmental laws. The future direction of these laws currently awaits the findings of the Fitzgerald Inquiry.

However, it is clear that the new laws will be more comprehensive and effective in their application than the existing legislation.

It would therefore be sensible, if not prudent for corporations to establish long term strategic corporate plans to deal with existing and potential environmental problems.

The implications for corporations and their officers are enormous. They include:

- increased licence fees;
- an increased use of bonds to secure the performances of standards;
- an increased emphasis on reducing pollution and using best available technology;
- the self-monitoring of licence conditions together with increased public availability of results, combined with the ability of third parties to institute their own civil or criminal proceedings;
- an increased use of prosecution;
- the difficulty in obtaining environmental impairment liability insurance;
- the potential size of clean-up and third party costs;
- an increased requirement for environmental audits for the purposes of preparing company accounts, minimising the chances of prosecution of directors and managers, obtaining basic third party insurance, and on sale or lease or redevelopment of land;
- an increased emphasis on waste minimisation and stringent standards for waste disposal; and
- significantly increased potential liability of senior management and the need for due diligence enquiries to minimise the chances of prosecution.

Appendix 1 Summary of legislative provisions in Queensland

General overview

In Queensland there is currently a decentralised system of administrative responsibility for environmental management which is operated without direct oversight by a single authority. Each government authority or agency (including local authorities) are required by law to assume responsibility independently for undertaking environmental management procedures with respect to its area of activities and responsibilities.

Land tenure

Land Act (currently land policy and administration is the subject of review) – Administered by the Division of Land Management within the Department of Lands. It consolidates the law relating to alienation, leasing and occupation of Crown land, provides for the setting aside of land as a public reserve, and the opening, closing and use of roads.

Development control

Local Government Act and **Local Government (Planning EL) Environment) Act** (not yet proclaimed) – Administered by the Department of Housing and Local Government and local government authorities.

- Responsibility for town planning and land subdivision control is delegated to local authorities most of which have prepared town planning schemes which regulate the purposes for which land can be used within particular land use zones.
- Local authorities must consider the environmental impacts of proposals seeking development approval. Environmental impact has been defined by the Full Court of Queensland to exclude flora and fauna. However the term has been defined in wider terms in the Local Government (Planning & Environment) Act to overcome the effect of this decision.
- Local authorities and the Minister may require the submission of an environmental impact statement. The types of development applications requiring an environmental impact statement are currently prescribed in a bulletin issued by the Department.

Environmental coordination

State Development Public Works Organisation Act – Administered by the Coordinator General of the Department of Premier Economic and Trade Development and the Under-Secretary of the Department of Environment and Heritage.

- The Under-Secretary of the Department of Environment and Heritage is responsible for coordinating government activities to ensure proper account is taken of environmental effects of any development.
- A government authority responsible for approving development or undertaking works has the duty and the power to consider the environmental impact of that development or works.
- The Coordinator General is responsible for preparing infrastructure coordination plans for prescribed developments (large mineral processing developments such as the Gladstone Alumina Refinery) as well as regional planning (although no such plans have ever been prepared).

Pollution control

State Environment Act – This Act is administered by the Department of Environment and Heritage. It establishes a State Environmental Council, whose chief executive is responsible for administering the Clean Air Act, the Clean Waters Act and the Noise Abatement Act.

Clean Air Act

- All scheduled premises are to be licensed. Renewals and transfers of licences must be approved.
- Occupier of scheduled premises must not alter method of operation and occupier of unscheduled premises cannot do any work that would cause it to become scheduled premises.
- Controls are imposed in respect of fuel burning equipment and control equipment, chimneys, dark smoke and air impurities exceeding licence requirements or prescribed standards.
- Licences can be revoked and conditions altered, premises shut down and discharges of air impurities prohibited or restricted. There are appeals to the District Court in respect of such decisions.
- The managing director, manager or other governing officer and every member of the governing body (ie. board of directors) can be charged with an offence under the Act. Penalties extend up to $20,000 with an extra $2,000 per day for each day that the offence continues.

Clean Waters Act

- All premises discharging waste to any water or premises from which waste could cause water pollution are to be licensed. Renewals and transfers of licences are to be approved.
- Occupiers of any premises cannot alter method of operation or operate premises in such a way that might cause water pollution.
- Controls are imposed on water pollution equipment.
- Licences can be suspended or cancelled and discharges can be prohibited in emergency situations or otherwise constrained by a Supreme Court order. These decisions can be appealed to the District Court.
- Managing directors or governing officers can be charged with an offence under the Act. Penalties can extend to fines of $10,000 for a first offence, plus $1,000 per day for each day that the offence continues.

Noise Abatement Act

- Allows public complaints in respect of excessive noise.
- Requires excessive noise to be abated.
- Provides for a power to enter, examine and conduct tests.
- Provides for the issue of show cause and noise abatement orders prohibiting an occupier from making excessive noise.
- Activity causing excessive noise must be licensed. Change in ownership or occupier must be notified within 30 days.
- Licences can be revoked or amended and exemption can be sought in respect of compliance with licence conditions.
- Penalties are prescribed in respect of breaches of the Act. The general penalty is a fine of $2,500 plus $150 for each day the offence continues.

The Agricultural Chemicals Distribution Control Act – This Act is administered by the Department of Primary Industries and controls the distribution of agricultural chemicals from aircraft and from ground equipment.

Pollution of Waters by Oil Act and **Queensland Marine (Sea Dumping) Act 1988** – These Acts are administered by the Department of Environment and Heritage and control the dumping of oil and/or other waste products in Queensland waters. Discharge of oil into any water is an offence.

Sewerage and Water Supply Act – This Act is administered by the Department of Local Government and Housing and has as one of its objectives the prevention of water pollution by the control of discharges to a sewerage system. It provides for local authority control over discharges to a sewerage system in order that the final effluent from the system may comply with any licence issued under the Clean Waters Act.

Health Act – This Act is administered by the Department of Health. It establishes that the implementation of solid waste disposal controls is the responsibility of local authorities, under the supervision and to the satisfaction of the Director General of Health.

Litter Act – This Act is administered by the Department of Local Government and Housing. It provides for on the spot fines and legal proceedings to ensure the reduction and possible elimination of littering in public places. The Act provides that a person is not permitted to place or cause litter to be left in a public place except in litter receptacles so provided.

Flora and fauna conservation

National Parks and Wildlife Act – This Act is administered by the Department of Environment and Heritage. This Act establishes the office of director of National Parks and Wildlife to administer statutes relevant to the conservation of flora, fauna and natural landscapes with provisions and power, controls and penalties to regulate public activity in the interests of nature conservation. The Act provides for classification of State lands for possible reservation as national parks, the setting aside of such land and its management.

Fauna Conservation Act – This Act is administered by the Department of Environment and Heritage. Its principal objective is to conserve native animals and manage the harvest of those species of animals subject to exploitation. Ownership of all fauna in its wild state is vested in the crown. Apart from non-protected and prohibited fauna, all fauna in Queensland is protected at all times, except for certain exemptions at certain times. Provision is made for the declaration of land at 3 levels of protection: sanctuary, refuge and reserve.

Forestry Act – This Act is administered by the Department of Primary Industries. It provides for the protection and management of State forests which are permanently reserved for the production of timber and associated products and protection of water sheds. Due regard is to be given to the conservation of soil and the environment, protection of water quality and the use of the area for recreational purposes.

Native Plants Protection Act – This Act is administered by the National Parks and Wildlife Service within the Department of Environment and Heritage. It provides for the protection of certain species of plants native to Queensland.

Soil conservation and rehabilitation

Soil Conservation Act – This Act is administered by Director-General of Department of Primary Industries. It provides for the preparation of plans to conserve soil and prevent or mitigate soil erosion. Owners have rights of objection and appeal in respect of such plans. Owners can be required to undertake soil conservation measures.

Stock Routes and Rural Lands Protection Act – This Act is administered by the Department of Lands. It provides for the control and destruction of vermin and noxious plants.

Land Act – This Act is administered by the Division of Land Management within the Department of Lands. It provides for reservation of lands for public purposes such as reserves, recreation grounds and environmental parks.

River Improvement Trust Act – This Act is administered by various river improvement trusts and the Water Resources' Commission under the responsibility of Department of Primary Industries. It provides for the declaration of river improvement areas and trusts whose objective is to improve the flow of watercourses and to prevent or reduce both flooding and erosion.

Social and cultural matters

Cultural Records (Landscapes Queensland and Queensland Estate) Act 1987 – This Act is administered by the Department of Environmental Heritage. It provides for the preservation and management of all components of Landscapes Queensland and the Queensland Estate. Landscapes Queensland refers to all areas or features within Queensland that have been used, altered or affected in some way by man and are of significance to man for any anthropological, cultural, historic, prehistoric or social reason. The Queensland Estate refers to evidence of man's occupation of the areas comprising Queensland at any time that is at least 30 years in the past but does not include anything that is a facsimile, constructed after the Act for the purpose of sale or that is not of prehistoric or historic significance. The designations of Landscapes Queensland or the Queensland Estate requires the consent of the respective government department and where the land is private land the consent of the owner. Accordingly very few items other than those in public ownership have been listed. The Act imposes restrictions on activities affecting Landscapes Queensland of the Queensland Estate.

Hazardous substances

Agricultural Chemicals Distribution Control Act – This Act is administered by the Department of Primary Industry. It controls the distribution of agricultural chemicals from aircraft and from ground equipment.

Agricultural Standards Act – This Act is administered by the Department of Primary Industry. It controls the sale of seeds, fertilisers, growth regulating materials, lime, pest regulating materials, pest destroyers, veterinary medicines and stock foods and regulates the sale of marking preparations and testing reagents. Its controls include registrations and certifications.

Health Act – This Act is administered by the Department of Health. It controls the use of lead and lead paint in relation to buildings, house and structures. Regulation imposing restrictions on poisons have been enacted pursuant to the Act.

Radioactive Substances Act – This Act is administered by the Department of Health. It aims to protect the public from unnecessary exposure to ionising radiation. There is provision for the grant, extension, refusal, suspension or cancellation of licences. It also provides for the control of radioactive substances and disposal of such wastes.

Resource development

Mineral Resources Act – This Act is administered by the Department of Resource Industries. It provides for the granting of mining leases and authorities to prospect on crown land, private land and reserved land. Covenants relating to rehabilitation and re-soiling of land surfaces are required and a variety of conditions to mitigate pollution may be imposed on mining leases and authorities to prospect. Mining is precluded in national parks and environmental parks.

Petroleum Act – This Act is administered by the Department of Resource Industries. It provides for the exploration, development and regulation of petroleum and natural gas which are declared to be the property of the crown. Activities under the Act may be carried out in national parks and reserves. The *Petroleum Regulations 1956* are the main reference for petroleum exploration and development.

Forestry Act – This Act is administered by the Department of Primary Industries. It provides for the protection and management of State forests which are permanently reserved for the production of timber and associated products and protection of water sheds. Due regard is to be given to the conservation of soil and the environment, protection of water quality and the use of the area for recreational purposes.

Water Act – This Act is administered by the Department of Primary Industries. It vests in the crown ownership and control of the natural waters, beds and banks of watercourse, and land and all quarry materials in waters of the state. It only applies to non-tidal waters. Approval is required in respect of any activity affecting these resources.

Harbours Act – This Act is administered by the Department of Transport. It vests in the crown ownership and control of all land below the high water mark. Approval is required in respect of all works below the high water mark.

Summary

The existing system of environmental management Queensland has the following characteristics:

- environmental impact assessment is decentralised to particular decision making authorities;
- there is no central body undertaking regional strategic planning; and
- the environmental management process is based on specific issue – orientated statutory controls and on overall assessment prior to approval, of the effects of new developments.

Appendix 2 Figures

Figure 1 Environmental legislation – Queensland

(Commonwealth legislation excluded)

Development Legislation	Resource Allocation Legislation
1. State Development Public Works Organisation Act – infrastructure plans for prescribed developments.	1. Minerals – Mining Act, Petroleum Act
2. Industry Development Act – Industrial development on Crown Land.	2. Land: (a) Private Land: (i) Development Approval – Local Government Act, City of Brisbane Town Planning Act; (ii) Subdivisional Approval – Local Government Act, City of Brisbane Town Planning Act, Building Units Group Titles Act, Beach Protection Act, The Irrigation Act, Water Act, Integrated Resort Development Act; (iii) Building Approval – Building Act. (b) Crown Land: (i) Land under water – The Harbours Act (Tidal Waters), Waters Act (Non-tidal); (ii) Other land – The Land Act.
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 1962, The Rundle Oil Shale Agreement Act 1980.	3. Soil, sand, gravel, rock, clay, earth, stone – Water Act (extraction from a water course), Forestry Act (extraction from areas other than a water course).
	4. Waters: (a) Non-tidal water courses – Water Act; (b) Tidal waters – Harbours Act and Canals Act; (c) Natural Lakes – Local Government 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 & Marketing Act.
	7. Energy – Electricity Act.

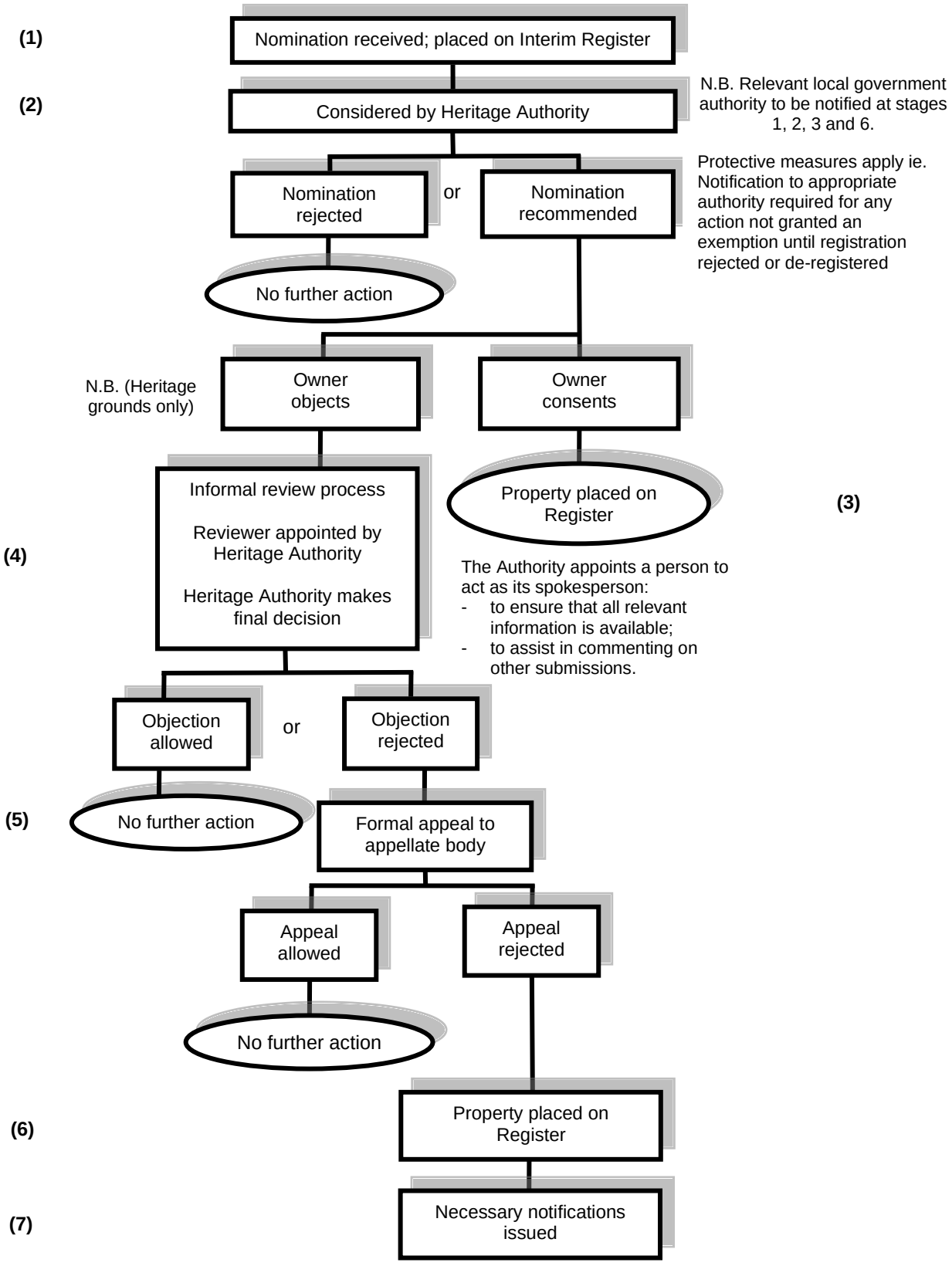
Figure 1 Environmental legislation – Queensland (continued)

(Commonwealth legislation excluded)

Conservation		
Conservation of the Natural Environment	**Preservation of the Cultural and Heritage Environment**	**Protection of Environmental Elements**
1. Reserves, (Public, Recreation, Environmental) Land Act, Local Government Act, Main Roads Act.	1. Cultural Records (Landscapes Queensland and Queensland Estate) Act, National Trust of Queensland Act, Queensland Museums Act.	1. Air – Agricultural Chemicals Distribution Control Act, Clean Air Act.
2. State Forest –Forestry Act.		2. Noise – Noise Abatement Act.
3. Marine Parks – Marine Parks Act.		3. Solid Wastes – Health Act, Litter Act, Sewerage & Water Supply Act.
4. National Parks – National Parks & Wildlife Act.		4. Waters: (a) Non-tidal – Clean Waters Act, Pollution of Waters Board Act, Sewerage & 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 Leads) Act, Pollution of Waters by Oil Act, Sewerage & Water Supply Act.
5. Beaches – Beach Protection Act.		5. Toxic and Hazardous Wastes – Agricultural Chemicals Distribution Control Act, Agricultural Standards Act, Health Act and Radioactive Substances Act.
6. Animals – Fauna Conservation Act.		6. General legislation: (a) Community – Local Government Act; (b) Building – Building Act; (c) Waterways – Queensland Marine Act, Harbours Act, Port of Brisbane Authority Act, Gold Coast Waterways Act; (d) Motor Vehicles – Traffic Act, Motor Vehicles Safety Act, Motor Vehicles Control Act, Carriage of Dangerous Goods by Road Act;

Conservation		
Conservation of the Natural Environment	**Preservation of the Cultural and Heritage Environment**	**Protection of Environmental Elements**
		(e) Extractive Industry – Mines Regulation Ct, Explosives Act, Coal Mining Act, the Mining Act; (f) Licensed Premises – Liquor Act; (g) Planning – State Development and Public Works Organisation Act.
7. Plants – Native Plans Protection Act, the Stock Routes and Rural Lands Protection Act and Local Government Act.		
8. Soil – Soil Conservation Act.		
9. Water – The Water Act – The Irrigation Act and River Improvement Trust Act.		

Figure 2 Procedure for registration



A similar procedure for de-registration. This would be a rare occurrence. Could only be instituted with Governor-in-Council approval.

Figure 3 Procedure for applications for work in respect of registered places

For any substantial work other than that specifically excluded from the need to seek approval In the Notice of Registration (given to the owner and to the local authority).

(1) Owner lodges applications with local authority namely:

(a) The usual Building Application and/or Planning Application (B.A. or P.A.).

(b) Heritage authority application form. (If project would not normally require a B.A. or P.A. then only this application is lodged).

(2) Application must be advertised etc. by applicant and a copy of whatever Is lodged under (1)(a) and (b) is forwarded to the heritage authority.

(3) If local authority has delegated powers it considers applications and If no conflict with heritage authority guidelines deals with the matter(s) in the usual manner.

(4) If (1)(b) causes a problem ie. conflict with approval under (1)(a), and it is a matter where:

(a) Local authority has a discretion under (1)(a), then discretion must be exercised in favour of the requirements of (1)(b).

(b) Local authority has no discretion then the matter must be referred to the heritage authority (e.g. if Minister's powers to vary Acts/Ordinances required)

OR

(c) Application refused and applicant entitled to take matter to the appellate body.

(5) Even where delegated authority, the heritage authority should have the right to call in any matter if it considers It necessary to do so and deal with (1)(a) and (1)(b) Itself, taking note of what the local authority's usual practice or provisions under (1)(a) would be.

If local authority has no delegated powers then It cannot deal with the matter and must abide by the decision of the heritage authority, which will have processed the application.

Figure 4 Procedures re appeals against Stop Work Orders and Conservation Orders

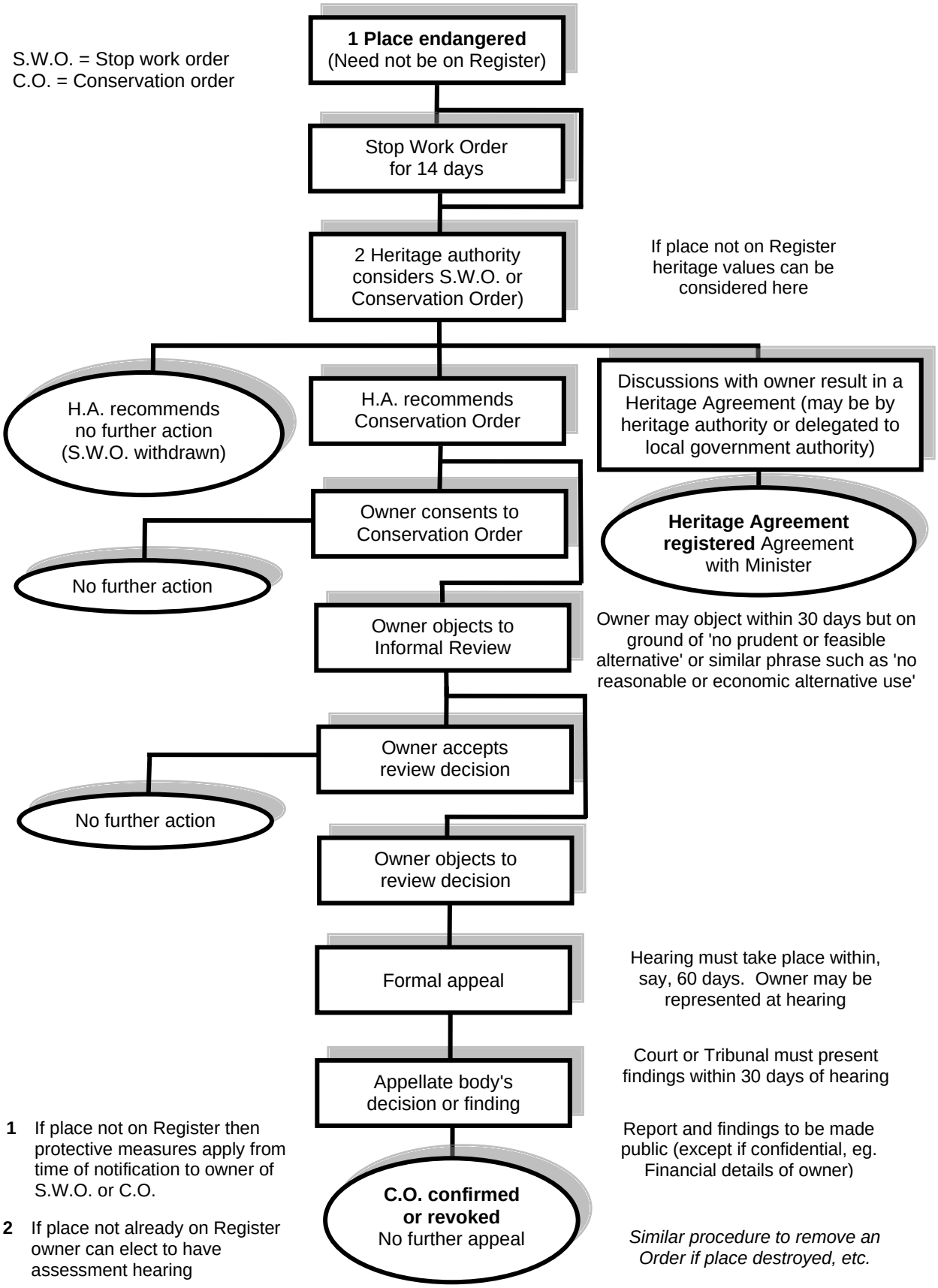


Figure 5 Environmental impact study

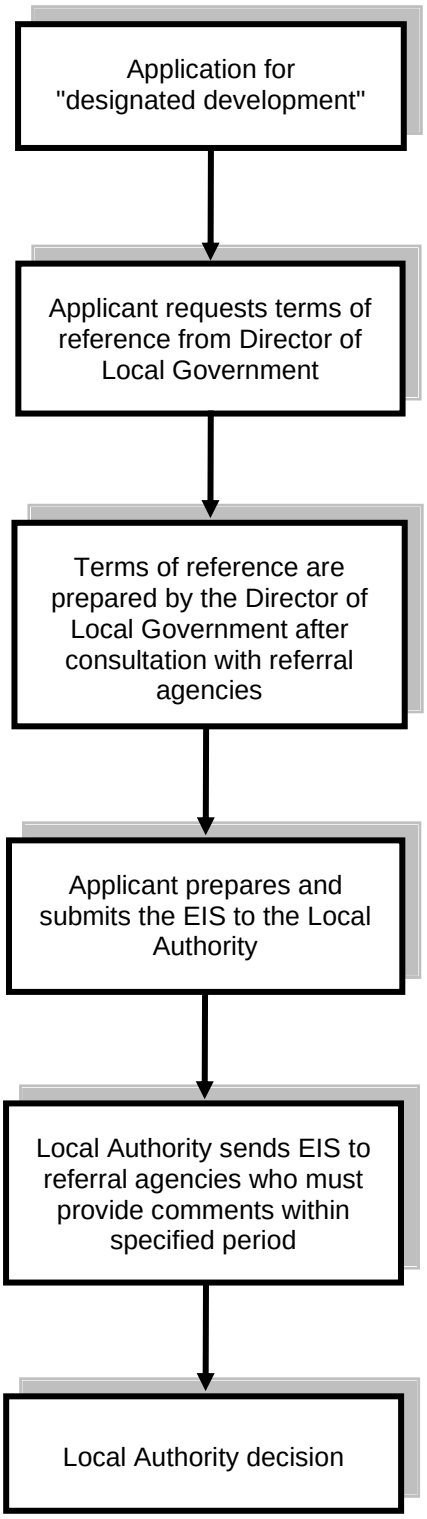


Figure 6 Site contamination assessment

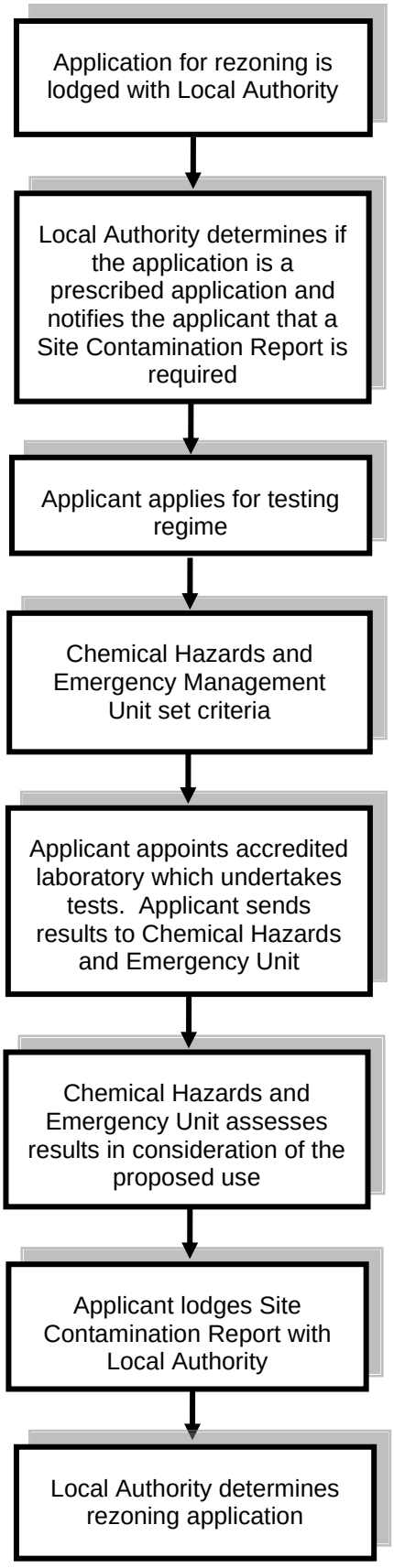


Figure 7 Rezoning application

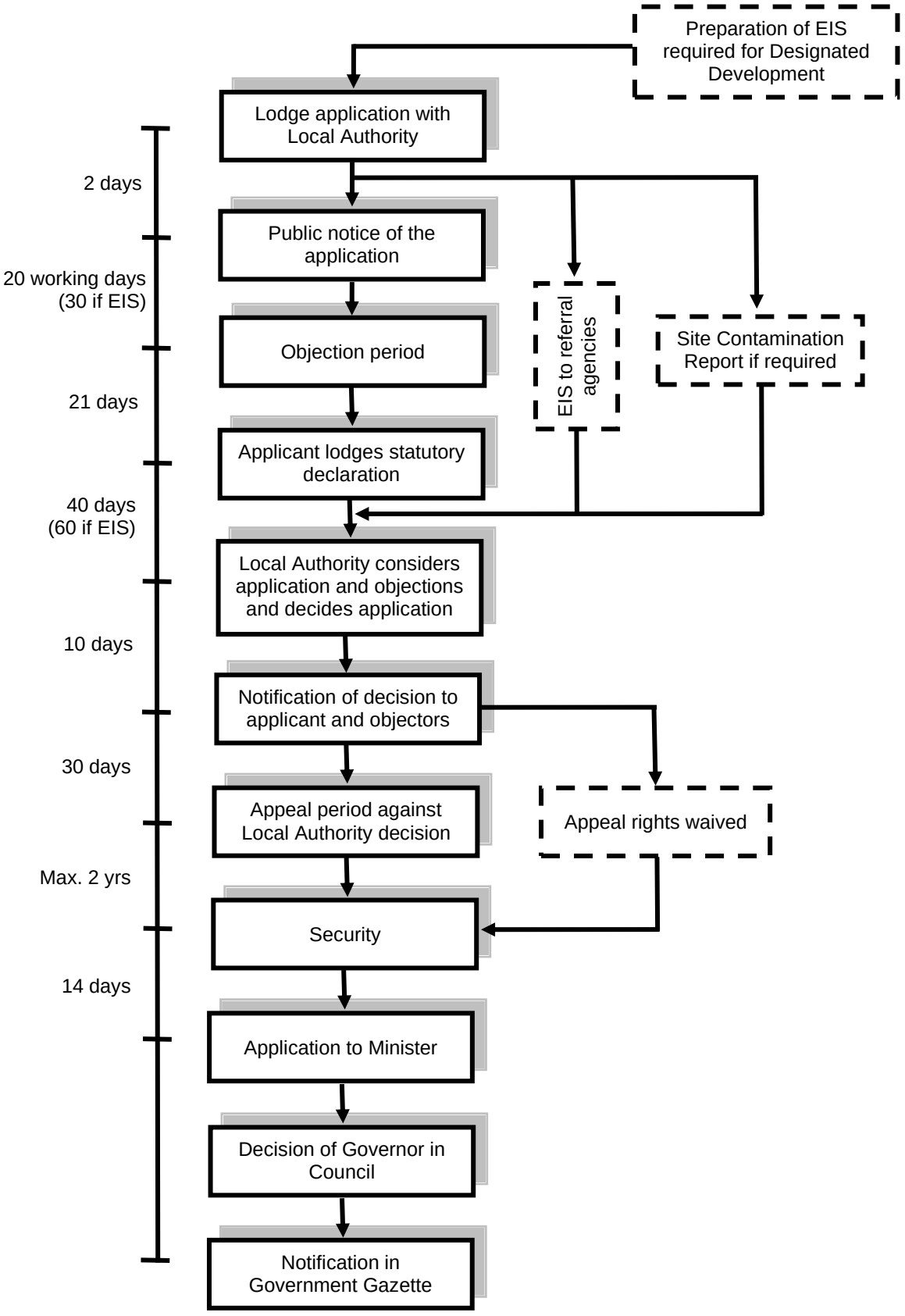
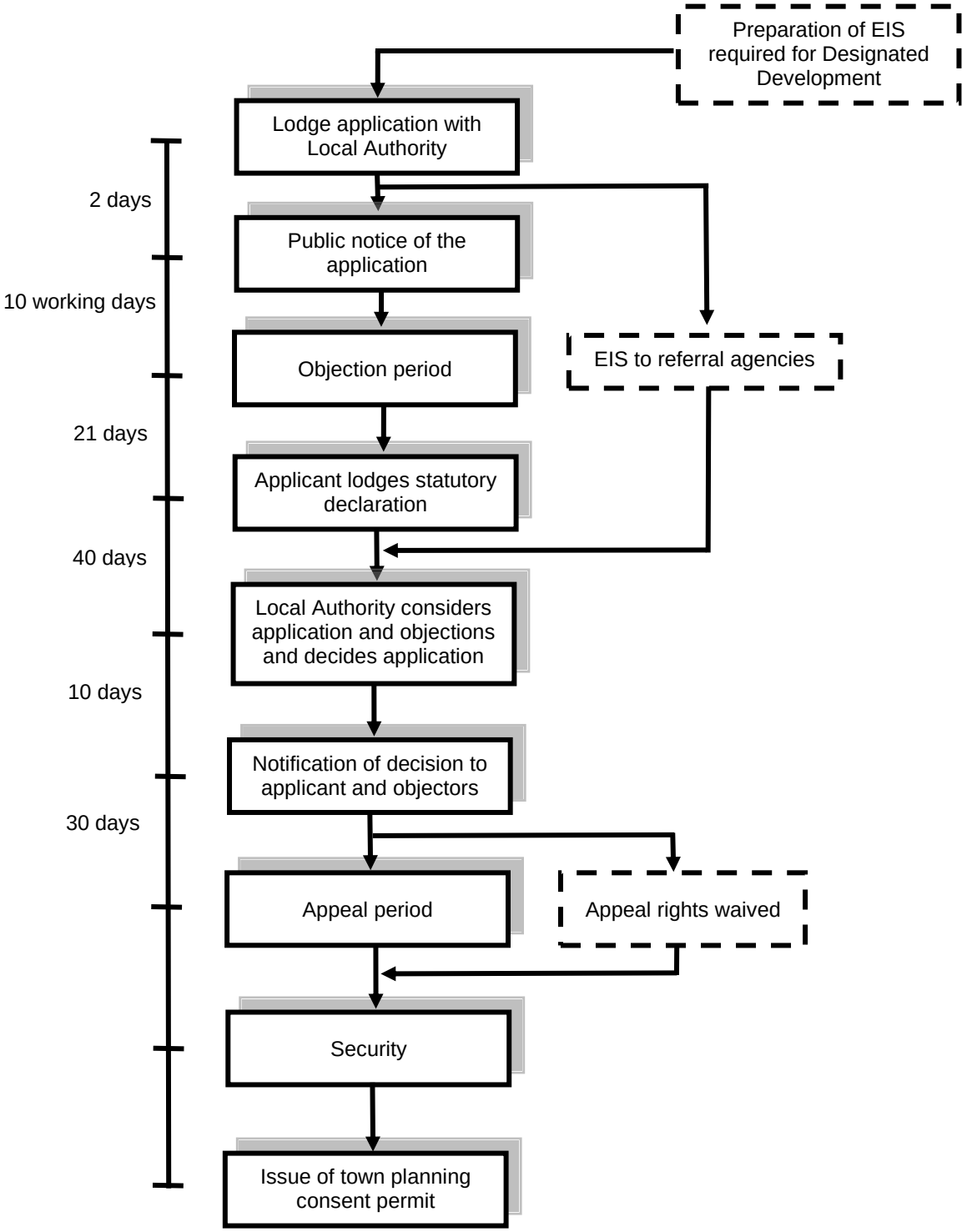


Figure 8 Consent application



This paper was presented at the TTC Environmental Law conference, Brisbane, March 1991.

Contaminated Land Act 1991 (Qld)

Ian Wright

This article discusses the implications which the *Contaminated Land Act 1991* (Qld) imposes on all parties involved in a property transaction

March 1992

Environment report – significant implications for all parties

The *Contaminated Land Act 1991* (**Act**) commenced operation on 1 January 1992. The major objectives of the Act are to publicly identify contaminated land, assess and where appropriate remediate the contaminated land at the expense of a polluter, owner or local authority; ensure that the land is not a hazard to human health or the environment, and restrict the future use of contaminated land.

The Act is administered by the director of the Bureau of Emergency Services within the Department of Police and Emergency Services. The director's authority has been delegated to the director of the Chemical Hazards and Emergency Management Unit.

The Act imposes obligations on polluters, owners, occupiers and the State Crown to notify the director of contaminated land. This information is placed on a Contaminated Sites Register which is open for inspection. Failure to notify the director is an offence.

The director may order the preparation of a site investigation report in respect of the contaminated land and, where necessary, the clean-up of the contaminated land by the polluter, owner or local authority. Where clean-up is ordered, the director may also order the preparation of a report validating that the clean-up has been successful.

If a site investigation report is not provided or contaminated land is not cleaned up, the director may cause a report to be prepared or the contaminated land to be cleaned up at the expense of the polluter, owner or local authority. If the costs of the report or the clean-up are not paid, the director can take action to recover the sum as a debt.

In respect of clean-up costs, the director can execute against the property to recover the costs in priority to all other persons other than the local authority in relation to unpaid rates and charges and a mortgagee registered before the recording of the contaminated land on the Contaminated Sites Register.

A person receiving a notice from the director 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.

The Act has potential ramifications not only for polluters but also for lenders, vendors, purchasers, lessors and lessees. Each of these parties may incur liability for penalties and clean-up costs.

A lender may incur liability under the Act by virtue of its position as an "*occupier*" where it enters into possession of the property, as an "*owner*" where the mortgagee is entitled to possession of the property and as the party granting an indemnity to a receiver and manager of the property.

Apart from the direct risks to lenders, the application of the Act may also detrimentally affect the viability and credit worthiness of borrowers, the value of the security property and the public relations image of the lender.

It is essential, therefore, that lenders adopt appropriate procedures to ensure that any risk to the value of the security property and to the lender itself is minimised.

Vendors and purchasers of land will also have to adopt appropriate risk management procedures. Vendors should avoid making representations or warranties as to the state or condition of the property and the property's fitness for use or development. However, vendors are required by the Act to notify the purchaser if the land is on the Contaminated Sites Register or of any notices issued by the director. Failure to give notice is an offence but does not avoid the contract at the election of the purchaser.

Purchasers, on the other hand, should investigate the Contaminated Sites Register where the transaction involves land or businesses which could be considered to have a high risk of environmental liability. It is anticipated that relevant details from the Contaminated Sites Register will be noted on the Titles Register.

It will also be necessary for lessors and lessees to address their potential liability under the Act on their leases. The lessor may be liable for penalties and clean-up costs as the owner of the land where pollution occurs. The lessor is also at risk if the value of its assets is diminished by reason of the contamination of the property by the lessee.

The lessee, on the other hand, should ensure that the land is not contaminated and that if it is, the lessee will be indemnified by the lessor in respect of any liability or loss which the lessee may suffer by reason of that prior contamination.

In summary, the Act has significant implications for all parties involved in property transactions. Appropriate steps should therefore be taken to minimise risks where possible. The introduction of the Act represents only a small part of the total reform package being adopted in this State. Accordingly, it will be necessary to address further and possibly wider issues raised by the increased level of environmental regulation in the near future.

This paper was published in the Queensland Property Report, March 1992.

Vegetation Protection Orders: Procedures planning and practice

Ian Wright

This article discusses the Brisbane City Council's Vegetation Protection Orders by examining the procedures for protecting trees and vegetation; the impact of the Ordinance on the planning process; and discusses some important practice points of the Ordinance such as enforcement, compensation and property transactions

March 1992

Introduction

You may be wondering why a lawyer has been asked to speak about vegetation protection orders. I think this will help to explain why. It adds a whole new meaning to the concept of new growth. (Figure 1).

Figure 1 "New Growth"

I intend to limit my discussion of the Brisbane City Council's Vegetation Protection Ordinance to three issues:

- first, the procedures for protecting trees and vegetation;
- second, the impact of the ordinance on the planning process; and
- thirdly, some important practice points.

Turning to protection procedures first.

Procedures for protection

The council can protect trees and vegetation through the making of vegetation protection orders or VPOs. This is a four stage process.

- First, the council makes a proposal for a VPO, either at its own initiative or at the request of individuals or community groups. The proposed VPO is supported by an interim protection order to prevent destruction or interference with vegetation in the period before the making of a final decision.

  The proposed VPO can relate to trees or vegetation but cannot encompass solely geological or physiographical features. Trees can be listed individually or as a group. Vegetation can be listed according to class, species or area.

  Trees are defined to mean a tree or shrub which is more than 3 metres in height or more than 12 centimetres in diameter at the trunk or has a foliage cover of more than 3 metres.

  Trees or shrubs not falling within this definition are caught by the definition of vegetation which is defined to mean all vegetable growth and material of vegetable origin whether living or dead and whether standing or fallen.

  This definition covers dying as well as dead trees and vegetation.

- Second, notice of the proposed VPO is given to land owners affected by the VPO as well as the general public through newspaper advertisements.

  It is important to note that the council is not required to notify other persons who may be adversely affected by the VPO. These persons may include:

  - occupiers;
  - lessees and tenants;
  - persons entitled to fell trees on the land;
  - persons entitled to work the surface of the land for minerals or quarry materials;
  - persons whose amenity may be affected by the VPO – for example, persons who allege that a tree excludes light from their building; and
  - persons who might allege a loss of amenity by virtue of an unprotected tree being felled.

  It is desirable that these persons are notified. However, the council has obviously taken the view that this cannot be justified financially.

  Land owners and interested parties have two months to lodge a submission of support or objection with council.

  It would seem that the objection is not properly constituted unless it states the grounds of the objection and relates to the objects of the ordinance.

  These would appear to be mandatory rather than directory provisions. Objections which do not comply with these requirements can be disregarded.

- Third, the objections and submissions are assessed by an independent Vegetation Protection Advisory Committee which makes a recommendation to council.

  After consideration of the committee's recommendation, the council may decide to make the VPO, refuse to make the VPO or modify it.

  Notice of council's decision is then given to land owners and the general public. Defects in the notice process are specifically declared not to invalidate the VPO.

  The legal consequence of other defects in procedure are not stated in the Ordinance and accordingly will have to be assessed on a case by case basis. For example, it is likely that a wrong identification of a species will not invalidate a VPO where the trees are adequately identified by the rest of the description. Although valid, there may be problems in enforcing the VPO.

- Finally, if a VPO is made by the council, it is listed on the Vegetation Protection Register. This register is open to the public for inspection on the payment of the appropriate fee.

  This is a separate register from that dealing with town planning and subdivisional applications under the Local Government (Planning & Environment) Act.

  It is intended to incorporate information from the Vegetation Protection Register onto the Rates Register. This has yet to be done.

  Specific enquiries should therefore be made to the council's Recreational & Health Branch to search the Vegetation Protection Register.

Turning now to the impact of the ordinance on the planning process.

Planning process

As you are no doubt aware, the development approval process in Queensland is regulated by the Local Government (Planning & Environment) Act and the Building Act.

The relationship between the development approval process and VPOs is not explicitly stated in the ordinance.

The integration of VPOs with existing development controls is therefore a matter of some confusion.

In order to understand the inter-relationship, it is necessary to distinguish between three categories of applications:

- town planning applications;
- building applications; and
- applications to destroy or interfere with vegetation.

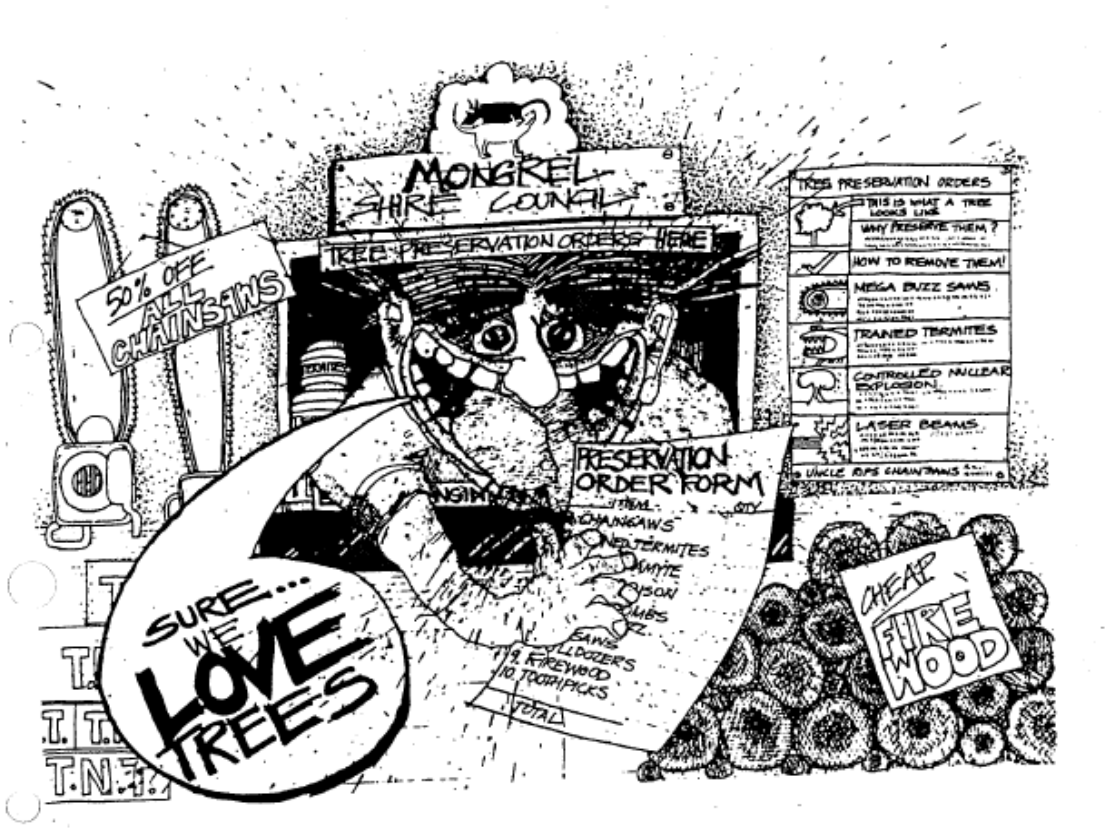
Town planning applications

The first category encompasses town planning applications such as subdivisions, notification of conditions, town planning consents and rezonings.

In the case of such applications, the Local Government (Planning & Environment) Act imposes on the council an obligation to consider whether a deleterious effect on the environment would be occasioned by the implementation of the proposal the subject of the application.

The council is therefore required by the Act to consider tree preservation issues. This overhead shows the council hard at work. (Figure 2).

Figure 2 "Mongrel Shire Council"



It is a valid exercise of the council's town planning powers to either refuse an application because it would involve the removal of existing trees or to require the preservation of trees as a condition of approval.

Indeed, tree preservation has been required by the Local Government Court which is now constituted as the Planning & Environment Court in the 1980 case of *Bulrmanis & Maroochy Shire Council*.

The council's town planning powers however, are of little use if the vegetation is removed by a land owner prior to the lodgement of a town planning application.

The purpose of a VPO therefore is to preserve trees pending the lodgement of a town planning application at which stage the council can exercise its powers to determine what, if any, vegetation is to be retained.

An examination of the decided cases in other jurisdictions involving the consideration of VPOs in planning appeals reveals that there are no general principles other than that preservation is given its statutory weight which is indeterminate in all cases but sometimes determining in a specific case.

If the council refuses an application or imposes conditions which are not relevant or reasonably related to the proposed development, the applicant would be entitled to appeal to the Planning & Environment Court.

On the other hand, if the council approves an application to develop land the subject of a VPO, the approval will practically, if not legally, supersede the VPO.

Accordingly, if the council is intending to protect trees, it will be necessary to impose appropriate conditions on the approval.

If a tree preservation condition is not placed on the approval, an astute land owner may pollard the trees and suggest to the council that the planning permission for the site supersedes the VPO.

Building applications

The second category of applications are those made under the Building Act.

When dealing with building applications, it is not legally permissible for the council to consider tree preservation matters.

Accordingly, where it is intended to lodge a building application, an approval will first have to be obtained under the ordinance from the council's Department of Recreation & Health.

This approval is then submitted with the application for building approval to the council's Building Department.

Application to destroy or interfere with vegetation

The third category of applications are those that relate solely to the destruction or interference with vegetation protected by a VPO.

The ordinance requires these applications to be made in the prescribed form. The applications are assessed by the council which may approve the application either conditionally or unconditionally or refuse the application.

The council is given express power to impose a condition requiring replanting where it approves an application.

In considering an application, the council is required to consider:

- the extent to which the vegetation meets the objectives of the ordinance;
- the environmental impact of the damage or interference;
- the purpose of the damage or interference; and
- whether any prudent and feasible alternative exists to the damage or interference.

The phrase "*prudent and feasible alternative*" is taken from the Australian Heritage Commission Act, a Commonwealth Act which in turn has taken the phrase from United States legislation.

An analysis of the cases decided under the United States legislation reveals that an alternative is feasible if it is capable of being built or made to work with available technology while an alternative is prudent if it does not present unique problems.

An applicant dissatisfied with the council's decision may request a reconsideration by the Vegetation Protection Advisory Committee.

The committee's recommendation is considered by the council in making its final decision. There is no appeal from council's decision.

Turning now to some important practice points.

Practice points

Enforcement

Firstly, enforcement.

It is an offence to fail to comply with the conditions of an approval granted by council pursuant to the ordinance.

It is also an offence to destroy or interfere with any vegetation without council approval unless the destruction or interference is sanctioned by the ordinance.

Generally speaking, removal of vegetation is sanctioned in three circumstances:

- First, where vegetation is dangerous or within a specified distance of buildings.
- Second, where removal is necessary to:
  - establish electricity, telephone, water, sewerage or gas lines;
  - construct roads;
  - comply with legislation (examples include noxious weeds and the requirements of rural fire boards);
  - construct dividing fences; or
  - survey a property.
- Third, where removal occurs in the course of cultivation, pasturing, grazing or maintaining a lawn or ornamental garden.

  If a person destroys or interferes with vegetation without approval, the council may direct the person to restore, regenerate or replace the vegetation.

  If a person fails to comply with the direction or fails to comply with the conditions of an approval, the council may enter the property, perform the works and recover the expense from the person.

  The council may also prosecute a person for committing an offence under the ordinance.

  The burden of proving a breach of the ordinance rests with the council which must prove its case beyond a reasonable doubt.

  The offence is one of strict liability. That is, it is not necessary for the council to prove knowledge on the part of the defendant of the existence of the VPO.

  The burden of proving that the destruction or interference was sanctioned by the ordinance rests with the defendant who must prove its case on the balance of probabilities.

Compensation

Secondly, compensation.

In short, there is none.

The ordinance expressly excludes the right to compensation. This contrasts with the UK system, where compensation is payable.

In the United Kingdom, the compensation claimable is the difference between the value of the land as woodland and the value of the land as it would have been as grazing land with the trees cleared from it.

It should be noted that even in the United Kingdom, there is no question of land owners being compensated for loss of development value.

The reason for this is that the VPO, like the preservation of listed buildings and restrictions on advertising are amenity controls not development controls.

Traditionally, compensation has only been payable in this country for loss resulting from development controls, that is, (the so called injurious affection provisions) not amenity controls.

Whilst no compensation is payable, the council should give consideration to providing financial assistance to land owners in addition to any technical assistance it may provide.

The council's recently introduced general differential rating system would be an appropriate mechanism for providing such assistance.

Property transactions

Finally, turning to commercial transactions involving the purchase of land.

When a person is considering the purchase of land in the City on which trees are growing, the purchaser must consider how it will be affected by the VPO.

A purchaser of tree bearing land or its consultants should make the following enquiries with regard to VPOs:

- Has a VPO been made? This can be ascertained by searching the Vegetation Protection Register.
- If a VPO has been made what is the effect of the VPO? Does it apply to a particular tree, a group of trees, vegetation of a particular class or species or all vegetation?
- Does the VPO affect the purchaser's ability to carry out the contemplated development on the land?
- Have any subsisting conditions been attached to approvals granted to previous owners which may be binding on the purchaser?
- Have any directions as to replanting been made in respect of previous breaches of the VPO?
- Have there been any previous refusals which will give some indication of the likelihood of obtaining an approval to destroy or interfere in the vegetation in the future? and
- If an application does have to be made, will any destruction or interference of vegetation on the land fall within any of the exemptions contained in the ordinance?

Conclusion

In conclusion, VPOs will have an important impact on the land development process in Brisbane.

Like other amenity controls such as heritage protection, VPOs are as important as existing development controls.

As land development professionals, we must come to understand their operation and their potential impact on our clients.

At least one thing is for sure – the council will not be exercising its new found powers like the council depicted in this overhead. (Figure 3)

Figure 3 "Sahara Forest Council"

This paper was presented at the Urban Development Institute of Australian seminar, Brisbane, March 1992.

Sustainable development and environmental law reform in Australia

Ian Wright

This article discusses the policy, institutional and legal changes in Australia in order to establish the conditions for sustainable development. It examines the policy considerations which underpin sustainable development and the changes in Australia's institutional and legal framework in order to reflect sustainable development conditions

April 1992

Abstract: The development of environmental law in Australia is being driven by international forces. The 1987 Report of the World Commission on Environment and Development changed the entire perception of the relationship between the environment and development. It introduced the concept of development into the policy making process. This paradigm requires the natural resource base to be managed in the long run so that economic development will be a sustainable process. This paper considers the policy, institutional and legal changes which are occurring in Australia in order to establish the conditions for fostering sustainable development.

Introduction

Since the 1970s, we have witnessed a flurry of environmental legislation of growing sophistication. The period has given rise to many interesting legal and policy questions. However, it has merely been a warm-up for what is likely to lie ahead.

The 1987 report of the World Commission on Environment Development changed the entire perception of the relationship between conservation and development. Central to the report is the concept of 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 (WCED 1990:87).

The phrase has found its way into practically everything written or spoken about our environmental future. It is a motherhood doctrine of apparently unchallengeable rectitude. Its underpinning notion of intergenerational equity is compelling and ethically irresistible. However, unless practical effect is given to the concept of sustainable development, it is likely to become little more than a political code-word for enhanced environmental awareness (Grant 1991:124).

The purpose of this paper is to examine some of the policy, institutional and legal changes which are occurring in Australia in order to establish the conditions for fostering sustainable development.

The paper begins with a brief look at the concept of sustainable development and some of the policy considerations underpinning its implementation. Changes in Australia's institutional and legal frameworks are then examined with a view to suggesting possible future directions and issues.

Policy framework

Intergenerational equity

The concept of sustainable development is firmly rooted in the notions of intergenerational and intergenerational equity. It seeks the maintenance for present and future generations of an environment at least as healthy, productive and diverse as it is now. This involves the retention of the same or better range of options as applies now, access to the same or better range or resources and to the same or better quality of environment, and the adoption of solutions to identifiable problems within one generation or at least reversal of those problems (Commonwealth of Australia 1990:8).

Ecological viewpoint

The concept of sustainable development represents an ecological or ecocentric view of the environment. This ideology emphasises non-material goals, the intrinsic value of the environment, harmony with nature and a risk adverse attitude to development. A decentralised approach both to industrial development and environmental decision making with increased public participation is also characteristic of this approach (Wright 1991:21).

The Commonwealth government's commitment to an ecological approach is highlighted in its Discussion Paper on Ecologically Sustainable Development and in its more recent position paper on the proposed National Environmental Protection Agency. In both documents the Commonwealth specifically recognises the need to deal cautiously with irreversible ecological changes.

It is argued that the principles of irreversibility and caution will have a profound impact on the future of environmental law and policy in this country.

The principle of irreversibility is derived from ecology. It recognises that ecosystems are made up of independent components such that events at one place in the environment at one time may have repercussions in other places at other times thereby making ecological changes unpredictable and sometimes irreversible.

The Commonwealth has suggested that as a general rule, decisions that may result in irreversible damage to the stock of environmental assets should be carefully evaluated and avoided where possible (Commonwealth of Australia 1990:9). Accordingly, any development that would result in an irreversible loss in the productivity of the biosphere or in biodiversity will not be allowed to proceed.

Precautionary principle

The principle of irreversibility is complemented by what is referred to as the principle of preventative action or the precautionary principle.

Traditionally, a development has been allowed to proceed unless clear evidence has been shown to the effect that changing the status quo would have an adverse effect on the environment (Comino 1991:59).

The precautionary principle shifts the burden of uncertainty from the environment onto the polluter. Accordingly, where there is unclear data or uncertainty, a development will not be allowed to proceed until it is demonstrated that there is no adverse effect or that any adverse effect can be reduced through preventative action or further research at a modest cost (Commonwealth of Australia 1990:9; 1991:5).

The implications of such a shift go to the very root of the character of environmental regulation in this country. It will require governments to redesign their regulatory frameworks so as to control industrial pollutants on a preventative basis. This matter is taken up in more detail later in the paper.

Impact of policy changes

The adoption of an ecocentric perspective in the policy making process will have a substantial impact on existing institutional and legal frameworks. These changes are a complement to; not a substitute for the wider policy changes inherent in the concept of sustainable development.

Institutional frameworks

Existing institutions

Generally speaking, institutions in Australia have tended to be independent, fragmented and working to relatively narrow mandates with closed decision processes. Those responsible for the economy are institutionally separate from those responsible for managing natural resources and protecting the environment (WCED 1990:354).

In its 1987 report the World Commission put forward a number of proposals for institutional change. Some of these changes have been implemented by Commonwealth and State governments; whilst others remain to be implemented. The sweeping nature of the proposals makes it possible to only summarise them briefly here.

Commonwealth and State governments

With respect to governments, the World Commission has proposed 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 (WCED 1990:356).

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's Discussion Paper on Ecologically Sustainable Development.

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 choices will be clearer if they are based on the best available information and assessments of the full cost and benefits of alternative courses of action. This role is performed by the Resource Assessment Commission which has already conducted enquiries into the Australian forestry and timber industry and mining in the conservation zone of the Kakadu National Park. An enquiry into the coastal zone has also recently been announced.

With respect to the states, a degree of integration between resource management and environmental protection agencies has already been attempted with reasonable success in Western Australia with the Department of Conservation and Land Management and in Victoria with the Department of Conservation, Forests and Lands (Boer 1987:12).

Whilst there is the danger that resource development sections may dominate the interests of conservation sections, the advantages of reduced conflict and more efficient and more effective decision making appear to be substantial (Boer 1987:12).

In addition, conservation has been integrated into the land use planning system in New South Wales pursuant to the *Environmental Planning and Assessment Act 1979*. That Act provides a model for an integrated system of planning and environmental protection that may be adopted in other jurisdictions.

The World Commission has also proposed that sustainable development objectives be incorporated in the terms of reference of cabinet and legislative committees dealing with national economic policy as well as key sectoral and international policies (WCED 1990:358).

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 subcommittee on sustainable development has also been established to oversee the Commonwealth's role in formulating a sustainable development strategy (Commonwealth of Australia 1990:10).

The World Commission has also recommended that new regional and subregional arrangements be put in place to deal with transboundary environmental resource issues (WCED 1990:359). The Commonwealth government has sought to implement this proposal through the creation of a National Environmental Protection Agency (**NEPA**) and the establishment of new ministerial arrangements with the States and territories. The nature of the proposed agency and the new ministerial arrangements are set out in the Commonwealth's position paper released in July 1991 and the Prime Minister's One Nation statement in February of this year.

In accordance with the recommendations of the World Commission, the role and capacity of existing environmental protection and resource management agencies has also been strengthened (WCED 1990:363). State and Federal governments have also been more active in collecting information through the creation of environmental data bases, scientific research as well as the activities of governmental agencies such as the Resource Assessment Commission (WCED 1990:368).

Dispute resolution bodies

In addition to proposals relating to governmental agencies, the World Commission has also proposed that new forms of environmental dispute resolution be developed (WCED 1990:378).

In accordance with this proposal the Experts Group on Environmental Law of the World Commission has recommended that a clearing house service be established to assist with the resolution of environmental and resource disputes through the use of mechanisms such as fact finding, mediation, conciliation, arbitration and judicial settlement (EGEL 1985:17).

In Australia the courts have emerged as the critical institution for the resolution of environmental disputes. 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.

There is an urgent need therefore to develop fair and efficient means of settling environmental disputes which acknowledge the legitimate claims of development as well as environmental protection.

Programs have been initiated particularly in North America to find alternatives to judicial decision making. These programs are usually referred to as Alternative Dispute Resolution (**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 existing environmental planning courts and tribunals in the near future.

Private sector institutions

The World Commission has also recognised that non-governmental organisations, scientific groups and private corporations will be central to the implementation of strategies of sustainable development (WCED 1990:370).

In its Discussion Paper on Ecologically Sustainable Development, the Commonwealth states that scientific research can assist in the implementation of sustainable development by providing information on environmental problems, increasing the efficiency of resource processes and identifying technology alternatives (Commonwealth of Australia 1990:19).

The Senate Select Committee for Industry, Science and Technology has also recognised that research and development of this type could help address the domestic trade deficit through the development of pollution control technology for application locally and for export overseas.

The World Commission has also proposed that private sector institutions such as corporations, banks and other financial institutions integrate environmental protection and sustainable development in their corporate policies (WCED 1990:373). The environmental responsibilities of private enterprises has been further extended by the Experts Group on Environmental Law which has recommended that enterprises take into account in decision making the foreseeable consequences of their activities which could significantly affect the environment, cooperate with regulatory authorities and take measures to minimise the risk of accidents and damage to the environment (EGEL 1985:19).

The Experts Group has also recommended that banks and other financial institutions that provide funds for development projects should require an assessment of the environmental effects and sustainability as part of the evaluation process of projects for which loans are requested.

Although these recommendations have not been implemented by legislation in this country, there would appear to be an increasing movement for corporations to adopt formal environmental policies. The impetus for implementation of these policies has come from both industry itself as well from environmental advocacy organisations (Borque 1991:11).

Environmental policies are being increasingly viewed by corporations as good management practice, good public relations and a mechanism to avoid the imposition of significant penalties. In addition, environmental advocacy organisations have 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 Environmentally Responsible Economies developed a set of guidelines, called the "*Valdez Principles*" for adoption by corporations. The principles include: protection of the biosphere; sustainable use of natural resources; reduction and disposal of waste; wise use of energy; risk reduction; marketing of safe products and services; damage compensation; disclosure; environmental directors and managers; assessment and annual audits.

The World Commission has also proposed that non-governmental organisations and other members of the public have better access to information on the environment and natural resources, a right to be consulted and to participate in decision making on activities likely to have a significant effect on their environment and a right to legal remedies and redress when their health or environment has been or may be seriously affected (WCED 1990:372).

Whilst Commonwealth and State governments have taken some steps to implement these proposals, it is clear that new environmental laws will provide for community access to information, rights of notification, objection and appeal, as well as the right to obtain injunctive relief and/or civil penalties in respect of breaches of environmental laws. These rights will also be supplemented by public education programs about the environment and the public's role in protecting the environment.

Impact of institutional changes

The institutional changes that are occurring in our governmental, judicial and private sector institutions in order to implement the concept of sustainable development are being complemented by and to a certain extent have resulted in fundamental changes in the character of environmental regulation in this country. These changes in environmental laws will encourage environmental issues to become a daily factor in the functioning of our institutions, thereby bringing about further institutional change.

Legal framework

Existing framework

Environmental law in this country is almost entirely a product of statute. The common law offers little protection for the environment. Its focus on the protection of a private individual's right to use resources has allowed private landowners the right to manage their land largely unfettered (Christie 1990a:263).

Reliance must therefore be placed on legislation to ensure the protection of the environment. Unfortunately environmental legislation in this country is constrained by constitutional considerations and our common law tradition.

Constitutional constraints means that the legislatures cannot merely recite their way into jurisdiction. Accordingly it is the Australian courts and not the Australian legislatures which will decide whether legislation regulating the environment is valid. In addition our common law tradition has meant that legislation focuses on individual action and intention rather than collective liability and responsibility.

However with the adoption of sustainable development, a new era of environmental legislation and regulation based on a broader sense of environmental responsibility is emerging. The following analysis is intended to illustrate some of the emerging trends.

Pollution control

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. The advantage of emission standards is that they are technically and administratively simple as common standards can be set for all parties. The ambient quality standards on the other hand, require more technical information but have the potential advantage of being more responsive to particularly sensitive areas.

The environmental quality management approach is generally preferred by business as it emphasises the overall level of pollution and would allow pollution rights to be bought and sold. Any new entrant to the pollution market would therefore have to adopt or create new technology or buy a discharged licence (Johnson 1990:291).

However this approach 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 focuses 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 regulatory frameworks so as to control industrial pollution on a preventative basis. A variety of legislative changes can be anticipated:

- 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, extend the precautionary principle automatically to new installations and set the groundwork for the progressive elimination of discharges from existing sources. This would be achieved by requirement to use the best available technology on new installations, combined with a requirement to set phase-in timetable 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 1 tonne per year of sulphur dioxide. Allowances not used through emissions may be banked or sold (Bourque 1991:5).

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 (Court 1992:93-94).

Environmental planning and assessment

Sustainable development will also lead to the establishment and implementation of more sophisticated environmental planning and assessment mechanisms within environmental laws.

For instance, land use and regional planning will need to be consistent with a region's carrying capacity. This is defined as the maximum rate of resource consumption and waste discharge that can be sustained indefinitely without progressively impairing bio-productivity and biological diversity.

The focus of natural resource assessments and environmental impact assessments will also change from one of trading off a level of environmental impact with a level of resource use to that of maintaining ecological integrity.

In addition to the regulation of the planning stage of an industrial development, there will be an increasing trend to regulate other stages of the industrial development cycle through environmental audits. An environmental impact audit may be conducted to ensure that commitments made in the environmental impact assessment have been implemented or that the predicted level of impacts are not exceeded. Industrial premises may also be audited to ensure that its operations are complying with emission standards, licence conditions and legislative requirements.

Finally, site contamination audits may be conducted on the decommissioning of a project to determine whether any residual contamination from an industry requires remediation.

The increasing sophistication of environmental planning and assessment procedures is leading to what can be called "*project life cycle*" environmental management (Jenkins 1992: 201).

Accountability

New environmental laws will also tend to make government agencies increasingly responsible and accountable for ensuring that their policies, programs and budgets support sustainable development (Tabemer 1990b:181).

Accordingly environmental legislation will be binding on the Crown and the roles of regulatory authorities will be continually reviewed. 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. Detailed monitoring records will be required to be kept and results will have to be disclosed to the regulatory authority together with appropriate certificates to the effect that monitoring has been undertaken and that all licence conditions have been met.

There is also a 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 (Christie 1990:299).

Enforcement

New environmental legislation will also be characterised by increased enforcement. The following are intended to be illustrative only of the types of enforcement mechanisms that may be adopted.

- 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

Greater public participation will be either encouraged or directed by environmental laws in the future. The following is illustrative of the legal rights which may be created to encourage public participation in the environmental decision making process.

- 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.
- Financial and technical assistance may also be provided to facilitate participation.

Conclusions

In summary, this review of policy, institutional and legal developments in Australia indicates that we are entering a new era in which the environment can no longer be considered an added on consideration. It is instead one that will need to be an integral part of all decision making processes. As professionals involved in the development process, we will have to develop new knowledge and adapt existing skills if we are to meet the challenges that lie ahead.

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Nature Conservation Bill 1992 (Qld)

Ian Wright

This article discusses the effect of the *Nature Conservation Bill 1992* and how it will impact transactions involving property and resource projects

May 1992

Introduction

The *Nature Conservation Bill 1992* was introduced into the Queensland Parliament on 28 April 1992 and is expected to be assented to in the near future.

The Minister for Environment and Heritage administers the Act through the Chief Executive of the Department of Environment and Heritage. The Act is binding on the Crown and is to be administered in consultation with all interested parties.

The Act amalgamates the provisions of the Fauna Conservation Act, the National Parks and Wildlife Act, the Native Plants Protection Act and certain parts of the Land Act into one piece of legislation.

Objectives

The object of the Act is nature conservation. This is to be implemented through a State conservation strategy that calls for the gathering of information, community education, the dedication, declaration and management of protected areas, the protection of native wildlife and its habitat and the sustainable use of protected areas and wildlife.

Protected areas

The Act empowers the Governor-in-Council to dedicate or declare:

- Crown Land as national park (scientific), national park, conservation park or resources reserve.
- Land held in trust under the Aboriginal Lands Act and Torres Strait Islanders Act as national park (Aboriginal land/Torres Strait Islander land).
- Private or Crown Land as nature refuge, coordinated conservation area, wilderness area, world heritage, management area or international agreement area.
- Crown land is defined by the Act to mean all land other than land which has been freeholded, leased from the Crown, reserved for a public purpose or is the subject of a mining tenement. Therefore, all land which is not Crown Land is private land.

Private land cannot be declared as a protected area unless the Minister has notified all landholders of the proposed declaration and their rights to make submissions. Landholders include all persons having an interest in the land, such as the registered proprietor, lessee, mortgagee and the holder of a mining tenement.

The Minister is required to consider any submissions made in relation to the proposed declaration. Where the proposed declaration relates to a nature reserve, coordinated conservation area or wilderness area, the Minister and the land owner may enter into an agreement in respect of the conservation of the area.

If no agreement is reached, the Minister may notify the landholders that a recommendation may be made to the Governor-in-Council that the area be compulsorily declared as nature refuge and that an objection may be made. The Minister is required to consider any objections duly made before the Governor-in-Council declares the area as nature refuge. Landholders can then claim compensation from the State in respect of the declaration.

Where the proposal relates to a world heritage management area or an international agreement area, the Minister may prepare a conservation plan in accordance with the Act. On approval of the conservation plan, the areas are declared and landholders can claim compensation from the State.

The declaration of a protected area must specify:

- the area of the declaration;
- the area's significant cultural and natural resources and values, the proposed management intent and the proposed use (called a management intent); and
- the covenant applying to a compulsory declaration of a nature refuge (called a conservation covenant).

Conservation agreements, covenants and plans

A conservation agreement may contain terms relating to financial and technical assistance, the use of the area, access, the undertaking of activities and any other matter relating to the conservation of the area. The term can be binding on the State, the landholder and its successors in title. Landholders can register the agreement on the administrative advice file within the Titles Office.

Conservation covenants contained in compulsorily declared nature refuges are binding on landholders and their successors in title.

Conservation plans are required to be prepared by the Minister as soon as practical after the declaration of a protected area with the exception of a national park (Aboriginal land/Torres Strait Islander land), nature refuges which are the subject of a conservation agreement and world heritage management areas and international agreement areas. In the case of the latter two protected areas, a conservation plan is prepared by the Minister prior to the declaration of these protected areas.

The Minister is required to give public notice of the proposal to prepare a draft conservation plan as well as the draft conservation plan. The final conservation plan is approved by the Governor-in-Council. On approval, the conservation plan replaces the declared management intent for certain protected areas.

A conservation plan is binding on all persons including the parties responsible for the protected areas and prevails over any inconsistent planning scheme. Landholders and other affected persons having an interest in the land may claim compensation from the State in respect of a conservation plan.

Management of protected areas

Protected areas are to be managed in accordance with the management principles specified in the Act in respect of each area, the declared management intent of each area, the terms of any conservation agreement or conservation plan and in the case of national park (Aboriginal land and Torres Strait Islander land), the conditions of the lease and the customs of Aboriginal people.

All cultural and natural resources of a national park (scientific), national park, conservation park or resources reserve are declared to be the property of the State. Further, no interest in land can be created in respect of such areas unless it is granted by the chief executive under the Act or by the Governor-in-Council or another person with the consent of the chief executive under another statute. Any interest created in these areas must be consistent with the management principles and the management intent or conservation plan for the area. However, any interest existing at the time a national park is dedicated under the Act may continue in force until it expires or is terminated in accordance with its terms.

It is also an offence to take, use, keep or interfere with a cultural or natural resource of a protected area other than under a management intent, conservation agreement or plan or authority under the Act. Mining tenements are also prohibited in a national park (scientific), national park, national park (Aboriginal land/ Torres Strait Islander land) and conservation park.

Prescription of protected wildlife

The Act empowers the Governor-in-Council to prescribe wildlife (animals and plants) as:

- *protected* – wildlife that is presumed extinct, endangered, vulnerable, rare or uncommon;
- *international* – wildlife that is not indigenous to Australia; and
- *prohibited* – wildlife that is an unnatural hybrid or international wildlife and is a threat to protected wildlife.

The prescription must contain a declared management intent containing a statement of the significance of the wildlife to nature and its value, the proposed management intent for the wildlife and the principles relating to any proposed taking and use of the wildlife.

Management of protected wildlife

Protected wildlife is to be managed in accordance with the management principles specified in the Act, the management intent for the wildlife and any conservation plan for the wildlife.

All protected wildlife (other than plants on freehold land or crown land that is subject to a lease containing a freeholding provision) is the property of the State.

There are restrictions in the taking, use, keeping or interfering with protected wildlife as well as native wildlife in areas the subject of a conservation plan, the release, keeping, use, abandonment or introduction of international or prohibited wildlife and the breeding of hybrids or mutations of protected animals.

Interim conservation orders

Where rare or threatened wildlife, a protected wildlife habitat, an area of major interest or protected area is under immediate threat, the Minister may make an interim conservation order prohibiting the threatening process and may suspend any operation being conducted pursuant to authority under another Act such as the Forestry Act, the Mineral Resources Act or the Local Government (Planning and Environment) Act.

The order is to be served on the local authority and all landholders. It is to continue in force for 60 days but may be extended for a further 90 days by the Governor-in-Council. The order prevails over any inconsistent planning scheme. A landholder may claim compensation in respect of the making of the order.

Register

A register of all protected areas and wildlife, conservation agreements and plans, critical habitats and other areas of major interest and interim conservation orders is maintained by the chief executive. The register is open for inspection by the public.

Conclusion

The Act will have a significant impact on transactions involving property and resource projects. A landholder and any purchaser of land should search the register to ascertain:

- whether a protected area declaration, protected wildlife prescription or an interim conservation order has been made in respect of the land; and
- the terms of any conservation agreement, covenant or plan made in respect of protected areas of protected wildlife.

This paper was published in the Queensland Property Report, May 1992.

Land contamination law in Queensland

Ian Wright

This article discusses the enforcement of the *Contaminated Land Act 1991* (Qld) and how its operation will impact property transactions in Queensland

June 1992

Land contamination

Introduction

It is now well recognised that poor practices associated with the use, manufacture and disposal of chemicals, wastes and other hazardous substances can result in land contamination. The Queensland government has responded to public awareness of the problems associated with contaminated land with the enactment of the *Contaminated Land Act 1991* (**Act**) which came into effect on 1 January 1992. The Director of the Chemical Hazards and Emergency Management (**CHEM**) Unit is responsible for the administration of the Act and its Regulations. The Act is complemented by other pollution control legislation as well as the *Local Government (Planning and Environment) Act 1990*.

Objectives of the Act

The broad objectives of the Act are to publicly identify contaminated land, assess and, where appropriate, remediate the contaminated land, ensure that the land is not a hazard to human health or the environment and restrict the future use of contaminated land. 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 a matter in or on land that, in the opinion of the Director, 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 The Director has prescribed thresholds for various substances beyond which the land will be considered to be contaminated.

Notification of contamination

The Director must be notified of the existence, or the likely existence, of contaminated land by the polluter within 30 days of the polluter becoming aware of the contamination or, if the contamination occurred before 1 January 1992, by 1 January 1993 or within 30 days of becoming aware, whichever is the later. The owner or occupier of the land, the local authority or the Crown must notify the Director within 30 days of becoming aware of the contamination or by 1 January 1993, whichever is the later. An occupier includes a person in actual occupation or control of the land or, alternatively, the owner. A lessee, licensee, mortgagee in possession, receiver, liquidator and trustee in bankruptcy would be occupiers under the Act. Owner means the person who has the freehold estate or is entitled to possession of the land. A mortgagee entitled to enforce a mortgage as a result of a default by the mortgagor would be entitled to possession as would a lessee and, accordingly, would be owners under the Act.

Contaminated Sites Register

Land that is notified to the Director as being contaminated is placed on the Contaminated Sites Register and classified as follows:

- *possible site* – the land is reported to be contaminated or the use may have caused contamination;
- *probable site* – the land has been used for a prescribed use or a use that is known to cause contamination;
- *confirmed site* – an assessment demonstrates a level of contamination that represents a health or environmental hazard;
- *restricted site* – the level of contamination permits a limited use or on-site activity as specified;
- *former site* – a site that has been remediated;
- *released site* – a site that has been investigated and found to be not contaminated.

Information can be obtained in respect of all the above categories, excepting a possible site. Probable, confirmed and restricted sites also are noted on the certificate of title by the Registrar of Freehold Land Titles.

Assessment, remediation and validation

The Director may direct the preparation of a site investigation report, the remediation of the contaminated land and the preparation of a report validating the remediation by.

- the polluter, or

- the owner, if the contamination occurred before 1 January 1992, the contamination happened after the owner's acquisition or the land was recorded on the Register at the date of the acquisition; or
- the local authority, if the contamination arose because of an approval given by the local authority, who should have known it would result in contamination or the land is recorded on the Register and the approved use is either contrary to the restriction or is a prescribed use that results in a hazard to human health or the environment.

If the direction is not complied with, the Director may perform the work and recover the costs from the party to whom the direction was made. In respect of remediation costs, the Director can execute against the property to recover the costs in priority to all persons other than the local authority 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 Director requiring the preparation of a report, the undertaking of work or the payment of costs may appeal to the Planning and Environment Court against such notice. Relief will only be granted in limited circumstances.

Impact on Land development

The Act will have a significant impact on those persons involved in the land development process, in particular developers and their consultants as well as local authorities. These parties need to consider the following matters in relation to land development in the future.

First applications for the rezoning of land that has been used for a purpose set out in the Regulations to the *Local Government (Planning and Environment) Act 1990* must be supported by a site contamination report prepared by the CHEM Unit. The government has indicated that this requirement will be extended to other town planning applications such as subdivisions, notification of conditions and town planning consents. Second, the Act imposes restrictions on the use of land. For instance, land owners are prohibited from contaminating land; disposing of contaminated soil or hazardous substances other than in a place approved by the Director, using contaminated soil, hazardous substances or other contaminated matter from contaminated land other than with the approval of the Director, and using a restricted site contrary to restrictions specified in the Contaminated Sites Register. In addition, local authorities are prohibited from preventing the disposal of contaminated soil or hazardous substances at a ate approved by the Director of the CHEM Unit for that purpose and approving the use of a restricted site contrary to a restriction specified in the Contaminated Sites Register. Thirdly, the Act also imposes liabilities on polluters, owners and local authorities. Owners will only be liable where the land was contaminated after purchase or if the contamination occurred prior to purchase, the land was listed on the Contaminated Sites Register.

The liability of local authorities, however, is much wider. A local authority will be liable where the land the subject of an approval was classified as a restricted site on the Contaminated Sites Register or where the land the subject of the approval has been used for a purpose set out in the Regulations to the Act. These are purposes which are known to have caused contamination in the past Surprisingly, this list is not identical to the list under the Regulations to the *Local Government (Planning and Environment) Act 1990*.

Local authorities are also liable where the contamination has resulted from an approval they should have known would result in contamination. The question therefore arises as to when a local authority should have known that contamination would result from its approval. Apart from the uses that are listed in the Regulations to the Act and the *Local Government (Planning and Environment) Act 1990*, local authorities are left to their own devices to ascertain whether a use may result in contamination or not. Even assuming that a local authority has the vision to determine which uses will result in contamination, what steps should a local authority take in respect of such applications in order to minimise its liability?

The strict legal answer would be to refuse all such applications, but that is not commercially prudent as local authorities are in the business of attracting development. The only solution therefore is to adopt a risk management strategy by requiring detailed environmental impact statements and quantitative risk assessments in the consideration phase and then imposing performance related conditions on approvals that can be monitored by the local authority throughout the life of a project.

These requirements will result in additional expenditure for applicants in the form of detailed studies and ongoing monitoring and for local authorities in terms of detailed assessment and enforcement of planning conditions. Local authorities will therefore have to consider whether the cost of this additional expenditure should be borne by their ratepayers or transferred to applicants in terms of increased application fees and bonding arrangements.

Conclusion

In conclusion, the Act will have a significant impact on property transactions in Queensland. All professionals involved in property transactions must therefore come to understand the Act's operation and its potential impact on their clients. The Act reflects a policy shift on the part of the government towards greater environmental control. This is being reinforced by further legislation including the Heritage Act, the Nature Conservation Act and the proposed Environmental Protection Act and Coastal Management Act. All this legislation will affect land development in this State.

This paper was published as a Planning Law Update in the Queensland Planner 32:2, 18-19, June 1992.

Environmental problems in the Asian Pacific region: The role of transnational environment law

Ian Wright

This article discusses the nature and extent of environmental problems in the Asian Pacific region and analyses how transnational environmental law has provided and can provide solutions for the use of natural resources and environmental protection in the region. This article then looks to the impact of legal policy issues arising from transnational environmental law in the Australian context

June 1992

Abstract: The Asian Pacific region suffers from a myriad of complex environmental problems which are causing serious damage to terrestrial, aquatic and atmospheric ecosystems. These environmental problems are incapable of resolution by the actions of individual countries. The majority of countries lack the economical and technical resources to implement appropriate environmental management systems. In addition many of these environmental problems transcend national boundaries. Accordingly, the economic and environmental problems of the region are only capable of resolution through the development of new forms of international cooperation and agreement. This paper considers the extent to which transnational environmental law and policy has provided and can provide a process for formulating and implementing solutions for the use of natural resources and the protection of the environment in the Asian Pacific region. The paper also considers the impact of Australia's International obligations on the development of domestic laws relating to the environment.

Introduction

The Asian Pacific region is significant, not only in terms of its size but also in terms of the variety of environmental problems it exhibits (Fuse and Iwama 1981:186).

The region is defined by the Economic and Social Commission for Asia and the Pacific (**ESCAP**) and consists of two subregions: East Asia and the South Pacific. It comprises all countries from the Islamic Republic of Iran eastwards, together with all countries in the Pacific except Hawaii and United States possessions (Crawford 1991:19).

In addition to global concerns about the environment the region suffers from a plethora of diverse environmental problems of its own which are causing serious damage to its terrestrial, aquatic and atmospheric ecosystems (Mushkat 1989:21).

These environmental problems frequently transcend national boundaries and as such are only capable of remedy through new forms of international and regional cooperation and agreement. Transnational environmental law and policy provides a process and a set of techniques which can assist States within the region to formulate better solutions for the use of common resources and the protection of the environment (Richardson 1990:209).

The purpose of this paper is to analyse the state of transnational environmental law and policy the Asian Pacific region and to consider its policy implications for Australia. First the nature and extent of environmental problems and concerns in the region are discussed. Second the emergence and nature of transnational environmental law are examined. Third the legal policy issues arising out of the development of transnational environmental law and its application to the Asian Pacific region are considered. In conclusion a possible mechanism for addressing the regions environmental problems are outlined.

Environmental problems and concerns in the Asian Pacific region

The Asian Pacific region contains some of the most devastated land on earth. The region's terrestrial systems have been substantially degraded by deforestation, desertification, soil erosion, loss of vegetation, water logging, salination and the extinction of species. Marine and fresh water pollution has also resulted in a deterioration of the region's aquatic ecosystems whilst air and noise pollution has reached critical levels in major cities and industrial centres (Mushkat 1989:21-22).

In addition, the impact of some global environmental phenomena are particularly acute in the region. Changes in weather, water patterns and sea level associated with the greenhouse effect could cause havoc in low lying coastal areas. The region also continues to be used as a platform for nuclear weapons testing and the dumping of ultra hazardous wastes (Mushkat 1989:22-23).

These environmental dysfunctions have resulted from the pursuit of unsustainable economic development. The domination of international trading relationships by the advanced nations of the north have burdened the developing countries of the south with a huge foreign debt which has operated to draw economic surpluses from the south to the north. This has created tremendous political pressure for developing countries in the region to exploit their limited natural resources in an unsustainable manner to repay loans (Richardson 1990:209).

Increasingly development of this nature has resulted in environmental impacts being felt beyond the boundaries of individual countries or what is commonly referred to as transboundary pollution.

Emergence of transnational environmental law

The challenge

The rapid deterioration of global and regional environments has focused attention on the capacity of transnational environmental law to respond to ecological problems.

It is argued that transnational environmental law can assist in the resolution of environmental problems by providing a framework for cooperation between States, establishing the circumstances in which States may utilise global resources and providing mechanisms for resolving interstate environmental disputes (Richardson 1990: 209). However the system of transnational environmental law and policies is still very much in the process of development.

Development at global level

The origins of transnational environmental law can be traced to the United Nations Conference on the Human Environment held in Stockholm in 1972.

The 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 cooperation. This represented the first coherent expression of 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 (WCED 1990:87).

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 titled 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 reaffirmed the principles of sustainable development and emphasised amongst other things the need to develop greater international cooperation to deal with deforestation, ozone layer depletion and the greenhouse effect.

In 1983, the United Nations established the World Commission on Environment and Development (**WCED**) to define common international environmental concerns and to propose long-term strategies for responding to these concerns in a manner that facilitates sustainable economic growth.

The Commission released its report in 1987 titled Our Common Future the 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 environmental 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 of this year. The conference known as the Earth Summit was concluded earlier this month. The major achievements of this 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 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.

Development at regional level

The concept of sustainable development has also been elaborated through various specific regional initiatives.

In the Asian Pacific region special purpose international governmental agencies have been created at both the regional and sub-regional levels to address international issues. These institutional mechanisms are described in Figure 1.

At the regional level environmental administration is primarily provided by UNEP and ESCAP although it is envisaged that Australia's recent initiative, the Asia-Pacific Cooperation Coordination Forum (**APEC**) will play an increasingly important role in relation to environmental matters.

Inter-governmental agencies have also been created to address the environmental issues at the sub-regional level. East Asia and South Asia are administered by the Association of South East Asian Nations (**ASEAN**) and the South Asia Cooperative respectively whilst the south pacific is administered by the South Pacific Commission (**SPC**) and the South Pacific Bureau for Economic Development (**SPEC**).

Each of these sub-regional organisations has formulated an environmental programme based on the concept of sustainable development. These programmes are also set out in Figure 1.

Non-government organisations

Finally an important component of the institutional framework at the international level as well as in the Asian Pacific region is the non-government organisations (**NGO**). Bodies such as the International Council of Scientific Unions (**ICSU**), the International Union of the Conservation of Nature and Natural Resources (**IUCN**), the World Wildlife Fund (**WWF**), the International Institute for Environment and Development (**IIED**) and Greenpeace have all served to raise environmental awareness and to stimulate action to protect the environment (Richardson 1990: 212).

Nature of transnational environmental law

Sources of international environmental law

International law is derived from a variety of sources. Article 38(1) of the Statute of the International Court of Justice has become known as the most authoritative statement as to the content of the sources of international law. It recognises four sources:

- international conventions signed, ratified or acceded to by States;
- international custom as evidence of a general practice accepted as law;
- the general principles of law recognised by civilised nations; and
- the judicial decisions and teachings of the most highly qualified publicists of the various nations (as subsidiary means for the determination of rules of law).

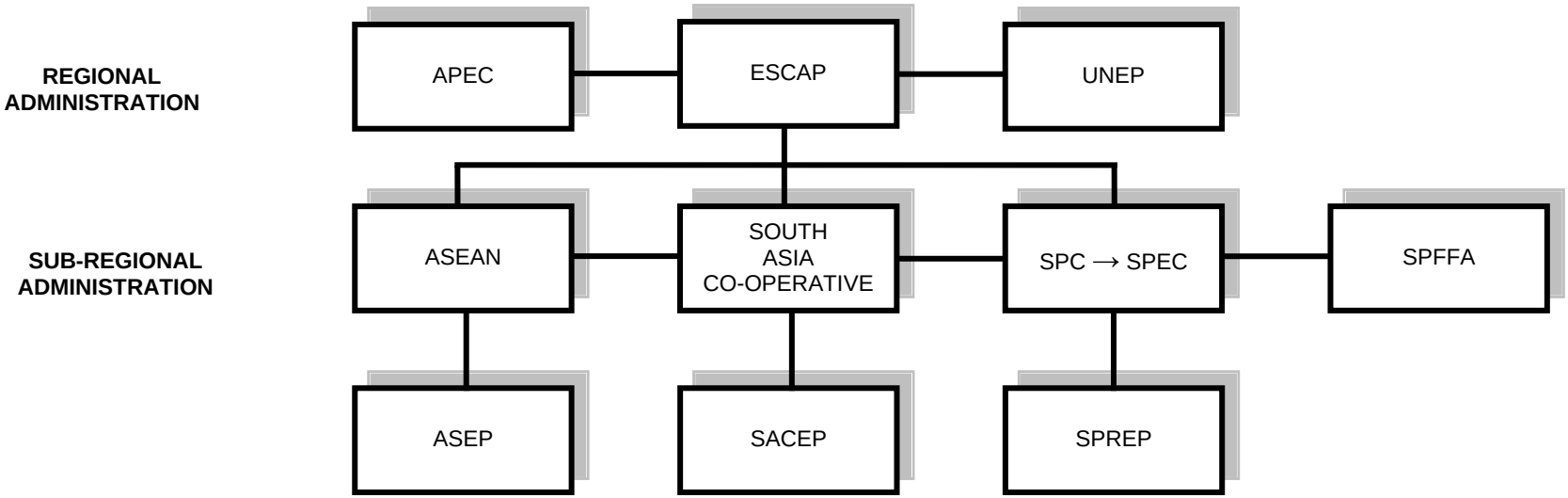
In addition there are a whole range of other international instruments which are not necessarily binding but which nations may wish to implement. These include the resolutions of international organisations such as the United Nations Security Council, the Organisation for Economic Cooperation and Development (**OECD**), the United Nations General Assembly and the specialised agencies of the United Nations such as UNESCO and UNEP.

International treaties

The most familiar form of international law is international treaties or conventions. Treaties that have been signed, ratified or acceded to and have therefore come into force are binding on the parties but will not bind non-parties. However where a treaty merely codifies or is evidence of an existing customary international law, non-parties will be bound by the customary rule.

Treaties may be bilateral, regional or multilateral and may deal solely or in part with regional matters. An example of a bilateral treaty which deals in part with environmental matters is the Torres Strait Treaty between Papua New Guinea and Australia. Examples of regional and multilateral treaties relating to the environment to which Australia has become a party are set out in Figure 2.

Figure 1 Environmental Administration Asia/Pacific Region



APEC - Asian/Pacific Economic Cooperation Forum (Ministerial Conference)

ESCAP - Economic and Social Commission for Asia and the Pacific

UNEP - United Nations Environment Program

ASEAN - Association of South East Asian Nations

SPC - South Pacific Commission

SPEC - South Pacific Bureau for Economic Cooperation

SPFFA - South Pacific Forum Fisheries Agency

ASEP - ASEAN Environment Program

SACEP - South Asia Cooperative Environment Program

SPREP - South Pacific Regional Environment Program

Figure 2 Regional and multilateral 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)
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)

	Conventions, Treaties and Protocols
	Convention on the Prevention of Marine 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 Cooperation 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

Multilateral 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 (**Bonn Convention**) and conventions recently signed in Rio on climate change and the conservation of biological diversity.

Australia has also become a party to a number of regional environmental agreements negotiated within the framework for the South Pacific Commission. These include:

- the Convention on the Conservation of Nature in the South Pacific;
- the South Pacific Nuclear Free Zone Treaty; and
- the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (known as the **SPREP Convention**) and its two protocols: the Protocol for the Prevention of Pollution of the South Pacific Region by Dumping and the Protocol Concerning Cooperation in Combating Pollution Emergencies in the South Pacific Region.

There are however no binding global or regional conventions dealing with air pollution, planetary ecosystem, environmental quality or with water pollution in international rivers, lakes or common drainage basins (Williams 1984:121). The absence of any global or regional conventions on the liability of transboundary pollution means that regard must be had to customary international law to resolve these issues.

Customary international law

Customary international law refers to those general practices or customs which are accepted by States as obligatory.

The existence of a rule of customary international law relating for example to transboundary pollution 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 arbitration tribunal held Canada liable for the damage that a private smelting operation in British Columbia had caused property in the United States. Amongst other matters 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 of areas beyond the limits of national jurisdiction*" (Campbell 1991: 6).

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 create 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.

Policy issues

The development of transnational environmental law at global and regional levels raises a variety of policy issues. Chief among these is the impact of Australia's international obligations on the development of domestic laws relating to the environment.

Existing framework

Environmental law in this country is almost entirely a product of statute. The common law offers little protection for the environment. Its focus on the protection of a private individual's right to use resources has allowed private landowners the right to manage their land largely unfettered (Christie 1990:263).

Reliance must therefore be placed on legislation to ensure the protection of the environment. Unfortunately environmental legislation in this country is constrained by constitutional considerations and our common law tradition.

Constitutional constraints means that the legislatures cannot merely recite their way into jurisdiction. Accordingly it is the Australian courts and not the Australian legislatures which has decided whether legislation regulating the environment is valid. In addition our co law tradition has meant that legislation focuses on individual action and intention rather than collective liability and responsibility.

However with the adoption of sustainable development, a new era of environmental legislation and regulation based on a broader sense of environmental responsibility is emerging.

Common law

Clear evidence of this trend is provided by recent developments in Australia's common law relevant to environmental matters.

The recent decision of the High Court of Australia in the land rights case of Eddie Mabo and the State of Queensland indicates that concepts being developed in the international arena will have an increasing influence on the development of Australia's common law.

The decision, which was handed down earlier this month 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 to 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 discriminatory 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 organisation 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 looking more actively to transnational environmental law as a source for the development of the common law in Australia.

Impact on Federal systems

Developments in international law will also have a substantial impact on the distribution of powers in our Federal system.

Under the Commonwealth Constitution the Federal government has 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 that 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 CLR 1 (Tasmanian Dams case), *Richardson v The Forestry Commission* (1988) 164 CLR 261 (Lemonthyme and Southern Forest case) and *Queensland v The Commonwealth* (1989) 167 CLR 234 (the 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)), corporation's power (section 51(xx)), Federal financial power (sections 51(ii) and 96), race power (section 51(xxvi)), the Territory's power (section 122) and the external affairs power (section 51(xxix)).

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 a local basis. As a result many environmental matters which once 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 (Campbell 1991:13).

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 this year acknowledges the important role of the States in relation to the environment and the contribution they can make in the development: 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 Authority (**NEPA**). 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.

Pollution control legislation

The implementation of sustainable development in accordance with Australia's international obligations will require Australia and other Asian/Pacific countries to establish and implement more sophisticated pollution control legislation.

The traditional approaches to environmental protection in the Asian Pacific region are 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 environmental quality management approach is generally preferred by business as it emphasises the overall level of pollution and would allow pollution rights to be bought and sold. Any new entrant to the pollution market would therefore have to adopt or create new technology or buy a discharged licence (Johnson 1990:291).

However this approach 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 focuses 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 regulatory frameworks so as to control industrial pollution on a preventative basis. A variety of policy changes can therefore be anticipated.

- 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, extend the precautionary principle automatically to new installations and set the groundwork for the progressive elimination of discharges from existing sources. This would be achieved by requirement to use the best available technology on new installations, combined with a requirement to set phase-in timetable 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 insofar 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 1 tonne per year of sulphur dioxide. Allowances not used through emissions may be banked or sold (Bourque 1991:5).

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 (Court 1992:93-94).

Conclusion

The Asian Pacific region suffers from a variety of complex environmental problems which can only be resolved through international cooperation and agreement.

However the level of cooperation among countries in the region is low. To date cooperation has been confined largely to formal institutional setting. The magnitude of the region's problems however means that a greater level of cooperation is necessary.

In order to properly implement sustainable development international cooperation will have to extend beyond formal institutional setting to the formulation of common standards, practices and rules. This will necessitate the adoption of a comprehensive regional strategy for environmental protection and the rational use of natural resources based on the environmental priorities specific to the region. To ensure its success implementation of such a strategy should be embodied in an international treaty and supported by formal enforcement mechanisms (Mushkat 1989:38).

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This paper was presented at the Asian/Pacific Basin Studies Unit conference, Gold Coast, June 1992.

Impact of contaminated land legislation on the valuation and land economist professions

Ian Wright

This article discusses the impact of land contamination legislation by considering the impact of the Act on the land development process, property transactions and valuation and land economist professions

July 1992

Introduction

The purpose of this paper is to consider the implications of the *Contaminated Land Act 1991* and other related legislation on the valuation and land economist professions.

I will do this in three parts:

- Firstly, I will consider the impact of the Act on the land development process.
- Secondly, I will examine the impact of the Act on property transactions, in particular, purchasing, leasing and mortgaging of land.
- Finally, I will consider the implications of the Act on the valuation and land economist professions.

Turning first to the impact of the Act on land development.

Impact on land development

As you are no doubt aware, the development approval process in Queensland is regulated by the *Local Government (Planning and Environment) Act 1990* and the *Building Act 1975*. These Acts establish a land use planning and building system which is administered by local authorities.

The government has sought to use this system as a mechanism for managing existing land contamination and preventing future land contamination.

This will have a significant impact on those persons involved in the land development process, in particular, developers and their consultants (whether they be valuers, planners or engineers) as well as local authorities.

These parties need to consider the following matters in relation to land development in the future.

Site contamination reports

First, town planning applications in respect of land that has been used for a purpose set out in the Regulations to the Local Government (Planning and Environment) Act must be supported by a site contamination report prepared by the Department of Environment and Heritage. The Regulations set out those uses which are known to have caused contamination in the past Under the Local Government (Planning and Environment) Act, a town planning application will not be considered to be legally made until a site contamination report is provided. In addition, local authorities are required, by the Act, to consider the report when assessing the town planning application.

Land use restrictions

Second, the *Contaminated Land Act 1991* imposes restrictions on the use of land. For instance, it is an offence punishable by a $6,000 fine for a person to:

- contaminate land;
- dispose of contaminated soil or hazardous substances other than in a place approved by the Director of the Department of Environment and Heritage;
- use contaminated soil, hazardous substances or other contaminated matter from contaminated land other than with the approval of the Director; and
- use a restricted site contrary to restrictions specified in the Contaminated Sites Register. In addition, it is an offence for local authorities to:
    - prevent the disposal of contaminated, soil or hazardous substances at a place approved by the Director of the Department of Environment and Heritage for that purpose; and
    - approve the use of a restricted site contrary to a restriction specified in the Contaminated Sites Register.

Criminal liability

Thirdly, the *Contaminated Land Act 1991* imposes liabilities on polluters, owners and local authorities. I shall deal with the liability of polluters and owners when I consider the impact of the Act on property transactions.

However, in respect of local authorities, they will be liable under the Act in three circumstances:

- First, where the land the subject of an approval was classified as a restricted site on the Contaminated Sites Register at the date of approval.
- Second, the land the subject of the approval has been used for a purpose set out in the Regulations to the *Contaminated Land Act 1991*. These are purposes which are known to have caused contamination in the past. Surprisingly, this list is not identical to the list in the Regulations of the *Local Government (Planning and Environment) Act 1990*.
- Thirdly, local authorities will be liable where the contamination has resulted from an approval they should have known would result in contamination.

In respect of this third head of liability, the question that arises for consideration is: in what circumstances should a local authority have known that contamination would result from its approval?

Apart from the uses that are listed in the Regulations to the *Contaminated Land Act 1991* and the *Local Government (Planning and Environment) Act 1990*, local authorities are left to their own devices to ascertain whether a use may result in contamination or not. Even assuming that a local authority has the vision to determine which uses result in contamination, what will a prudent local authority do in respect of such applications in order to minimise their liability?

The strict legal answer would be to refuse all such applications, but that is not commercially prudent, as local authorities are in the business of attracting development.

The only solution for a prudent local authority is to adopt a risk sensitive strategy by requiring detailed environmental impact statements and quantitative risk assessments in the consideration phase and then imposing performance related conditions on approvals that can be monitored by the local authority throughout the life of a project.

In short, this all adds up to a lot of additional expenditure for applicants in the form of detailed studies, ongoing monitoring and increased delays and for local authorities in terms of detailed assessment and enforcement of planning conditions.

Valuers and land economists will therefore have to consider these additional costs when preparing valuation and feasibility reports for new developments.

Turning to the impact of the *Contaminated Land Act 1991* on property transactions.

Impact on property transactions

The *Contaminated Land Act 1991* presents both direct and indirect risks for persons involved in the purchasing, leasing or mortgaging of land.

Direct risks

In terms of direct risks, the *Contaminated Land Act 1991* imposes obligations on polluters, owners and local authorities to notify the Department of Environment and Heritage of contaminated land, prepare site investigation reports in respect of contaminated land, to remediate contaminated land and to prepare reports validating any remediation that is undertaken.

The liability of local authorities and its resulting impacts on the land development process have already been considered. In respect of the liability of polluters and owners, polluters are liable under the Act without qualification. Owners, however, are only liable in three circumstances:

- First, if contamination occurred before 1 January 1992.
- Second, the land was purchased prior to the contamination.
- Third, the land was listed in the Contaminated Sites Register at the date of purchase. However, both polluters and owners can raise three defences to avoid liability:
  - first, the contamination was caused by lawful and accepted practice at the time;
  - second, the contamination was caused before 1 January 1992 and it would not be fair and reasonable for the person to be liable; and
  - third, the person is unable to pay the costs of assessment, remediation or validation.

Under the Act, any person who causes or permits land contamination is considered to be a polluter and is therefore prima facie liable. The definition of owner, however, is much wider.

Under the Act, owner is defined to mean the person who has the possession of the freehold estate in the land or is entitled to possession of the land. The registered proprietor, lessor, lessee, receiver, liquidator, trustee in bankruptcy and mortgagee in possession will all be owners for the purposes of the Act. A mortgagee who is entitled to enforce a mortgage as a result of a default by a mortgagor would also be entitled to possession of the land and accordingly, would be an owner for the purposes of the Act. That is, mortgagees are owners under the Act whether they are in physical possession or not.

Indirect risks

Apart from the direct risks of liability, the application of the Act will also create the following indirect risks for persons involved in property transactions:

- First, the imposition of penalties and remediation costs may affect the financial viability and credit worthiness of the party.
- Second, the existence of contamination may affect the value of the land.
- Third, the public image of the party may be affected which in turn may affect the business of that party. For instance, it is reported that Exxon in the United States has suffered a 10% drop in sales following the Exxon Valdez disaster in Alaska and that it is currently considering a change of name.

Risk minimisation

As a result of these matters, parties involved in the purchase, lease or mortgage of land will undoubtedly take steps to minimise the risk of financial loss.

There are three strategies available to parties involved in property transactions to minimise risk:

- First, commission an environmental audit of the site. An environmental audit is an independent, objective assessment of the environmental risks and provides recommendations for the minimisation of risks and proposals for remediation. Typically, environmental audits are prepared by a multidisciplinary team comprising scientists, financial experts and lawyers. Financial analysts have an important role to play in these audits as they must determine the financial implications of environmental exposures identified in the audit process.
- Second, risk can be minimised by transferring that risk through insurance. Unfortunately, it is not yet possible to obtain comprehensive environmental risk insurance cover from insurance companies. A standard general or public liability policy should provide cover for most accidental and non-foreseeable damage and contamination to third parties. However, gradual pollution or damage resulting from the ordinary operation of a particular plant is usually excluded from standard insurance cover.

  Specific environmental insurance cover will generally only extend to some risks and there is generally a requirement that a company's operations be thoroughly audited in addition to full disclosure of all information pertinent to the risk as a pre-requisite to cover. It is not possible to insure against fines or penalties incurred through environmental damage on public policy grounds and therefore, personal criminal liability of directors or penalties against individuals or a corporation are excluded by insurance law.

  It is possible to obtain environmental impairment policies but these generally do not insure against remediation or compensation costs for contamination which occurred in the past before the cover was in place.

  In summary, operations with a high level of environmental risk will find it difficult to gain environmental insurance coverage.
- The third method for a party involved in a property transaction to minimise risk is to take preventative action. This will generally involve requesting professional advisors such as engineers, lawyers and valuers to advise in respect of any potential land contamination that may affect the party's investment decisions. As a result, a greater duty will be imposed upon valuers and lawyers alike by our clients to play the detective during site investigations.

This will undoubtedly have significant implications for the valuation profession. I shall now consider those implications.

Impact on valuation practice

As I have already indicated, valuers will be subject to an increasing obligation (both commercially and legally) to investigate the existence of potential land contamination.

Searches

At the very least, valuers should, where possible, undertake a search of the Contaminated Sites Register to ascertain whether the land has been identified as contaminated. However, the fact that a site is not so registered does not of itself mean that the land is not contaminated. Under the Act, parties have until 1 January 1993 to notify the Department of Environment and Heritage of land that is contaminated. Accordingly, some parties who are aware of contamination may not as yet have given notification. In addition, there will be those cases where parties are unaware of contamination and accordingly, have not given any notification.

Site history

Apart from a search of the Contaminated Sites Register, valuers should also investigate the history of the site to ascertain its previous uses. A site history may be constructed from local authority town planning and building searches, title searches, discussions with council officers and neighbouring residents and aerial photography of the site.

Site inspection

In addition to preparing a site history, valuers should also identify potential environmental problems that are apparent in the course of site inspections. Whilst a skilled scientific auditor will be needed to identify more complicated risks, the more obvious environmental problems should be noted by the valuer.

For example, obvious signs of contamination that should be noted by the valuer would include:

- waste spills on or near industrial sites;
- environmental exposures associated with drum storage;
- underground storage tanks and associated leakage problems (Kerry's LUST problems);
- tank storage which is inadequately bunded;
- flammable liquids stored near ignition sources;
- spills illustrated by dead vegetation and other signs around tanks;
- spills of oil and other pollutants into streams and lagoons;
- unlined ponds and dams storing hazardous materials; and
- mining wastes polluting rivers and streams.

The systematic identification of such risks in the course of a site inspection will necessitate the preparation of simple check lists so that valuers can visit properties and from a layman's point of view, look for particular environmental risks that exist.

Valuation report

If environmental risks are apparent from a site inspection, the valuer should recommend to the client that an environmental audit be undertaken to identify the extent of such risks. The financial implications of environmental exposures such as delay, the fees of professional consultants, remediation and validation costs should then be considered as part of the valuation process.

Disclaimers

It will also be prudent for valuers to include an appropriate disclaimer in the written valuation report. Legal advice should be sought as to the form of the disclaimer but at the very least it should state that:

- The valuer has not become aware of contamination during the inspection and investigation other than that which is set out in the report.
- The valuer is not qualified to determine the existence of contamination and that appropriate scientific advice should be sought.
- The valuation is based on the assumption that there is no contamination of the land or buildings other than that set out in the report that would adversely affect its existing or proposed use.
- The existence of contamination may cause a loss in value and that the valuation report should be reviewed if contamination other than that set out in the report is established.

It should be noted, however, that disclaimers will not protect the valuer from liability for negligence if there is clear evidence of contamination that should have been noticed in the course of inspection or investigation and this was not brought to the attention of a party relying upon the valuation report. It will therefore be necessary for valuation practitioners to establish simple procedures and policies to ensure that no development project is assessed without the environmental issues being considered.

Conclusion

In conclusion, the *Contaminated Land Act 1991* will have a significant impact on property transactions in Queensland.

As professionals who are involved in these transactions, valuers and lawyers must come to understand the Act's operation and its potential impact on our clients.

The *Contaminated Land Act 1991* reflects a policy shift on the part of the government towards greater environmental control. This has been reinforced by further legislation such as the Queensland Heritage Act and the Nature Conservation Act and will be further reinforced with the introduction of the Environmental Protection Act and the Coastal Management Act later this year. All this legislation will affect property transactions in this State.

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This paper was presented at the Australian Institute of Valuers and Land Economists seminar, Brisbane, July 1992.

COLIN BIGGERS & PAISLEY LAWYERS

Impact of proposed environment protection legislation on the valuation and land economist professions

Ian Wright

This article discusses the implications of the proposed Environment Protection Legislation on the valuation and land economist professions. It specifically looks at the policy framework upon which the legislation is based and provides a brief description of the proposed legislation. It then discusses the various impacts of the legislation on the valuation of land and what changes it will cause in the valuation practice

July 1992

Introduction

The purpose of this paper is to consider the implications of the State government's proposed Environment Protection Legislation on the valuation and land economist professions. The paper is divided into four parts:

- The first part considers the policy framework upon which the Environment Protection Legislation is based.
- The second part provides a brief description of the proposed Environment Protection Legislation.
- Whilst the third part considers the implications of the legislation on the valuation of land.
- The final section discusses those changes in valuation practice that will be necessitated by the proposed legislation.

Policy framework

The proposed Environment Protection Legislation is intended to implement the concept of ecologically sustainable development. This concept refers to the use of natural resources in a way which meets the needs of present generations without compromising the ability of future generations to meet their needs.

The need to implement the concept of ecologically sustainable development arises from the Inter-governmental Agreement on the Environment signed in February of this year by all State and territory governments, the Commonwealth government and the Local Government Association of Australia.

As a party to that agreement, the Queensland government has acknowledged that the development and implementation of its environmental policies and programmes should be guided by the concept of ecologically sustainable development.

The Queensland government has also agreed that the promotion of ecologically sustainable development requires policy making and programme implementation to be based on the following principles:

- *Precautionary principle* – environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.
- *Intergenerational equity* – the present generation should ensure that the next generation is left with an environment which is at least as healthy, diverse and productive as the one the present generation experiences.
- *Irreversibility* – public and private decisions need to be based on careful evaluation to avoid, wherever possible, irreversible damage to the environment.
- *Valuation of environmental assets* – the valuation of environmental assets should take into account all relevant values including economic, ecological, aesthetic and social values.
- *Polluter pays* – those who generate or benefit from pollution should bear the cost.
- *User pays* – the users of goods and services should pay prices based on the full life cycle costs of providing them, including the use of natural resources (including the global commons) and the ultimate disposal of any wastes.

These principles form the policy basis upon which the proposed Environment Protection Legislation has been developed.

Proposed legal framework

Scope of legislation

The proposed Environment Protection Legislation is intended to be introduced into parliament in the latter half of this year but will not commence operation until mid-1993.

The legislation is intended to control environmental contamination and degradation. The legislation will repeal the *Clean Air Act 1963*, *Clean Waters Act 1971* and the *Noise Abatement Act 1978*. The legislation is complemented by the *Contaminated Land Act 1991* which commenced operation on 1 January this year.

The Environment Protection Legislation will apply to both the private and public sectors. It is currently envisaged that the legislation will provide a broad framework specifying mechanisms for:

- the development of environmental standards;
- the management of environmental contamination and degradation;
- the enforcement of the legislation; and
- the administration of the legislation.

The legislation, however, will not deal with environmental impact assessment. This will be the subject of separate legislation to be introduced in 1993. The proposed environmental impact legislation will establish mechanisms for evaluating the environmental significance of human actions whether they be development projects, policies, plans, products or programmes. An analysis of that legislation is beyond the scope of this paper.

With this qualification in mind, it is now appropriate to consider each of the elements of the proposed Environment Protection Legislation.

Environmental standards

Environmental standards will not be specified in the legislation. Rather, they will be set out in subordinate legislation to be known as environment protection policies. These are not policies in the conventional meaning of the word. They are proscriptive legally enforceable documents that contain standards, management techniques and penalties.

Environment protection policies will be developed by the Chief Executive Officer of the Department of Environment and Heritage who is required to give public notice of proposed policies and to consult with relevant local authorities and other parties affected by the policies.

Environment protection policies could cover general topics such as waste minimisation or CFCs as well as specific topics like water quality of the Brisbane River catchment or air quality in the Brisbane air shed.

The first environment protection policies will relate to air, water, noise and waste management and in accordance with the Inter-governmental Agreement on the Environment will impose standards that are consistent with those in other States. After these policies have been declared, other more specific policies will be developed on a needs basis such as for transport noise, cattle feed lots and litter.

In order to provide certainty for industrial investment whilst at the same time ensuring that environment protection policies keep pace with technological innovations, environment protection policies will be reviewed periodically but at least every seven years.

Environmental management

In addition to setting standards, the Environment Protection Legislation will also provide mechanisms for managing environmental contamination and degradation. At least six management mechanisms are currently envisaged.

- First, those industries with the most potential to contaminate the environment will have to be licensed. Licensing will occur in one of three ways:
    - first, where the proposed action is subject to a State government approval process such as that applicable to mining, a separate licence will not be issued by the Department of Environment and Heritage or the Department of Resource Industries. Rather, environmental considerations will be addressed by the Department of Resource Industries in consultation with the Department of Environment and Heritage in the course of determining whether to issue a mining tenement;
    - second, where the proposed action is subject to a local government approval process such as town planning or building, the environmental issues will be addressed by the local authority in consultation with the Department of Environment and Heritage in the course of considering whether to grant approval; and
    - third, where the proposed action may have environmental impacts beyond the boundaries of individual local authorities, a separate licence will be required from the Department of Environment and Heritage. To ensure certainty, a list of premises, which will have to be separately licensed by the Department of Environment and Heritage will be prepared. This list is being refined from interstate lists and bears some

resemblance to the schedule of designated developments under the *Local Government (Planning and Environment) Act 1990*.

Licences issued by the Department of Environment and Heritage will be life of project as is the case with mining and town planning permits rather than annual renewal. The licensee will be required to undertake self-monitoring and to submit compliance certificates to the Department. A Register of Licences will be maintained by the Department and information will be available to the public. A new fee structure designed to provide an incentive to industry to minimise environmental contamination and degradation will also be introduced.

- Secondly, the Chief Executive Officer of the Department can require an environmental audit to be prepared where there is non-compliance with the provisions of a licence or an environment protection policy or the potential exists for site contamination. The audit can be prepared by the operator or by consultants who will have to endorse the report and as such will be subject to the false information provisions of the Act. Failure to undertake an audit will be an offence and the Chief Executive Officer may reject an inadequate audit.
- Thirdly, where a business is unable to comply with the conditions of a licence or the standards set out in an environment protection policy, the business can negotiate an environment management plan with the Department. Environment management plans are binding contracts which set out a transitional programme of works to achieve compliance. Environment management plans are developed by the operator and approved by the Department. If the Department agrees to the plan, it becomes a legal condition of the operator's licence. It, like the licence, is also a public document.
- Fourthly, the licensing authority, whether it be the Department of Environment and Heritage, the Department of Resource Industries or local authorities can require, as a condition of a licence or a term of an environment management plan, that a financial assurance be provided to ensure compliance with the licence, environmental management plan or the provisions of the legislation. Financial assurances may be in the form of bank letter of credit, bonds, a bank guarantee or an insurance policy. Guidelines will be prepared to assist local authorities with the calculation of bonds. These guidelines will be similar to those prepared by the Department of Resource Industries in relation to the setting of securities for mining tenements.
- Fifthly, the legislation will provide procedures for the notification, control and clean-up of contaminants released during emergencies, malfunctions and accidents. Owners and occupiers will be required to notify the Department as soon as practical after an accident. Failure to notify will be an offence. The Chief Executive Officer will be empowered to order the undertaking of site investigations to assess the extent of contamination and where appropriate, to clean up the pollution. Costs incurred by the Chief Executive Officer or other persons as a result of the contamination may be recoverable from the operator.
- Finally, the Chief Executive Officer of the Department may grant an exemption from compliance with the terms of an environment protection policy, licence or environmental management plan where the release of material is unavoidable and/or would not cause unacceptable contamination. A register of exemptions will be maintained by the Department and will be available to the public.

Enforcement

These environmental management mechanisms will be complemented by stringent enforcement provisions. These will be of three types.

- First, the legislation will have a three tier system of offences:
  - the first tier encompasses indictable offences for intentional, reckless or criminally negligent action or inaction with the potential for or resulting in severe environmental contamination or degradation;
  - the second tier includes summary offences for breach of the statutory provisions of the legislation; and
  - the third tier relates to minor offences.

  Penalties will range from on the spot fines for third tier offences to jail terms and million dollar fines for first and second tier offences. Infringement notices will be issued by delegated officers such as police officers, local authorities and the Department of Transport in respect of third tier offences. This will avoid legal costs associated with court actions. However, prosecutions will be commenced in respect of first and second tier offences. These prosecutions can be brought by the Chief Executive Officer or any other person with the written approval of the Chief Executive Officer.

  In addition to these environmental offences, the legislation will also create offences for the provision of false information and the failure to comply with the conditions of an environment protection policy, licence or environmental management plan as well as the provisions of the legislation. Liability will also be imposed on corporate officers for offences committed by corporations whose only defence will be that they had no knowledge of the offence and exercised all due diligence. In order for corporate officers to rely on this defence, it will be necessary to ascertain the corporation's potential liabilities by means of an environmental audit and to adopt appropriate solutions.

- Second, the Chief Executive Officer will also be empowered to issue an environment protection notice directing that certain preventative, control or abatement action be taken to deal with environmental contamination or degradation. If the environment protection notice is not complied with, the Chief Executive Officer can issue a second notice requiring immediate cessation of the operation. Failure to comply with the environmental protection notice is an offence.
- Finally, any person will be able to seek an injunction from the Planning and Environment Court in respect of breaches of the legislation. A breach of a court injunction is considered to be a contempt of court and is punishable by imprisonment.

Administration

The legislation is to be administered by the Department of Environment and Heritage which has been designated as the lead agency for environment and conservation management by the Public Sector Management Commission. As of 1 July 1992, the Department of Environment and Heritage is also responsible for the administration of the *Contaminated Land Act 1991*, which is intended to complement the Environment Protection Legislation.

It is envisaged that responsibility for the administration of the Environment Protection Legislation in respect of localised environmental issues will be devolved to local authorities. Whilst general agreement has been reached on devolution, the issue of additional resource provision is still to be finalised.

It is also currently envisaged that the Planning and Environment Court will be given jurisdiction to hear appeals in respect of licences, prosecutions for breach of the legislation and applications for injunctions. However, the Electoral and Administrative Review Commission (**EARC**) are currently reviewing the issue of appeals against administrative decisions. The EARC report is likely to be finalised prior to the commencement of the Legislation and any recommendations contained in that report will be incorporated into the final legislation.

It should also be noted that the legislation is still in the course of being drafted and as such, will be subject to further consultation and review. Notwithstanding this qualification, it is not unreasonable to assume that the final legislation will be recognisable from the outline provided in this paper.

Impact of legislation on land valuation

It is important for valuers to appreciate the provisions of the propose Environment Protection Legislation and its impact on valuation practice.

The quantification of environmental costs is a difficult if not impossible task. Whilst I do not pretend to be an expert in this very specialised field of economics, it is clear that land values will be diminished, at least in the short run, by the introduction of this legislation. At least three factors will contribute to the diminution.

- First, restrictions imposed by licence conditions and environment protection policies will influence the determination of the highest and best use of the land. The role of the valuer is to assess the highest and best use of the land having regard to its potential utility and the probability of consent being obtained for these potential uses. Obviously if this probability is reduced because of environmental considerations, then land values must also reduce.
- Second, the requirement to obtain licences from the Department of Environment and Heritage or for environment considerations to be considered as part of other approval processes such as those relating to mining and town planning permits, will also result in increased costs to developers and diminution of land values. Additional costs will arise from:
    - the cost of financing outstanding debts whilst the project is delayed;
    - the higher cost of inputs when the project is constructed at a later date;
    - the delayed commencement of cash flows; and
    - the actual monetary costs of seeking professional advice.
- Finally, the requirement to introduce new technology to meet strict environmental standards imposed in environment protection policies will also result in increased costs to developers and diminution in land values. Obsolescence of existing plant and equipment will also increase as and pollution measures are implemented.

It should be noted, however, that in the long term land values in particular cases may increase as a result of an enhanced environment or increased demand for environmentally sensitive developments.

Valuation practice

The potential impact of the legislation on land values means that valuers will be subject to an increasing obligation (both commercially and legally) to play detective in the course of preparing valuations.

Searches

At the very least, valuers should search the Department's records to ascertain whether land is affected by:

- a licence, and if so, the fees and financial assurances that are payable in relation thereto;
- environment management plans and any financial assurances provided therein;
- clean-up orders; and
- environment protection notices requiring the undertaking of works or the cessation of operations.

This should be complemented by a search of the Contaminated Sites Register under the *Contaminated Land Act 1991* to ascertain whether the land has been identified as a contaminated site, and if so, if any remediation orders have been made.

However, the fact that a site is not on the Register does not of itself mean that the land is not contaminated. Under the Act, parties have until 1 January 1993 to notify the Department of Environment and Heritage of land that is contaminated. Accordingly, some parties who are aware of contamination may not as yet have given notification. In addition, there will be those cases where parties are unaware of contamination and accordingly, have not given any notification.

Site history

Apart from a search of the various registered maintained by the Department, valuers should also investigate the history of the land to ascertain its previous uses. This will assist valuers in determining whether there has been land contamination or degradation. A site history may be constructed from local authority town planning and building searches, title searches, discussions with council officers and neighbouring residents and aerial photography of the land.

Site inspection

In addition to preparing a site history, valuers should also identify potential environmental problems that are apparent in the course of site inspections. Whilst a skilled scientific auditor will be needed to identify more complicated risks, the more obvious environmental problems should be noted by the valuer.

For example, obvious signs of contamination that should be noted by the valuer would include:

- waste spills on or near industrial sites;
- environmental exposures associated with drum storage;
- underground storage tanks and associated leakage problems;
- tank storage which is inadequately bonded;
- flammable liquids stored near ignition sources;
- spills illustrated by dead vegetation and other signs around tanks;
- spills of oil and other pollutants into streams and lagoons; and
- unlined ponds and dams storing hazardous materials; and mining wastes polluting rivers and streams.

The systematic identification of such risks in the course of a site inspection will necessitate the preparation of simple check lists so that valuers can visit properties and from a layman's point of view, look for particular environmental risks that exist.

Valuation report

If environmental risks are apparent from a site inspection, the valuer should recommend to the client that an environmental audit be undertaken to identify the extent of such risks. The financial implications of environmental exposures such as delay, the fees of professional consultants, remediation and validation costs should then be considered as part of the valuation process.

Disclaimers

It will also be prudent for valuers to include an appropriate disclaimer in the written valuation report. Legal advice should be sought as to the form of the disclaimer but at the very least it should state that:

- the valuer has not become aware of environmental contamination or degradation during the inspection and investigation other than that which is set out in the report;
- the valuer is not qualified to determine the existence of environmental contamination or degradation and that appropriate scientific advice should be sought;

- the valuation is based on the assumption that there is no environmental contamination or degradation of the land and adjoining land other than that set out in the report that would adversely affect its existing or proposed use; and
- the existence of environmental contamination or degradation may cause a loss in value and that the valuation report should be reviewed if contamination or degradation other than that set out in the report is established.

It should be noted, however, that disclaimers will not protect the valuer from liability for negligence if there is clear evidence of environmental contamination or degradation that should have been noticed in the course of inspection or investigation and this was not brought to the attention of a party relying upon the valuation report. It will therefore be necessary for valuers to establish simple procedures and policies to ensure that no development project is assessed without the environmental issues being considered.

Conclusion

In conclusion, the proposed Environment Protection Legislation and the complementary *Contaminated Land Act 1991* will have a significant impact on property transactions in Queensland. As professionals who are involved in these transactions, valuers and lawyers must come to understand the operation of both Acts and their potential impact on our clients.

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This paper was presented at the Australian Institute of Valuers and Land Economists seminar, Brisbane, July 1992.

Legislation update: The commencement of the Queensland Heritage Act 1992 and other legislative amendments during 1992

Ian Wright

This article discusses the commencement and effect of the *Queensland Heritage Act 1992* (Qld) and various other pieces of planning legislation enacted in Queensland during 1992

September 1992

Queensland Heritage Act 1992

Introduction

The *Queensland Heritage Act 1992* was assented to on 27 March 1992 and commenced operation on 21 August 1992. The interim legislation, the *Heritage Buildings Protection Act 1990*, expired with the commencement of the new Act. The underlying purpose of the legislation is to conserve Queensland's cultural heritage without precluding development. The Act binds all persons. That includes the Crown and its agencies but without exposing the Crown to criminal liability. "*Owner*" means the registered proprietor or a lessee or licensee from the Crown and includes a mortgagee in possession.

Heritage Register

The Act establishes a public register (Heritage Register) in which places with cultural heritage significance will be entered. The Register will also record details of heritage agreements, protected areas and orders or permits under the Act. The Registrar of Titles also holds details of the entry and removal of places in the Register and the existence of heritage agreements. The Register is administered by the Queensland Heritage Council which is made up of persons representing a range of organisations as well as persons qualified in assessing the heritage significance of a place.

Listing procedures

The Act sets out the procedure for entering a place in the Heritage Register and its removal from the Register. The council may, on its own initiative or on application of any person, provisionally enter a place in the Register if it is of cultural heritage significance and satisfies the criteria set out in the Act. Any person may object to the entry of the place in the Register on the grounds that it is not of cultural heritage significance or does not satisfy the relevant criteria. Only the owner may appeal to the Planning and Environment Court against the council's decision. The owner of a place may apply to the council for a certificate of immunity from registration. The certificate prohibits entry of the place in the Register for 5 years. Buildings listed in the schedule to the interim legislation are deemed to be provisionally entered in the Register. In respect of these buildings only the owner may object to the listing, which objection must be lodged by 21 October 1992.

Development in registered places

It is an offence to develop a registered place without the approval of the council or a certificate granted under the interim legislation. A maximum penalty of $1,000,000 is imposed. In order to develop a registered place an application must be lodged with the relevant local authority. The application is considered by the council or the local authority if it has delegated power from the council. Where the proposed development would destroy or substantially reduce the cultural heritage significance of the registered place, the application will only be approved if there is no prudent and feasible alternative to carrying out development. The applicant can apply to the council for a review and has appeal rights to the Planning and Environment Court. Where the Crown proposes to develop a registered place, a report must be submitted to the council in relation to the proposed development After public objection, the Minister responsible for the proposal must determine the application having regard to the council's recommendation.

Heritage agreements

The Minister may enter into a heritage agreement with the owner of a registered place. The agreement attaches to the land and binds owners and occupiers. The agreement may contain provisions relating to the conservation of the registered place or public appreciation of its cultural heritage significance. The agreement may restrict the use of the place; specify or restrict work to be carried out; provide that the place be available for public inspection; provide for financial, technical or professional assistance to the owner, provide for a review of the valuation of the place or exempt particular developments from the requirement of obtaining approval.

Protection of cultural relics

The Act also regulates the protection of places containing significant cultural relics and historical archaeological material. However the Act does not seek to deal with places whose cultural heritage significance derives solely from their association with Aboriginal tradition or island custom.

Enforcement

The Minister and the Planning and Environment Court are given powers to enforce the Act. The court can require compliance with a heritage agreement and may require rectification of damage caused by unapproved development. The Minister may issue a stop order prohibiting any work reducing the cultural heritage significance of any place whether registered or unregistered for 60 days. The Minister may also prohibit the development of a registered place for up to 10 years.

Impact on land development

Owners are not entitled to compensation for financial loss caused by a listing in the Register. However, the Act amends the Valuation of Land Act by requiring the restrictions on use set out in a heritage agreement to be considered in determining the unimproved value of the land. Accordingly, financial benefits in terms of reduced land tax and rates may be derived where the unimproved value of the land is reduced due to the existence of a heritage agreement. The effects of a heritage agreement may also have to be considered in preparing a lease of the land. In addition, purchasers and lessees are bound by any restrictions on use contained in a heritage agreement and any non-development order made over the land. The Land Titles Register and the Heritage Register should therefore be searched prior to entering into or completing any property transaction. The approval of the council will also be required where the use of the registered place has been restricted by a heritage agreement.

This paper was published as a Planning Law Update in the Queensland Planner 32:3, 20-21, September 1992.

Legislation update: Legal and policy developments relating to land development

Ian Wright

This article discusses the legal and policy developments in relation to land development by the Queensland government

September 1992

Legal and policy developments

In the first six months of this year the Queensland government has enacted an unprecedented volume of legislation relating to land development. There have also been significant developments at the international levels as well as in other jurisdictions. These developments have important implications for all planning and environmental professionals. The purpose of this column is to keep practitioners abreast of legal and policy developments in planning and environmental matters relevant to professional practice in Queensland. Since this is the first in what is intended to be a regular column, it is appropriate to take stock of what has occurred to date. Accordingly, what follows is a short summary of all significant legislative initiatives that have been enacted or announced by the State government in the last six months. It is intended to address particular initiatives as well as other judicial and policy developments in subsequent issues.

Contaminated Land Act and Regulations 1991 (commenced 1 January 1992)

The objectives of the Act are to publicly identify contaminated land, assess and where appropriate, remediate the contaminated land, ensure that the land is not a hazard to human health or the environment and restrict the future use of contaminated land (see Queensland Planner Volume 32 No. 2, page 18).

Queensland Heritage Act and Regulations 1992 (commenced 21 August 1992)

The objective of the Act is to provide for the conservation and comprehensive protection of Queensland's cultural heritage. The contents of this Act are discussed in greater detail in a separate article in this issue.

Nature Conservation Act 1992 (assented to on 22 May 1992 but has yet to commence)

The objective of the Act is the conservation of nature which is to be achieved by an integrated and comprehensive conservation strategy that involves amongst other things the gathering of information and community education, dedication, declaration and management of protected areas, the protection of native wildlife and its habitat and the ecologically sustainable use of protected wildlife and areas. A full explanation of the Act will be provided in the next issue of the Queensland Planner.

Local Government Legislation Amendment Act (assented to 13 May 1992)

The Act introduces a number of important reforms to local government in Queensland by amending:

- the City of Brisbane Act to provide for more flexible contracting arrangements for the Brisbane City Council, modernised rating provisions based on differential general rating and new financial provisions based on current accounting standards and principles; and
- the *Local Government Act 1936* to provide for the creation of the Office of Local Government Commissioner who will be responsible for ongoing review of local authority external boundaries and other reviewable local government matters and new powers which enable local authorities including the Brisbane City Council to undertake any business or enterprise activity that will benefit its area.

Queensland Home Building Code

The Code effectively replaces Appendix 4 to the Standard Building By-laws of the *Building Act 1975* as the controlling document for home building in Queensland. Homes complying with the Code comply with the *Building Act 1975*. The Code complies with all structures defined as class 1 or class 10 pursuant to the Building Code of Australia.

Water Resources Amendment Bill (introduced into Parliament on 17 June 1992)

This amendment to the *Water Resources Act 1989* addresses the effect on the riverine environment of development activities, dumping and clearing. The purpose of the Bill is to enable active management of the riverine environment in non-tidal watercourses and of works which might alter the physical integrity of those water courses or affect water quality. The Bill will require a permit to be obtained to clear vegetation, to excavate or place fill in a non-tidal watercourse. Large penalties apply where works are carried out without a permit.

Traffic Amendment Act 1992 (assented to 2 May 1992)

The amendments are intended to rectify anomalies in the 1989 Traffic Act Amendment Act which were intended to allow local authorities to use alternative parking control systems apart from meters. The amendments are expressed to be retrospective to the date of commencement of the 1989 amendments.

South Bank Corporation Regulations 1992 and South Bank Corporation (Modified Building Units and Group Titles) Regulations 1992 (commenced 5 June 1992)

The South Bank Corporation Regulations describe the requirements with regard to development approvals, survey plans, valuations and related items. The *South Bank Corporation (Modified Building Units and Group Titles) Regulations 1992* modifies the *Building Units and Group Titles Regulations 1980* to apply to the South Bank Corporation and its development.

Construction Industry (Portable Long Service Leave) Act 1991 (assented to 11 December 1991 and commenced on 1 July 1992)

The Act requires all contractors in the building and construction industry (which is defined to include many local authority functions) to pay .5% of the contract sum to the Long Service Board prior to the commencement of the work.

Professional Regulation

The *Professional Engineers Act 1988* has been amended to enable registration of companies undertaking professional engineering services in Queensland. The *Valuers Registration Act and Regulations 1965* have been repealed by the *Valuers Registration Act and Regulations 1992*. The *Surveyors Regulations 1992* have also repealed the old regulations under the *Surveyors Act 1977*.

Queensland Building Services Authority Act and Regulations 1992 (commenced 1 July 1992)

The Act provides for the settlement of disputes over home building, the tightening of licencing provisions and improved training of builders and sub-contractors. The Act establishes the Queensland Building Services Authority to administer the Act. The Authority consists of the Queensland Building Services Board which replaces the Builders Registration Board, the Home Building Advisory Service which will communicate Board policy and provide advice on authority services and a Registrar/Manager. The Act also establishes the Queensland Building Tribunal to resolve disputes, order rectification work, issue stop orders on building works and discipline licensees. The Regulations deal mainly with the issue of licences and permits and other matters relating to the activities of the Authority including insurances, progress payments, contracts for domestic building, cost escalation clauses and other related matters.

Supreme Court of Queensland Act 1991 (commenced 14 December 1991)

The Act restructures the Supreme Court into a trial division and a Court of Appeal. As a result, appeals from decisions of the Planning and Environment Court are now made on points of law and jurisdiction only to the Court of Appeal rather than to the Full Court of the Supreme Court as was previously the case.

Valuation of Land Amendment Act (assented to on 27 March 1992)

The Act allows the Department of Lands to sell valuation related information which is currently available under the existing legislation but on a more commercial basis. In particular, the new provisions set out how the Department may arrange for the way information is to be used, the fees and charges, method by which these are to be calculated and the payment details.

Primary Industries Corporation Bill (assented to on 13 May 1992 and commenced on 19 June 1992)

The Act implements the recommendations of the Public Service Management Commission to amalgamate the original departments of Primary Industries and Forestry, the Water Resources Commission and the Queensland Boating and Fisheries Patrol into one super department. The Act is administrative in nature with no policy changes.

Queensland Government (Land Holding) Amendment Act (assented to on 13 May 1992)

The Act enables Crown land used by the government to become freehold land held by the Queensland government. The transfer of operational land to freehold status may occur with the approval of the Governor-in-Council. The Act also provides for the acquisition by the Crown of privately owned freehold land with such remaining as freehold tenure in the name of the Queensland government.

Canals Regulation 1992 (commenced 8 February 1992)

The *Canals Regulation 1985* has been repealed by the *Canals Regulation 1992*.

The Integrated Resort Development Amendment Act

The Act clarifies a number of matters which have been a concern to planners, planning institutions and administrators of major resort developments. The Act enables amongst other things the staged development of resorts, the primary thoroughfare body corporate to lease Crown land external to the site for purposes related to the resort, and the primary thoroughfare body corporate and principal body corporate to own canals constructed in accordance with the Canals Act.

A-C Sheeting Code of Practice Approval 1992 (made on 27 April 1992 and gazetted on 17 July 1992)

A code of practice in respect of the treatment, removal and disposal of asbestos cement sheeting and asbestos coated metal sheeting has been made pursuant to the *Workplace Health and Safety Act 1989*. Although the Code is not mandatory, a court would be entitled to have regard to the provisions of the Code when determining whether there has been a breach of a duty by an employer under the provisions of the *Workplace Health and Safety Act 1989*.

Freedom of Information Bill 1989 (introduced into Parliament 5 December 1991)

The Bill is anticipated to apply to all State government agencies from 1 October 1992 and all councils from 1 April 1993. The Act gives a person the right of access to documents of a council subject to certain exemptions. As regard planning matters, applications can be expected in relation to submissions by developers outlining proposals, objections, reports by council officers on applications, expert advice by outside consultants and correspondence and advice received in relation to negotiations for settlement. Exemptions are available in respect of documents subject to legal professional privilege as well as other categories of documents.

Judicial Review Act 1992 (commenced on 1 June 1992)

The Act reforms the law relating to the review of questions of law of certain administrative decisions. The Act gives a person aggrieved by a decision the right to apply to the Supreme Court for a statutory order of review in relation to the decision. The Act enables review of decisions made pursuant to statute and delegated legislation as well as non-statutory schemes or programs funded by statutory charges extracted from citizens as well as those funded out of amounts appropriated by the Queensland Parliament. Thus, a scheme operated by a local authority funded by rate collections but having no statutory basis might be subject to review if a decision made pursuant to it had an adverse effect on the interests of a citizen. As regards planning matters, applications for review can be expected of decisions made by the Department of Transport in relation to transport planning issues, the Water Resources Commission in respect of catchment management issues and local authorities in respect of decisions made under by-laws.

Local Government (Planning and Environment) Amendment Act 1992 (assented 23 July 1992)

The Act makes provision for the operation of State planning policies and the consideration of those policies in the assessment of town planning and subdivisional applications. The Act also reinforces the importance of strategic plans and development control plans by requiring local authorities to refuse applications inconsistent with these documents unless there are sufficient planning grounds to justify approval of the application despite the conflict.

The Act also repeals the requirements relating to the preparation of economic impact assessments. These studies are now to be prepared in accordance with the procedures relating to environmental impact statements.

Coastal Protection Legislation

Following Cabinet approval, the proposed coastal protection legislation is in the course of being finalised and will be introduced to Parliament this year. The Act was proposed under the Coastal Protection Strategy released for public comment as a green paper in 1991. The strategy proposed a coastal protection plan and various regional plans. Work has already commenced on the preparation of plans for the Marlin Coast north of Cairns and the Whitsunday Coast near Mackay. When completed these regional plans will be incorporated in the relevant local authorities' town plans.

Environmental Protection Legislation

The preparation of the proposed legislation was approved by Cabinet in early March of this year. The legislation which is in the course of being finalised will be introduced to Parliament in the first half of 1993. The legislation is intended to provide the means to control air, water and noise pollution and allow wastes to be reduced. The legislation will replace the Clean Air Act, the Clean Waters Act and the Noise Abatement Act.

World Heritage Protection and Management Legislation

Cabinet has approved the preparation of legislation to protect Queensland's World Heritage listed wet tropical rainforests. The legislation will establish a Wet Tropics Management Authority, a Scientific Advisory Committee, a Community Consultative Committee and a detailed management scheme. The Act will be introduced to Parliament later this year.

This paper was published as a Planning Law Update in the Queensland Planner 32:3, 30-32, September 1992.

Environmental law

Ian Wright

This article discusses environmental law and the protection of the environment

October 1992

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.

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:

- **Resource Development** – this legislation provides primarily for the development of natural resources and includes "fast track" legislation, public development indenture and franchise agreements.
- **Resource 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 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 some 35 Acts. 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 6. General legislation: (a) Community – Local Government Act (b) Building – Building Act

Conservation		
Conservation of the natural environment	**Preservation of cultural and heritage development**	**Protection of environmental elements**
		(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 (b) Crown Land: (i) Land under water – Harbours Act (Tidal Waters), (Coastal Management Act), Water Resources Act (Non–tidal) (ii) Other land – Land Act

Development	
Development legislation	**Resource allocation legislation**
	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 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 legislation. 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.

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.

Future directions of environmental law

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 two emerging trends will dominate the growth and development of environmental law in the 1990s.

Trend No 1

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 of this year. 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)
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)

	Conventions, treaties and protocols
	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.

Trend No 2

Legislative power with respect to the environment will increasingly shift from the States to the Commonwealth

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 CLR 1 (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 this year, 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 Authority (**NEPA**). 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.

Trend No 3

Environmental law will move away from its anthropocentric bias as legal rights are accorded to species to exist and to the health 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 of this year, 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.

Trend No 4

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 Resource Assessment Commission was created by the Commonwealth to perform this role.

A degree of integration between resource management and environmental protection agencies has also been attempted at State level. The 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. Its *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 realm in formulating a sustainable development strategy. Finally the strategy paper is to be released in November of this year.

Trend No 5

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.

Trend No 6

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.

Trend No 7

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 (Bourque 1991:5).

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 (Court 1992:93-94).

Trend No 8

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.

Trend No 9

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.

Trend No 10

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;
- accessed 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.

Trend No 11

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 developments.

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 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 project 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.

Trend No 12

Environmental lawyers will need to development multidisciplinary skills in environmental sciences and social sciences

Environmental law needs to be product driven rather than process driven. For this to occur environmental lawyers needs to understand the merit issues and arguments involved in environmental disputes. To properly advise our clients, lawyers need to develop multidisciplinary skills in environmental and social sciences. Lawyers need to understand their clients' business and the issues which face their clients. These multidisciplinary skills need to be utilised to assist in effect the resolution of issues rather than in delay and obfuscation.

Managing environmental conflicts: The lessons of the Queensland Nickel Management case

Ian Wright

This article discusses the lessons that can be learned from the Queensland Nickel Management case by providing an analysis of the nature and management of environmental conflicts and what regulatory mechanisms that can be used to avoid environmental conflicts. It then discusses the manner in which the Queensland Nickel Management case was conducted by the parties and the Administrative Appeals Tribunal

November 1992

Introduction

To paraphrase the words of Gordon Gecko from the movie "*Wall Street*": "*Conflict is good – conflict is right, conflict made Australia what it is today!*" (Christie 1991:145).

In Australia, as elsewhere, 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 or political self-interest is threatened.

This situation however is likely to be exacerbated in the short to medium term as a consequence of the adoption of the concept of sustainable development by all levels of government in Australia.

Confusion about the meaning of sustainable development is likely to result in greater conflict. To some, the term is merely the new jargon for environmental protection whilst others see it as synonymous with economic growth. To avoid this ambiguity, phrases such as ecologically sustainable development and environmentally sustainable socio-economic development have been coined.

Despite the continuing uncertainty, a multi-faceted ethic comprising several elements appears to be evolving from the concept of sustainable development. This ethic comprises the following minimal elements (Dorcey 1992:23):

- the maintenance of ecological integrity and diversity;
- the fulfilment of basic human needs;
- the preservation of options for future generations;
- the reduction of injustice; and
- increased self-determination.

However the elaboration of these elements in more specific terms in relation to particular situations such as in the Queensland Nickel Management case reveals the different views that can underlie the evolving ethic and its present indeterminate nature.

Future conflict must also be expected as the implications of sustainable development become more evident. For instance, the application of sustainable development principles will have the following implications (Dorcey 1992:23-24):

- spatial boundaries will be increased to take account of bio-physical and socio-economic political systems;
- temporal scales will be increased to enable examination of long term consequences of proposed developments and the possibility of reversing the consequences of past commitments;
- greater demands will be placed on science to provide the knowledge needed to make informed decisions;
- uncertainty will be increased with the recognition that there are major gaps in the knowledge about natural systems that cannot be eliminated in the near future; and
- ethical concerns will increase as judgments about facts and values are made in the absence of adequate knowledge.

Taken together, these implications of sustainable development principles will be fertile ground for increased conflict. As a result there will be a greatly increased need for commitments to and arrangements by governments for avoiding and resolving environmental conflicts.

This paper focuses on the lessons that can be learned from the Queensland Nickel Management case in relation to the management of environmental conflict. The paper begins with a brief analysis of the nature of environmental conflicts and the management of such conflicts. This is followed by an analysis of the various regulatory mechanisms that can be used to avoid environmental conflicts. The paper then discusses the manner in which the Queensland Nickel Management case was conducted by the parties and the Administrative Appeals Tribunal. Finally a series of observations are made about the lessons that can be learned from the Queensland Nickel Management case.

Nature of environmental conflicts

Environmental conflicts are those site specific and public policy disputes which arise over the human use of physical and non-tangible resources (Sandford 1990:19).

The Queensland Nickel Management case was a classic environmental conflict. As with other environmental conflicts it comprised a complex changing interplay of technical and scientific facts, laws, values, perceptions, attitudes and emotions.

Environmental conflicts reflect ideological rather than factual disputes. Thus the rhetoric of environmental conflicts may be couched in terms of facts and technical detail but underlying this is a more fundamental dispute over beliefs and values.

The Queensland Nickel Management case was no exception. It represented a conflict between competing ideologies. On the one hand was the technocratic view held by the applicant and on the other was the humanistic ecocentric ideology of the Great Barrier Reef Marine Park Authority. The characteristics of these two viewpoints are summarised in Figure 1.

Figure 1 Environmental Ideologies

Characteristics	Technocratic	Humanistic
Core Values	• Material (economic growth) • Natural environment valued as a resource • Homocentric-domination over nature	• Non-material (self-actualisation) • Natural environment intrinsically valued • Harmony with nature
Economy	• Risk and reward • Rewards for achievement • Short term gains outweigh long term environmental impacts	• Risk avoidance • Income related to need • Long term environmental impacts outweigh short-term gains
Policy	• Authoritative structures (experts influential) • Hierarchical • Law and order	• Participative structures (citizen/worker involvement) • Non-hierarchical • Liberation
Society	• Centralised • Large-scale • Associational	• Decentralised • Small-scale • Communal
Nature	• Ample reserves • Nature hostile/neutral • Environment controllable	• Earth's resources limited • Nature benign • Nature delicately balances
Knowledge	• Confidence in science and technology • Separation of fact / value, thought / feeling • Reductionist – break problems into separate parts	• Limits to science • Integration of fact / value, thought / feeling • Holistic – focus on interconnection between parts

As a result of its ecocentric ideology, the Great Barrier Reef Marine Park Authority argued in favour of the preservation of the relevant part of the marine park firstly on the basis of the intrinsic value of the marine environment (ie. deep ecology viewpoint) and secondly from the standpoint that the area was beneficial to mankind for recreation, scientific research and as a storehouse of essential genetic material (ie. shallow ecology viewpoint). The Great Barrier Reef Marine Park Authority's ecocentric perspective also resulted in it taking a very cautious or risk adverse attitude to development that emphasised the limits of science and the need to take a holistic approach to the assessment of environmental impacts.

In contrast, the technocratic ideology of the applicant resulted in it arguing that the relevant part of the marine park should be developed for an off-loading facility that would generate much needed wealth and jobs provided all environmental impacts were carefully monitored and controlled. The applicant's technocratic perspective resulted in it taking a less risk adverse attitude to development that emphasized the capacity of science and technology to overcome any potential environmental problems.

Apart from opposing ideologies, environmental conflicts also possess unique qualities which make them difficult to manage. For instance:

- Ecological systems are different from other natural systems in that they have limited resources and a limited capacity to receive and recycle wastes. Furthermore ecological changes are unpredictable and irreversible. As a result, remedial action taken to reverse some adverse environmental impacts may create new ecological difficulties.
- It is difficult to make precise even general determinations about costs, parties and issues. Problems arise with setting the geographic boundaries of a dispute, setting an appropriate time horizon, valuing environmental costs and benefits, determining compensation for affected parties and summing the cost/benefit calculations of different individuals and groups.
- 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.
- The implementation of private agreements is difficult as environmental conflicts are not repeated in regular cycles. In addition the parties are not always readily identifiable and as a result an agreement may be challenged by a party not included in the negotiation process.

Management of environmental conflicts

Environmental conflicts, like other types of disputes can be managed through the application of particular mechanisms. The choice of the most appropriate mechanism depends firstly on whether the conflict is potential or actual and secondly the outcome to be achieved.

There are six possible reactions to a perceived conflict situation each with its own set of mechanisms or procedures:

- Ignoring conflict is the process by which the parties fail to take action to transform potential conflict into actual conflict. This may occur by an aware party choosing to focus its attention elsewhere or an unaware party failing to clarify the existence of a suspected conflict.
- Conflict avoidance is the process by which parties remove themselves from the actual conflict and the conflict ceases from lack of contact. An actual conflict can be avoided by both parties removing themselves from the conflict (withdrawal), by either party removing itself from the conflict (either because of persuasion or coercion) or by one party forcibly removing the other against the other's wishes from the conflict (conquest).
- Conflict suppression is the process of preventing potential conflict from being transformed into actual conflict. This occurs by one or more third parties suppressing overt behaviour.
- Conflict regulation is a process of directing and controlling actual conflict so that it is kept within acceptable qualitative and quantitative bounds. This can occur through the introduction of rules and laws as well as by agreement between the disputing parties who may see benefit in continuing the conflict rather than trying to resolve it.
- Conflict resolution is a process of terminating actual conflict. A wide variety of mechanisms have been developed to terminate conflict and these include informal discussion and problem solving, negotiation, facilitation, mediation, mutual fact finding, mini trial, summary jury trial, conciliation, administrative decision making, med-arb, rent-a-judge, private judging, arbitration, judicial decision making and legislative decision making.
- Conflict exacerbation is the process by which actual conflict is created or deepened.

Since the Queensland Nickel Management case was concerned primarily with the processes of conflict avoidance and conflict resolution I shall limit my comments to these conflict management techniques.

Avoidance of environmental conflicts

The Queensland Nickel Management case was similar to the environmental conflicts arising in respect of the Gordon-below-Franklin dam, Coronation Hill mine, the logging of the Lemonthyme and southern forests and the Wesley Vale pulp mill.

Whilst each of these conflicts revolved around the environmental consequences of a specific project, the underlying conflict was one of resource management. The resolution of the Gordon-below-Franklin dam involved a decision on the management of wilderness in South West Tasmania; the resolution of the Coronation Hill dispute involved a decision on the management of Kakadu National Park as well as the economic contribution of the mine resource compared to the value of the region to Aboriginal people; while the Lemonthyme logging conflict was related to the broader issue of the management of forest resources (Jenkins 1992:201).

The Queensland Nickel Management case was no different. It involved a decision on the management of the Great Barrier Reef Marine Park as well as the broader issue of the management of the coastal zone.

What is apparent from each of these environmental disputes is the absence of any institutional mechanism to resolve resource management issues other than in the context of a specific project.

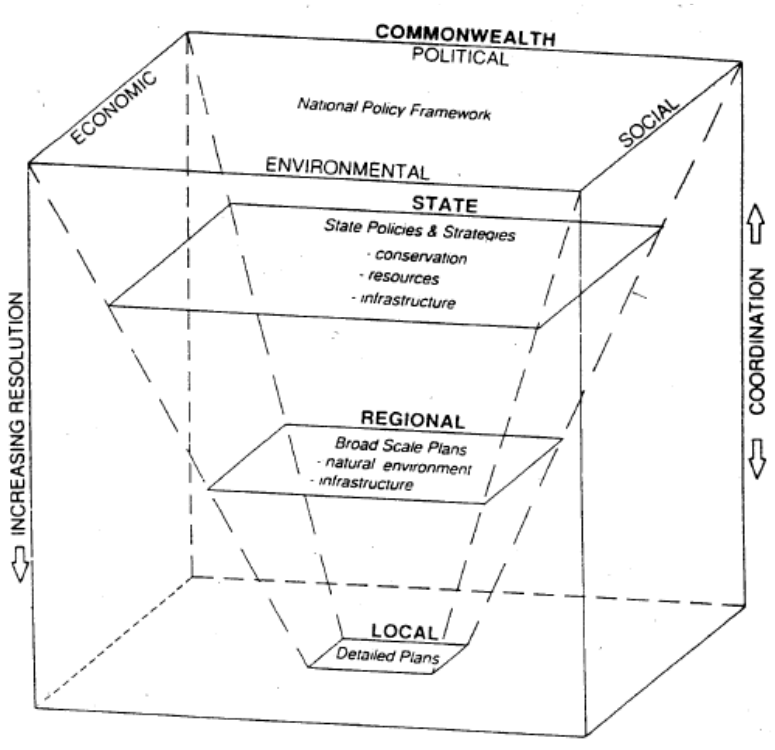
As a result, each of the projects was assessed in accordance with traditional zoning, environmental assessment and emission control requirements. For instance, zoning controls were used to separate incompatible uses and to impose conditions on development approvals whilst environmental assessment was used to require proponents to consider environmental effects and to avoid, or mitigate adverse environmental effects. Emission requirements were also used to set standards for pollution discharges.

Unfortunately, each of these regulatory mechanisms focus upon the planning stages of project development. In the case of the Queensland Nickel Management project, the needless waste of investors' funds and government resources could have been avoided if the broader issues of the management of the Great Barrier Reef Marine Park, the coastal zone and environmental discharge standards had been addressed before the applicant had become heavily committed to the project.

Accordingly there is a need for zoning and environmental assessment requirements to be complemented by the development of regional plans and resource management plans prior to the initiation of specific projects. A recent example is provided by the Cape York Planning and Land Use Study. This is a regional planning study of Cape York jointly sponsored by the Commonwealth and Queensland governments. Another example of a regional planning study is the SEQ 2001 Project.

A model land use planning structure which coordinates planning between all levels of government has been proposed by McDonald (1992:126). This is illustrated in Figure 2.

Figure 2 Model Land Use Planning Structure



Source: McDonald (1992:126)

There is also a need for traditional emission controls at the point of discharge to be complemented by ambient contaminant standards developed as part of an integrated catchment management process. Recent examples of this process include the Brisbane and Gladstone airsheds where ambient contaminant levels have on occasions exceeded air quality goals as well as the management of the Murray-Darling water basin.

One of the most important lessons to be learned from the Queensland Nickel Management case and other similar environmental disputes is that environmental conflict can be minimised, if not avoided, by the development of regional plans, resource management plans and ambient contaminant standards prior to the initiation of specific projects.

However the development of these resource management mechanisms will tax the financial resources of governments as well as the very limits of science. For instance the concept of sustainable development dictates that regional plans should be based on the notion of carrying capacity that is the maximum rate of resource consumption and waste discharge that can be sustained indefinitely without progressively impairing ecological integrity and diversity. Further, sustainable development requires that resource assessment should determine the level of resource use that maintains ecological integrity and diversity. In addition the waste management approach mandated by sustainable development means that wastes should be recycled, reused and reborn and that ambient contaminant levels should be within the waste absorbing capacity of the environment and below the thresholds of damage to human and environmental health.

One can only imagine the cost of the scientific research that is required to address each of these matters. Further, it is even questionable whether science can in fact deliver the goods. Science cannot provide politicians, bureaucrats and judges with the conclusive quantitative measures or the generally accepted conclusions which they require in order to make decisions. There is a common misperception on the part of politicians, bureaucrats and judges that science can provide such results.

It should be recognised however that "*truth*" in scientific terms is only a theory or fact which has not yet been proven to be false. The mere fact that senior and respected scientists have made conclusions at an earlier time does not mean that those conclusions ought to be accepted and applied without question in future cases. Hence the comments of Richard Kenchington, a witness for the Great Barrier Reef Marine Park Authority in the Queensland Nickel Management case warning of the dangers of placing too much faith in the so-called "*scientific commissars*".

The relationship between traditional environmental regulation mechanisms, emerging resource management mechanisms and the concepts of sustainable development is shown in Figure 3. It can be seen that the concept of carrying capacity will change the approach to land use and regional planning, that the principle of maintaining ecological integrity and diversity will change the nature of environmental and resource assessments and that the waste management approach will result in lower ambient contaminant levels as well as a commitment to the recycling, re-use and rebirth of wastes.

If the financial and scientific limitations to the implementation of these mechanisms can be overcome, then it is likely that environmental conflicts such as the Queensland Nickel Management case will be minimised if not avoided.

Figure 3 Existing and Future Environmental Regulation mechanisms

Development Control	Resource Management	Sustainable Development
Zoning	Regional Planning	Carrying Capacity
Environmental Assessment	Resource Assessment	Ecological Integrity and Diversity
Emission Controls	Ambient Contaminant Levels	Waste Management

Source: Jenkins (1992: 205)

Resolution of environmental conflicts

Unfortunately not all environmental conflicts can be avoided. Accordingly, it is necessary to develop mechanisms to resolve these conflicts.

Categories of conflict resolution mechanisms

Dorcey (1992:21) has identified four categories of conflict resolution mechanisms:

- *Political mechanisms* – these include all the legislative bodies and their executives, national to local, that are set up to resolve conflicts through the decisions of elected representatives or citizen's referendums.

- *Bureaucratic – administrative mechanisms* – these include all the ways in which government administrators resolve conflicts such as referral processes, guidelines, taskforces, impact assessment processes, planning procedures, interagency committees and special purpose organisations.
- *Legal – judicial mechanisms* – these include the entire hierarchy of the courts from the High Court to local Magistrate Courts as well as quasi-judicial bodies such as royal commissions, public inquiries and regulatory tribunals.
- *Market mechanisms* – which provide for the resolution of conflicts by allowing prices to balance demand and supply. They can involve the creation of both markets and transferable rights as well as interventions in the market.

Since the Queensland Nickel Management case involved the use of a legal-judicial mechanism to resolve an environmental conflict, I will limit my comments to this category of conflict resolution mechanism.

Legal – judicial mechanisms

The traditional legal-judicial method of resolving environmental conflicts is public adjudication. This is a process where the parties present their case in an adversarial manner and a decision is imposed by a third party, usually a judge. The process is characteristic of courts, tribunals and public inquiries and has generally been used to resolve environmental planning conflicts over the past 20 years.

However, in recent years there has been increasing dissatisfaction with the traditional adversarial approach to resolving environmental conflict. Various problems have been identified with traditional litigation based approaches and a number of these became apparent in the course of the Queensland Nickel Management case. For instance:

- The adversarial ("*win/loose*", "*winner takes all*") approach means that parties are concerned with persuading an 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.
- The majority of judges, lawyers and jurors do not have the interdisciplinary training which is necessary to enable them to understand the technical and scientific issues involved in environmental conflicts.
- There are also problems with proving factual errors and causal relationships. The law requires proof on the balance of probabilities in civil matters and beyond reasonable doubt in criminal matters. Science however ascribes a different meaning to the concept of proof. It relies on the notion of statistical significance. As a result what are considered to be scientific truths are simply those statements which scientists consider to have a low probability of being proven incorrect in the future.
- The rules of procedure also segment complex and related environmental problems into discreet legal actions and restrict the range of concerns to legally enforceable causes of action. The rules of evidence also restrict the information available for consideration to the narrowed set of issues. For example, the results of a sociological survey as to societal and community values in relation to a particular environmental dispute may be inadmissible because of the rule against hearsay. In Australia, the law of evidence requires a party wishing to provide a public opinion poll to call the persons who make up the public. Since societal and community values are an essential complement to scientific and technical evidence in environmental disputes this is a significant limitation of the adversarial process.
- The process of giving and testing evidence in adversarial proceedings also exacerbates the problems of obtaining accurate and full scientific expert testimony. Expert witnesses must rely on the ability of the lawyer who called them to ask the correct questions during examination in chief. If the correct questions are not asked the expert may be derived of the opportunity to present relevant information to the court.
- 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.
- 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 adversarial based approaches and lead to calls for the development of environmental conflict resolution techniques to complement the adversarial process.

Christie (1991:158) has argued that environmental conflicts should be resolved by an environmental tribunal which would have sufficient flexibility to adopt mediation procedures or a combined adversarial/inquisitorial approach or both depending on the nature of the conflict.

Since the Administrative Appeals Tribunal model used in the Queensland Nickel Management case represents the closest model we have to that suggested by Christie, it is appropriate that the performance of the tribunal model in the Queensland Nickel Management case be reviewed.

Adversarial / inquisitorial approach

In the Queensland Nickel Management case the Administrative Appeals Tribunal (**AAT**) functioned using both the adversarial and inquisitorial models. Whilst the case was conducted in a fundamentally adversarial manner the Tribunal on occasions adopted an inquisitorial approach. As a result the Tribunal, which was comprised of three lawyers, one of whom was an ecologist, asked questions and more importantly informed themselves by using sources outside of those presented by the parties appearing in the case.

Undoubtedly the aim of the Tribunal in adopting this inquisitorial approach was to ascertain the truth by whatever means available and thereby remove some of the inherent weaknesses of the adversarial system in evaluating conflicting scientific evidence.

However it is arguable that the Tribunal failed to achieve this basic objective for at least four reasons:

- Firstly, the Tribunal did not clearly articulate rules as to the types of matters susceptible of proof and what standards were to be applied. The Tribunal failed to set out these ground rules at the outset of the hearing and accordingly a large amount of time and body of evidence was allocated to establishing these matters.
- Secondly, the presence of a scientific member as part of the Tribunal did not ensure that the cross-examination of expert witnesses by lawyers did not become immersed in scientific minutiae. As a result much of the cross-examination failed to focus on the principal scientific issues in dispute.
- Thirdly, the inquisitorial approach of the Tribunal meant that expert witnesses were on occasions cross-examined by the Tribunal in relation to material derived from sources outside of that presented by the parties. Expert witnesses were often required to comment upon this material without having had the opportunity to fully analyse the context in which the material was produced. This was not only unfair to the witnesses involved but was not conducive to an informed response.
- Finally, the presence of a scientific member on the Tribunal did not prevent lawyers from impugning the evidence of expert witnesses by challenging the extent to which their evidence was value free. Lawyers in the case frequently argued that any methodologies or conclusions based on values was illegitimate and as such should be rejected. This deliberate misunderstanding or ignorance of the nature of science was never corrected by tribunal members.

Despite the problems associated with the operation of the model in the Queensland Nickel Management case, the model does offer substantial benefits over existing public inquiry and adversarial processes. Furthermore, these benefits will be maximised if tribunal procedures can be modified to address the problems that arose in the Queensland Nickel Management case.

Mediation

The environmental tribunal model suggested by Christie also recognises that adversarial/inquisitorial processes should be complemented by non-confrontational dispute resolution procedures such as environmental mediation.

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 (Moore: 1989:6).

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.

At the date of the Queensland Nickel Management case, mediation procedures were not institutionalised within the AAT. Accordingly it was left to the parties to the dispute to agree to a mediation process. As history indicates, no agreement could be reached and the matter proceeded to a hearing.

The failure of the parties to agree to a process of mediation was hampered by the fact that mediation was not institutionalised within the AAT or any other relevant decision making body.

It is suggested that a formal mediation system would have established the ground rules for the conduct of the negotiation process, in particular the identification of the agenda, the issues, the parties and an acceptable range of settlement outcomes. In the Queensland Nickel Management case, this may very well have facilitated the resolution of the conflict.

Accordingly, one of the lessons to be learned from the Queensland Nickel Management case is that mediation and other types of alternative dispute resolution procedures must be institutionalised within bodies invested with power to resolve environmental conflicts.

Conclusions

Whilst the Queensland Nickel Management case was terminated prior to any decision being delivered by the Administrative Appeals Tribunal, a number of valuable lessons can be learned from the case.

- Firstly, the case illustrates that environmental conflicts reflect ideological rather than factual disputes. The case was in reality a conflict between the technocratic perspective of the applicant and the ecocentric ideology of the Great Bather Reef Marine Park Authority.
- Secondly, the case illustrates that environmental conflicts have unique qualities which not only distinguish them from other types of conflicts but also make their resolution extremely difficult.
- Thirdly, environmental conflicts such as that in the Queensland Nickel Management case can be minimised if not avoided by the development of regional plans, resource management plans and ambient contaminant standards prior to the initiation of specific projects.
- Fourthly, the implementation of these resource management mechanisms in the light of the concept of sustainable development will tax the financial resources of government as well as the limits of science.
- Fifthly, the case illustrates some of the inherent weaknesses of the adversarial process in evaluating conflicting scientific evidence. Of particular concern was the lack of inter-disciplinary training of the lawyers involved in the dispute and the problems associated with proving factual errors and causal relationships.
- Sixthly, the case illustrated some of the inherent weaknesses of the inquisitorial approach when strict rules of procedure are not adopted by decision makers. Of particular concern was the failure to set ground rules as to the matters susceptible of proof and the standards that were to be applied.
- Seventhly, environmental mediation and other alternative dispute resolution procedures must be institutionalised within bodies invested with power to resolve environmental conflicts.
- Finally, the environmental tribunal model suggested by Christie offers substantial benefits over existing public inquiry and adversarial processes provided tribunal procedures are developed to address the types of problems that arose in the Queensland Nickel Management case.

Therefore whilst the Queensland Nickel Management case raised more questions than it resolved, there is much to be learned from the way in which the case was conducted by the parties and the Administrative Appeals Tribunal.

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Planning law developments: Development legislation initiatives in Queensland, landmark precedent set in the High Court concerning Native Title, amendments to the Brisbane Town Plan and the protection of native flora and fauna – from an international to a local level

Ian Wright

This article discusses the recent State and local initiatives in development legislation specifically focussing on the Southbank Development Legislation; the Townsville City Council Development legislation; and the Brisbane Town Plan amendments. It also discusses the recent decision in the High Court case of *Eddie Mabo & Ors v The State of Queensland* and also legislation surrounding native fauna and flora

December 1992

Introduction

The speed of legislative and judicial reform at local, State and Commonwealth levels continues to increase unabated. This issue examines recent State and local initiatives in development legislation as well as an important judicial decision in the area of Aboriginal land rights. Recent legislation relating to the protection of native flora and fauna is also discussed in a separate article.

Southbank Development Legislation

The redevelopment of the former World Expo 88 site has been facilitated by the introduction of recent amendments to the Southbank Corporation Act which was proclaimed into force on 4 June 1992. The amended Act establishes a special subdivision code for land within the corporation area (**Southbank site**). The subdivisional code enables the Southbank site to be subdivided by a conventional plan of subdivision, stratum plans which creates airspace lots and leasehold building unit plans which create individual building unit lots and common property.

The innovative code was designed to accommodate the government's policy of restricting ownership to leasehold interests as well as the development plan for the site which encourages the erection of mixed use buildings on elevated podiums above service and transport corridors.

Conventional subdivision plans will be used to amalgamate titles into parcels based on uses such as public parkland, private development areas, railway land, privately owned land and Crown land. Stratum plans are intended to permit the subdivision of buildings into airspace lots which can be limited in height and depth. A management statement which sets out the management and maintenance arrangements for the building must be filed with the stratum plan. Provision is also made for the valuation of lots by the Valuer-General and the adjustment of lot boundaries by the registration of boundary adjustment plans. A system of statutory easements created by plan registration rather than by grant (as is the case with conventional easements) is created. Provision is also made for the subdivision and amalgamation of stratum lots.

Leasehold Building Units Plans (**LBUP**) will be used to subdivide conventional and stratum lots. Unlike a traditional building units plan, a LBUP can be used to subdivide the whole or part of a building and land which is not contiguous can be acquired to create additional common property. The process of registration is similar to the *Building Units and Group Titles Act 1980* in that various plan and certificates must be registered but, in addition, leases of all lots and common property must be registered. On registration of the LBUP, the Titles Office will issue a certificate of title for each lot recording the leasehold interest of the lot lessee. Management disputes are to be handled in the same way as under the *Building Units and Group Titles Act 1980*.

Townsville City Council Development Legislation

The Townsville City Council has successfully lobbied the State government to enact legislation to facilitate the development of some 245 hectares of land located in the suburb of Douglas. Known as the *Townsville City Council (Douglas Land Development) Act 1992*, the Act repeals the *Townsville City Council (Sale of Land) Act 1973* which had previously provided for the development of the land.

Pursuant to the repealed Act, the land was included in the Residential A zone under the council's planning scheme. This zoning unduly restricted the manner in which the land could be developed. Accordingly, the new Act enables the council to prepare a concept plan for the land and to invite expressions of interest from prospective developers which are consistent with the concept. The council is empowered to negotiate a final plan of development with the chosen developer then to submit the finalised master plan to the Minister for Local Government, Housing and Planning for approval. When that approval is obtained, the master plan will become the planning control for the area until the last lot in the development is sold.

Brisbane town plan amendments

The Brisbane City Council has recently amended its town plan so as to provide for efficient and environmentally sensitive development of land in new areas and for additional housing in established residential areas. The amendments can be summarised as follows:

- Land within the Future Urban zone which is of no particular environmental value can be subdivided as if it were in the Residential A zone without requiring a prior rezoning. However, Future Urban zoned land that is required for native bushland, fauna habitat and wildlife corridors will be protected.
- Land within the Residential A and Inner Residential zones can be subdivided into 300 square metre lots with 10 metre frontages. Subdivisional applications for lots with areas between 300 square metres and 450 square metres must be accompanied by a house design that complies with the amenity and privacy controls set out in planning policy 7.29. Whilst building approval will be issued in respect of buildings complying with the house design, a town planning consent application will be required where the building fails to comply with the design.
- The minimum site area for the development of duplex houses in the Residential B and Inner Residential zones has been reduced so as to enable duplexes to be erected either side by side or one above the other. This will enable traditional high set Brisbane houses to be converted into two dwellings.
- The minimum site area for the development of attached houses in the Residential A zone has been reduced to enable construction of small groups of attached houses integrated with the overall residential development of the area. An application for town planning consent will be required in respect of the development of attached houses in the Residential A zone.

The council has also introduced planning policies 7.27 Design of Attached House Development, 7.28R1 Minimum Site Area Relaxation and 7.29 Small Allotment Detached Houses as well as a number of practice notes to support the implementation of the amendments.

Native title recognised by High Court

On 3 June 1992 the Full Court of the High Court of Australia delivered its judgment in the case of *Eddie Mabo & Ors v The State of Queensland*. In this case, the plaintiffs sought a declaration that the Meriam people were entitled to the lands of the Murray Islands located in Torres Strait. They argued that the Meriam people had possession of the land since time immemorial and that upon the annexation by the Crown of this islands on 1 August 1879, the land became part of the colony of Queensland but that the Crown's sovereignty was subject to the land rights of the Meriam people based on local custom and traditional Native Title.

Six of the seven members of the High Court agreed that the common law of Australia (decisions of courts) recognised a form of Native Title which, where it has not been extinguished, reflects the entitlement of the indigenous inhabitants to their traditional lands in accordance with their laws and customs. The majority accepted that Native Title can be extinguished by legislation or by an appropriation by the Crown which is inconsistent with the continuing right to enjoy Native Title such as appropriation for uses such as roads, railways and other permanent public works.

In terms of the plaintiff's claim, the majority held that when the Murray Islands were annexed, the ultimate title vested in the Crown subject to the communal Native Title of the Murray Islanders and that their Native Title had not been extinguished. Accordingly, the Meriam people were entitled, as against the whole world, to possession, occupation, use and enjoyment of the lands of the Murray Islands, excluding some land subject to particular Crown leases against which communal Native Title had been extinguished.

Protection of native fauna and flora

Introduction

In recent years, there has been increasing debate about the protection of native flora and fauna. This debate can be traced to increasing public concern about the loss of native species and the emergence of concepts such as biological diversity. Before examining recent legislative developments at local, State and Federal levels, it is important to set the international context in which these issues are emerging.

International Developments

The United Nations Environment Programme (**UNEP**) has been developing a convention on Biological Diversity since 1988. This convention was concluded prior to the meeting of the United Nations Commission on Environment and Development (**UNCED**) at Rio De Janeiro in June 1992. The convention was opened for

signature in Rio and over 150 countries including Australia, EEC, Japan, Indonesia, Thailand, United Kingdom, Canada and China signed. The only major exception was the United States.

The convention will come into force 90 days after 30 countries have ratified or acceded to it. This convention attempts to protect species situated within the national jurisdiction of particular states by imposing obligations on parties to:

- develop national action plans to conserve their biological diversity and to implement other obligations in the convention;
- develop programmes for the in situ conservation of species by, amongst other things, designating geographical areas of particular importance to biological diversity, regulating the use of biological resources, adopting plans for the rehabilitation of ecosystems where necessary, controlling the release of genetically modified organisms, eradicating or controlling alien species which threaten ecosystems, habitats or species and establishing systems for the recording and use of knowledge of indigenous peoples relevant to the conservation of biological diversity and the sustainable use of its components;
- adopt strategies for the ex situ conservation of species, for example, through zoos, botanic gardens and seed and gene banks;
- make arrangements for the identification and monitoring of threatened species in ecosystems;
- establish training and education programmes for experts and to increase public awareness for the need to conserve biodiversity;
- introduce procedures requiring projects, programmes and policies to be subject to environmental impact assessments;
- carry out surveys and inventories of biological diversity within their jurisdiction; and
- establish a global list of areas of particular importance for the conservation of biological diversity and of species threatened with extinction on the global level.

In addition to the Convention on Biological Diversity, it should also be noted that the United Nations Commission on Environmental Law has published a draft Covenant on Environmental Conservation and Sustainable Use of Natural Resources. Article 20 of the draft Covenant deals with conservation of biological diversity and provides that "*states shall ensure the protection, preservation and conservation of biological diversity, at the genetic, species and ecosystem levels and shall take all necessary measures to that end both in situ and, where appropriate ex situ*".

The implementation of the convention will be facilitated by an action plan known as Agenda 21. This document sets out an action plan for promoting sustainable development at the national and international level into the 21st century and deals specifically with biological diversity. Implementation will also be facilitated by the establishment of a Sustainable Development Commission by the United Nations. The task of the Commission will, amongst other things, be to review the national reports to the United Nations of national governments on the progress they are making towards ecologically sustainable development.

Another document signed at the "*Earth Summit*" relevant to the issue of biological diversity was a statement of principles on forests. This was a non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests.

Commonwealth government

In 1988, the Commonwealth government established the Endangered Species Advisory Committee (**ESAC**) to provide advice to the Federal Environment Minister. In October 1989 ESAC released a draft Australian National Strategy for the Conservation of Species and Habitats Threatened with Extinction.

In 1988, the Commonwealth government established nine working groups inviting a wide cross-section of public and private sector membership to prepare reports in the areas of agriculture, fisheries, manufacturing, mining, energy production, transport, tourism, energy use and forestry. These working groups were coordinated by an Ecologically Sustainable Development Steering Committee (**ESDSC**) established within the Department of the Prime Minister and Cabinet. The reports of the working groups were submitted to the Prime Minister in December 1991 and were publicly released.

On 26 February 1992, the Prime Minister announced, as part of the One Nation Statement, that agreement had been reached on an Inter-governmental Agreement on the Environment (**IGAE**). Under the Agreement, the Australian and New Zealand Environment and Conservation Council (**ANZECC**) was required to develop and report on a strategy for a national approach to the protection of rare, vulnerable and endangered species.

At a Heads of Government meeting in May 1992, it was agreed to release a draft strategy prepared by the ESDSC as a discussion paper to promote discussion and obtain community views on possible future policy directions. Section B of the discussion paper dealt with the protection of ecological systems and biological diversity and recommended that a comprehensive framework for a national strategy be prepared by a Biological Diversity Advisory Committee (**BDAC**). A draft national strategy for the conservation of Australia's biological diversity was published by the BDAC and released for public comment in March 1992.

More recently, the Commonwealth government has drafted legislation dealing with threatened, extinct and endangered species or habitats supporting an endangered species. The Endangered Species Bill contains the following elements:

- the creation of three categories of endangered, vulnerable and presumed extinct species;
- the establishment of a list of endangered species and their habitats as well as ecological communities which are defined as integrated sets of various native species that inhabit particular areas;
- the decision to add or delete an item from the list must be made by the Environment Minister without considering any matters that do not relate to nature conservation;
- the Environment Minister is given power to veto development decisions that might threaten the extinction of a species or a habitat supporting an endangered species;
- in making an order to veto development, the Environment Minister must ensure that the prohibitions, restrictions and requirements contained in the order have the minimum practicable, social and economic impact while ensuring that they adequately address the grounds on which the order is made;
- the veto applies to all planning approvals and export permits issued by Commonwealth departments and agencies and through provisions giving effect to international agreements, the proposed legislation will also have the potential to apply to the development of decisions of State and local governments; and
- the Federal Court is given power to grant injunctions to stop developments that might threaten an endangered species or its habitat.

The Bill is expected to be introduced into parliament before the end of this year. This Bill will be supported by the Democrats and therefore is expected to be passed.

Queensland government

Whilst the proposed Commonwealth Endangered Species Bill would give the Commonwealth government overriding powers to protect species if State and local governments fail to take appropriate action, the Queensland government has recently taken steps to enact its own flora and fauna protection legislation. Known as the *Nature Conservation Act 1992* (**Act**), the Act was assented to on 22 May 1992, although only certain sections have yet been proclaimed into force.

The Act is administered by the Minister for Environment and Heritage through the Chief Executive of the Department of Environment and Heritage. The Act repeals the Fauna Conservation Act, the National Parks and Wildlife Act, the Native Plants Protection Act and the environmental park provisions of the Land Act.

The object of the Act is the conservation of nature. This is to be achieved by an integrated and comprehensive conservation strategy that involves, amongst other things, the gathering of information, community education, dedication, declaration and management of protected areas, the protection of native wildlife and its habitat and the ecologically sustainable use of protected areas and wildlife.

The Act authorises the declaration of Crown and private land as one of 11 types of protected areas: national parks (scientific), national parks, national parks (Aboriginal land), national parks (Torres Strait Islander land), conservation parks, resources reserves, nature refuges, coordinated conservation areas, wilderness areas, world heritage management areas and international agreement areas.

Private land cannot be declared as a protected area unless the Minister has notified all landholders of the proposed declaration and their right to make submissions. Landholders include all persons having an interest in the land such as the registered proprietor, lessee and mortgagee.

Where the proposed declaration relates to a nature refuge, coordinated conservation area or wilderness area, the Minister and the landholder may enter into a conservation agreement. Where no agreement is reached and the area is a critical habitat or of major interest, the Governor-in-Council can compulsorily declare the area as a nature refuge. The compulsory declaration may contain covenants relating to the conservation of the area.

Where the proposal relates to a World Heritage Management Area or an International Agreement Area, the Minister must prepare a conservation plan prior to the declaration by the Governor-in-Council.

In addition to protected areas, the Act also makes provision for the protection of wildlife. The Act empowers the Governor-in-Council to prescribe animals and plants as protected, international or prohibited wildlife. All protected wildlife (other than protected plants on freehold land or Crown land that is subject to a lease containing a freeholding provision) is the property of the State. Restrictions are also imposed in respect of the interference with protected wildlife and native wildlife, the breeding of hybrids or mutations of protected animals and the introduction of international or prohibited wildlife into Queensland.

The following important practice points should be noted in relation to the Act:

- there is no general entitlement to compensation in respect of the declaration of protected areas. However, landholders may claim compensation in respect of adverse affection caused by the compulsory declaration of a nature refuge, the declaration of a World Heritage Management Area or an International Agreement Area or the preparation of a conservation plan in respect of an area of critical habitat or of major interest;
- landholders and their successors in title are bound by the terms of all conservation agreements, conservation covenants and conservation plans;
- conservation plans prevail over inconsistent local authority planning schemes thereby removing any existing use rights attaching to protected areas;
- all cultural and natural resources of a national park (scientific), national park, conservation park or resources reserve are declared to be the property of the State and no interest in land can be created in respect of such areas unless it is granted by the Minister under the Act or by the Governor-in-Council or another person with the consent of the Minister under another statute;
- it is an offence to take, use or interfere with a cultural or natural resource of a protected area other than in accordance with a conservation agreement, covenant and plan or an authority under the Act;
- mining tenements are prohibited in national parks and conservation parks;
- the Minister is empowered to make an interim conservation order where rare or threatened wildlife, a protected wildlife habitat, an area of major interest or a protected area is under immediate threat. The Minister may suspend any operation being conducted pursuant to an authority under another Act such as the Forestry Act, the Mineral Resources Act or the Local Government (Planning and Environment) Act. An interim conservation order prevails over any inconsistent planning scheme and any land owner adversely affected by the making of an order may claim compensation;
- a register of all protected areas and wildlife, conservation agreements and plans, critical habitats and other areas of major interest and interim conservation orders is maintained by the Chief Executive and is open for inspection by members of the public.

Local government

In addition to the Nature Conservation Act, it should be recognised that an increasing number of local authorities have taken steps to protect flora and fauna. A variety of instruments are being used to achieve this objective including by-laws, land swaps, conservation zones, environmental easements, planning policies and environmental impact statements. Whilst local authorities are becoming increasingly innovative in their approach to flora and fauna protection, the traditional instrument used by local authorities is the Tree Preservation By-law. One of the most recent and innovative applications of this technique is the Brisbane City Council's Vegetation Protection Ordinance which was introduced on 22 November 1992.

The Ordinance empowers the council to protect trees and vegetation through the making of vegetation protection orders or VPOs. This is a four stage process. First, the council makes a proposal for a VPO, either at its own initiative or at the request of individuals or community groups. The proposed VPO is supported by an interim protection order to prevent destruction or interference with vegetation in the period before the making of a final decision. The proposed VPO can relate to trees or vegetation but cannot encompass solely geological or physiographical features. Trees can be listed individually or as a group. Vegetation can be listed according to class, species or area. Trees are defined to mean a tree or shrub which is more than 3 metres in height or more than 12 centimetres in diameter at the trunk or has a foliage cover of more than 3 metres. Trees or shrubs not falling within this definition are caught by the definition of vegetation which is defined to mean all vegetable growth and material or vegetable origin whether living or dead and whether standing or fallen. This definition covers dying as well as dead trees and vegetation.

Second, notice of the proposed VPO is given to land owners affected by the VPO as well as the general public through newspaper advertisements. It is important to note that the council is not required to notify other persons who may be adversely affected by the VPO. These may include occupiers, lessees and tenants, persons entitled to fell trees on the land, persons entitled to work the surface of the land for minerals or quarry materials, persons whose amenity may be affected by the VPO such as persons who allege that a tree excludes light from their building and persons who might allege a loss of amenity by virtue of an unprotected tree being felled. Although it is desirable that these persons are notified, the council has taken the view that this cannot be justified financially. Landowners and interested parties have 2 months to lodge a submission of support or objection with the council. It would seem that the objection is not properly constituted unless it states the grounds of the objection and relates to the objects of the ordinance. These would appear to be mandatory rather than directory provisions. Objections which do not comply with these requirements can be disregarded by the council.

Third, the objections and submissions are assessed by an independent Vegetation Protection Advisory Committee which makes a recommendation to the council. After consideration of the committee's recommendation, the council may decide to make the VPO, refuse the VPO or modify it. Notice of council's decision is then given to land owners and the general public. Defects in the notice process are specifically declared not to invalidate the VPO. The legal consequence of other defects in procedure are not stated in the ordinance and accordingly will have to be assessed on a case by case basis. For example, it is likely that a wrong identification of a species will not invalidate a VPO where the trees are adequately identified by the rest of the description. However, there may be problems in enforcing a VPO that is defective in such a respect.

Finally, if a VPO is made by the council, it is listed on the Vegetation Protection Register. This register is open to the public for inspection on the payment of the appropriate fee. This is a separate register from that dealing with town planning and subdivisional applications under the Local Government (Planning and Environment) Act. It is intended to incorporate information from the Vegetation Protection Register onto the Rates Register.

Unfortunately, the relationship between the development approval process and VPOs is not explicitly stated in the ordinance and as a result, the integration of VPOs with existing development controls has been the source of some confusion. In order to understand the inter-relationship, it is necessary to distinguish between town planning applications, building applications and applications to destroy or interfere with vegetation.

The first category encompasses town planning applications such as subdivisions, notification of conditions, town planning consents and rezonings. In the case of such applications, the Local Government (Planning and Environment) Act imposes on the council an obligation to consider whether a deleterious effect on the environment would be occasioned by the implementation of the proposal the subject of the application. The council is therefore required by the Act to consider tree preservation issues. It is a valid exercise of the council's town planning powers to either refuse an application because it would involve the removal of existing trees or to require the preservation of trees as a condition of approval. Indeed, tree preservation has been required by the Local Government Court which is now constituted as the Planning and Environment Court in the 1980 case of *Bukamis and Maroochy Shire Council*. The council's town planning powers, however, are of little use if the vegetation is removed by a landowner prior to the lodgement of a town planning application. The purpose of a VPO therefore is to preserve trees pending the lodgement of a town planning application at which stage the council can exercise its powers to determine what, if any, vegetation is to be retained.

An examination of the decided cases in other jurisdictions involving the consideration of VPOs in planning appeals reveals that there are no general principles other than that preservation is given its statutory weight which is indeterminate in all cases but sometimes determining in a specific case. If the council refuses an application or imposes conditions which are not relevant or reasonably related to the proposed development, the applicant would be entitled to appeal to the Planning and Environment Court. On the other hand, if the council approves an application to develop land the subject of a VPO, the approval will practically, if not legally, supersede the VPO. Accordingly, if the council is intending to protect trees, it will be necessary to impose appropriate conditions on the approval. If a tree preservation condition is not placed on the approval, an astute landowner may pollard the trees and suggest to the council that the planning permission for the site supersedes the VPO.

The second category of applications are those made under the *Building Act 1975*. When dealing with building applications, it is not legally permissible for the council to consider tree preservation matters. Accordingly, where it is intended to lodge a building application, an approval will first have to be obtained under the ordinance from the council's Department of Recreation and Health. This approval is then submitted with the application for building approval to the council's Building Branch.

The third category of applications are those that relate solely to the destruction or interference with vegetation protected by a VPO. The ordinance requires these applications to be made in the prescribed form. The applications are assessed by the council which may approve the application either conditionally or unconditionally or refuse the application. The council is given express power to impose a condition requiring replanting where it approves an application. In considering an application, the council is required to consider the extent to which the vegetation meets the objectives of the ordinance, the environmental impact of the damage or interference, the purpose of the damage or interference and whether any prudent and feasible alternative exists to the damage or interference. The phrase "*prudent and feasible alternative*" is taken from the *Australian Heritage Commission Act 1975*, a Commonwealth statute which in turn has taken the phrase from similar United States legislation. An analysis of the cases decided under the United States legislation reveals that an alternative is feasible if it is capable of being built or made to work with available technology while an alternative is prudent if it does not present unique problems.

An applicant dissatisfied with the council's decision may request a reconsideration by the Vegetation Protection Advisory Committee. The Committee's recommendation is considered by the council in making its final decision. There is no appeal from council's decision.

It is an offence to fail to comply with the conditions of an approval granted by council pursuant to the ordinance. It is also an offence to destroy or interfere with any vegetation without council approval unless the destruction or interference is sanctioned by the ordinance.

Generally speaking, removal of vegetation is sanctioned in three circumstances:

- where vegetation is dangerous or within a specified distance of buildings;
- where removal is necessary to establish electricity, telephone, water, sewerage or gas lines, construct roads, comply with legislation (examples include noxious weeds and the requirements of rural fire boards, construct dividing fences or survey a property;
- where removal occurs in the course of cultivation, pasturing, grazing or maintaining a lawn or ornamental garden.

If a person destroys or interferes with vegetation without approval, the council may direct the person to restore, regenerate or replace the vegetation. If a person fails to comply with the direction or fails to comply with the conditions of an approval, the council may enter the property, perform the works and recover the expense from the person. The council may also prosecute a person for committing an offence under the ordinance.

The burden of proving a breach of the ordinance rests with the council which must prove its case beyond a reasonable doubt. The offence is one of strict liability. That is, it is not necessary for the council to prove knowledge on the part of the defendant of the existence of the VPO. The burden of proving that the destruction or interference was sanctioned by the ordinance rests with the defendant who must prove its case on the balance of probabilities.

The ordinance also expressly excludes the right to compensation. This contrasts with the United Kingdom system, where compensation is payable. In the United Kingdom, the compensation claimable is the difference between the value of the land as woodland and the value of the land as it would have been as grazing land with the trees cleared from it. It should be noted that even in the United Kingdom, there is no question of land owners being compensated for loss of development value. The reason for this is that the VPO, like the preservation of listed buildings and restrictions on advertising are amenity controls not development controls.

Traditionally, compensation has only been payable in this country for loss resulting from development controls, that is, (the so called injurious affection provisions) not amenity controls. Whilst no compensation is payable, the council should give consideration to providing financial assistance to land owners in addition to any technical assistance it may provide. The council's recently introduced general differential rating system would be an appropriate mechanism for providing such assistance.

When a person is considering the purchase of land in the city on which trees are growing, the purchaser must consider how it will be affected by the VPO. A purchaser of a tree bearing land or its consultants should therefore make the following enquiries with regard to VPOs:

- Has a VPO been made? This can be ascertained by searching the Vegetation Protection Register.
- If a VPO has been made what is the effect of the VPO? Does it apply to a particular tree, a group of trees. vegetation of a particular class or species or all vegetation?
- Does the VPO affect the purchaser's ability to carry out the contemplated development on the land?
- Have any subsisting conditions been attached to approvals granted to previous owners which may be binding on the purchaser?
- Have any directions as to replanting been made in respect of previous breaches of the VPO?
- Have there been any previous refusals which will give some indication of the likelihood of obtaining an approval to destroy or interfere in the vegetation in the future?
- If an application does have to be made, will any destruction or interference of vegetation on the land fall within any of the exemptions contained in the ordinance?

Conclusion

It is apparent that legislation protecting native fauna and flora will have an important impact on the land development process both in the immediate future and in the longer term. Land development professionals such as planners must therefore come to understand the operation of these laws and the potential impact on their clients.

This paper was published as a Planning Law Update in the Queensland Planner 32:4, 13-14, December 1992.

How legislation changes impact the planning industry

Ian Wright

This article discusses the enactment of recently introduced legislation and how they may impact State and local government planners and also practising planners

March 1993

Introduction

Land development professionals continue to be swamped with an avalanche of new legislation. This issue focuses on recently introduced legislation which will impact on the activities of State and local government planners as well as practising planners.

Anti-Discrimination Act

The Act commenced on the 30 June 1992 and prohibits discrimination on certain grounds in specified areas. The grounds of discrimination are sex, marital status, pregnancy, parental status, breast feeding, age, race, physical mental or intellectual impairment, religion, political belief or activity, trade union activity and lawful sexual activity. The areas in which discrimination on the specific grounds is prohibited are work, education, the supply of goods and services, the disposition of land, accommodation, superannuation and insurance, the administration of State laws and programmes and local government. In relation to local government, members of local authorities are generally prohibited from discriminating against others members in the performance of official functions although discrimination on the basis of political belief and activity is permitted.

The Act also provides an exemption for certain discriminatory behaviour that would otherwise be prohibited. The exemptions may be general in that they apply to all areas in which discrimination is prohibited or specific in that they apply to a specified area. An example of the former are actions done in compliance with legislation whilst an example of the latter is discrimination on the grounds of sex where students of a particular sex are prohibited from attending an educational institution.

The Anti-discrimination Tribunal is empowered to order compensation or otherwise redress any loss suffered by persons who have been discriminated against. Employers are also vicariously liable for breaches of the Act committed by their employees and agents. However a defence is available to employers who have taken all reasonable steps to prevent the discriminatory behaviour.

Freedom of Information Act

Although the Act commenced operation in respect of State government agencies on 19 November 1992, the Act will not apply to local authorities until May 1993. The Act requires government agencies to publish information describing their organisation, functions, policies, rules and practices. The Act also gives the public a right to access information in documents held by government agencies and to amend the information contained within those documents if it is incorrect, incomplete, out of date or misleading.

Access to government documents is excluded in the case of some government agencies such as Suncorp, the Queensland Investment Corporation, the Queensland Industrial Development Corporation and the Queensland Treasury Corporation and certain categories of documents such as those relating to cabinet and executive council meetings, law enforcement or public safety, legal professional privilege, trade secrets, business affairs and research and confidential information. Reasons must be given where the government agency refuses to grant access and such decisions may be reviewed internally by a more senior officer of the agency and then externally by the Information Commissioner. A private company may also seek a review of a decision where a government agency intends to release documents to a third party contrary to the wishes of the private company.

The Act will enable individuals and companies to obtain information from government agencies so as to challenge administrative decisions under the Judicial Review Act, institute civil proceedings, amend personal information held by government agencies and to derive a commercial advantage. Access to documents must be requested in writing and a fee of $30.00 is payable. The right of access extends to documents created at any time.

Local Government Legislation Amendment Bill (No 2)

The Bill was introduced into parliament on 21 November 1992 and was passed on 26 November 1992. The Bill follows on from the 1990 report of the Electoral and Administrative Review Commission (**EARC**) which found that there was a serious malapportionment in many local authorities between elected members and the voters they represented. The Bill addressed this problem by specifying tolerances of 20% for local authorities with less than 100,000 electors and 10% for local authorities with more than that number. The Bill sets out a procedure whereby

local authorities with electoral divisions may review the electoral arrangements and advise the Minister of Housing, Local Government and Planning by 26 February 1993 whether they wish to retain those arrangements or make the specified amendments. Local authorities are required to certify that the relevant electoral tolerances have not been exceeded and that account has been taken of factors such as demographic trends and community of interest. If a local authority with electoral divisions fails to give notice to the Minister by 26 February 1993 the local authority will automatically become undivided for the 1994 elections.

Proposals for changes of electoral arrangements will be referred to the Local Government Commissioner for investigation and recommendation to the Minister for approval. Notifications not requiring changes may also be referred by the Minister to the Commissioner for review. Where the Commissioner determines that a change is necessary the Commissioner will give public notice of the change and call for the lodgement of submissions. The Commissioner will access the submissions and make a recommendation to the Minister.

It should be noted that the process of reviewing electoral awards in the City of Brisbane is different. Under the City of Brisbane Act, *3* independent electoral commissioners are appointed by the Governor-in-Council when a redistribution appears necessary. The Bill retains this system but amends the tolerances from 20% to 10% in accordance with the EARC recommendations. The Bill also requires the Commissioners to publicly advertise the proposed changes and assess the submissions that are received.

The Local Government (Palm Beach Land) Bill 1992

The Bill which was introduced into parliament on 11 November 1992 and passed on 27 November 1992 is intended to address the problem of land subsidence at Palm Beach on the Gold Coast. The Bill establishes two funds. The first is intended to be used to settle all claims lodged by owners of damaged properties. Contributions to this fund will be made by the Gold Coast City Council and various private insurance companies. The second is intended to be used to acquire those properties where damage to houses is unable to be repaired. Although the State government is to contribute to this fund, all acquisition will be at market prices and will not be by compulsory acquisitions.

The Local Government (Robina Town Centre Planning Agreement) Bill 1992

The Bill was introduced into parliament on 25 November 1992 and passed on 27 November 1992. The Bill gives statutory approval to an agreement between the Albert Shire Council and the Robina Corporation for the planning and development of a Robina town centre in Albert Shire. The Bill provides that the planning agreement will take precedence over the planning scheme in respect of the site. The agreement sets out the planning intentions for the site as well as arrangements in respect of the provision of roads, water supply, sewerage, drainage and other infrastructure. The agreement also specifies the arrangements for obtaining development approvals as well as security arrangements. The need for the Bill arises from the inadequacies of the old town planning provisions of the *Local Government Act 1936* under which the original rezoning applications for the site were lodged. Whilst these problems have to some extent been overcome by the provisions of the *Local Government (Planning and Environment) Act 1990* it was inequitable to require the developer to reapply under the new legislation. Accordingly the Bill was introduced to provide for the orderly development of the site. It is hoped that the new planning legislation currently under review will be sufficiently flexible to avoid the necessity of introducing further site specific pieces of legislation in the future.

Mutual Recognition (Queensland) Bill 1992

The Bill was introduced into parliament on 12 November 1992 and passed on 26 November 1992. It gives effect to a national scheme for the mutual recognition by each State of regulatory standards for goods and occupations. The intention is to remove restrictions on interstate trade and commerce and the mobility of labour between Australian States. The Bill gives effect to an Inter-governmental Agreement on Mutual Recognitions signed by all heads of government on 11 May 1992. The Inter-government Agreement recognises the need for national standards to protect the health and safety of persons or to prevent or minimise environmental pollution.

The Bill is based on two principles. Firstly, that goods lawfully sold in one State can be lawfully sold in another State notwithstanding that it does not comply with the standards of that State. Secondly, that a person registered as carrying on an occupation in one State can carry on that occupation in another State. The Bill implements these principles by empowering the Commonwealth to pass a single Act that will override all inconsistent State legislation. However Commonwealth powers are limited by the fact that any amendment of this legislation will require the unanimous agreement of all States. This legislation provides the administrative mechanisms by which uniform environmental standards can be achieved across Australia.

Policy Development

The Commonwealth Environmental Protection Agency has recently released a discussion paper on the State of the Nation's Rivers. The discussion paper is intended to provide community input into the National Water Quality Management Strategy established by the Commonwealth and State governments. In addition the Commonwealth has released a draft Policy for Commonwealth Responsibilities in the Coastal Zone. All coastal local authorities should consider the impacts of this new policy on their administrative and legal obligations. Public submissions can be made in writing by 16 March 1993. The Resource Assessment Commission (**RAC**) has also released its draft report on the Coastal Zone Enquiry. Comments can be made to the RAC by 31 March 1993. Worksave Australia has also released draft National Standards for the Control of Major Hazardous Substances. Public comments close on 28 February 1993. The State government has also released two State planning policies. The first relates to the Development and Conservation of Agricultural Land. The second relates to the Planning for Aerodromes and other Aeronautical Facilities.

This paper was published as a Planning Law Update in the Queensland Planner 33:1, 6-8, March 1993.

Recent policy reviews cause a shift in the planning arena

Ian Wright

This article discusses the various policy reviews being conducted by the State and Federal government and analyses the recent *Endangered Species Protection Act 1992* (Cth) enacted by the Commonwealth government

June 1993

Introduction

This issue focuses on the various policy reviews that are currently being conducted at both State and National levels. Reference is also made to the Commonwealth government's recently enacted *Endangered Species Protection Act 1992* as well as various publications of interest to environmental planning practitioners.

SEQ 2001

The Regional Planning Advisory Group (**RPAG**) has released the first of 15 draft policy papers. The policy papers address various issues that are expected to arise out of the impact of population growth in South East Queensland over the next 20 years. The policy papers cover nature conservation, rivers and coastal management, extractive industry, open space and recreation, rural residential, major centres, culture and liveability, residential choice and efficiency, transport, water and waste water, solid waste, human services infrastructure, industry location and tourism, and agricultural land. The final recommendations arising out of the policy papers will be included in the Regional Framework for Growth Management which will be finalised in June of this year.

Intractable waste

The Independent Panel on Intractable Waste (**IPIW**) has released its final report entitled "*A Cleaner Australia*". The report consists of three volumes. Volume 2 is a 250 page technical backup to the findings and recommendations contained in volume 1 and contains comprehensive comments on the various options for dealing with intractable waste. Volume 3 contains numerous appendices to the report. The IPIW was disbanded on the presentation of its report and has been replaced by the Scheduled Wastes Working Group (**SWWG**) which has been charged with the preparation of an implementation plan based on the final report of the IPIW and the Australian New Zealand Environment and Conservation (**ANZECC**) Draft National Strategy for the Management of Scheduled Wastes.

Coastal zone enquiry

The Resource Assessment Commission's inquiry into the management of Australia's coastal zone and its resources has released a draft report. The report concludes that the quality of Australia's beaches and other coastal zone resources is under increasing threat, particularly from urbanisation and increased recreation and domestic tourism. The report also concludes that many local and State management agencies are under stress from the increased demands being made on them from the management of the coastal zone and its resources. In particular the report warns that serious problems are likely to emerge unless the capacity of local government to meet these demands is improved and a more integrated approach to management adopted. The report recommends against the establishment of new institutional mechanisms, instead focusing on the need to make more efficient and effective use of existing institutions and policy instruments.

National Forest Policy Statement

At the Council of Australian Governments meeting of 7 December 1992 the Commonwealth, State and Territory governments signed the National Forest Policy Statement.

The statement was based in a large part on the Resource Assessment Commission's Forest and Timber Inquiry completed in March 1992 and adopts many recommendations contained in the Commission's report. The Statement sets out the separate responsibilities of each of the three levels of government and as such is of relevance to local authorities. The Statement outlines national goals as well as specified objectives and policy initiatives that will be adopted to manage Australia's public and private forests. The Statement provides a framework within which pressure for change can be identified and accommodated to ensure that the nation derives the maximum benefits from its forests and forest resources.

Urban stormwater

The Commonwealth Environmental Protection Agency has released a discussion paper on urban stormwater entitled "*Urban Stormwater – A Resource Too Valuable To Waste*". The discussion paper is based on a national review report prepared by the CSIRO on urban stormwater and its impact on the environment. The CSIRO study reviewed current stormwater management practices and approaches and recommended appropriate changes. A wide range of representatives from State and local governments and the water industry were consulted during the course of the review.

Water systems

The Commonwealth Environmental Protection Agency has also released a discussion paper on the state of the nation's rivers entitled "*Towards Healthy Rivers – The Ills Afflicting our Rivers and How We Might Remedy Them*". The discussion paper is based on the findings of a report of the CSIRO entitled "*Towards Healthier Rivers*" published in November 1992. The report examines the need for healthy rivers, identifies the relevant policy issues and makes recommendations in relation to the development of policy. The CSIRO assessed the condition of the nation's rivers on ecological criteria. The report stresses however that the ecological criteria should not be adapted to each river and should not be assumed to be an ideal state to be attained for all rivers.

The report recommends the establishment of a cooperative national river health program with the States comprising public consultation on desirable river conditions, appropriate uses and health indexes; the adoption of various policy instruments and management tools such as flow regulation, water relocation and ecological assessment of rivers and community based recreational decisions; the adoption of a total catchment management framework; and the making of inter-governmental agreements to give effect to the programme.

State of the environment reporting

The Commonwealth Environmental Protection Agency has also issued a public discussion paper entitled "*The Development of National State of the Environment Reporting System*". The discussion paper is intended to stimulate debate as to what relevant stakeholders want from a national state of the environment reporting system. It is suggested that the national state of the environment reporting system include data on atmospheric, terrestrial, freshwater, marine and urban environments. The database would encompass information on ambient environmental quality, natural resource stocks and the conservation status of ecosystems. The completion of this information would enable Australia to meet its international reporting obligations. The database would also enable the preparation of national state of the environment reports which would identify patterns of environmental change and as such would provide a basis for decisions on ecologically sustainable use of resources.

Waste minimisation and recycling strategy

The Commonwealth Environmental Protection Agency has also released a National Waste Minimisation and Recycling Strategy. The strategy sets out the government's policy in relation to waste management issues. The strategy emphasises a cooperative approach involving the establishment of an emissions register; local, State and national monitoring systems of pollutants in the air, water, land and living material; a waste register listing significant waste streams; and a national voluntary waste audit scheme. The strategy is to be implemented by the Commonwealth through the Australian and New Zealand Environment and Conservation Council (**ANZECC**) or where appropriate the National Environmental Protection Authority (**NEPA**). NEPA will be particularly active in establishing legally enforceable national air and water quality standards that will provide strong impetus for industry to adopt waste avoidance practices.

State planning policies

The Queensland State government gazetted on 18 December 1992 State planning policies on the conservation of agricultural land and planning for aerodromes and other aeronautical facilities. These policies were gazetted pursuant to the provisions of the Local Government (Planning Environment) Act. Under the Act local authorities are required to have regard to the policies when preparing planning schemes and assessing town planning applications. The Planning and Environment Court is also required to regard to the policies when considering appeals from local authority decisions.

The agricultural land policy is concerned with the conservation of good quality agricultural land and provides guidance to local authorities on how this issue should be addressed when carrying out their planning functions. What is good quality agricultural land is defined in the "*Planning Guidelines for the Identification of Good Quality Agricultural Land*" issued with the policy. These guidelines also clarify the role of the local authority and the DPI in determining the location of good quality agricultural land. The policy examines the need to conserve agricultural land, the role of planning schemes in conserving good quality agricultural land, and various policy principles to guide local authorities in the application of the policy.

The airport planning policy is concerned with protecting aerodromes and other aeronautical facilities from encroachment by incompatible development and land uses so as to ensure long term operational and safety requirements of air traffic are maintained. The policy addresses the control of development land use in the vicinity of aeronautical installations and provides guidance to local authorities on how this issue should be addressed when carrying out their planning functions. The policy examines the need for control of development in the vicinity of aeronautical installations, categorises aeronautical installations, identifies the problems of planning for

aeronautical installations, discusses the various mechanisms for controlling development in the vicinity of aeronautical installations and provides guidance through detailed planning guidelines entitled "*Planning Guidelines Planning for Aerodromes and other Aeronautical Facilities*".

Endangered Species Protection Act 1992 (Cth)

The Commonwealth government has enacted the *Endangered Species Protection Act 1992* (**Act**). The Act will commence on the 21st May 1993 or such earlier dated fixed by proclamation. The Act was first proposed in a public discussion paper entitled "*An Australian National Strategy for the Conservation of Species and Habitats Threatened with Extinction*" which was released in 1989. This was followed by an options paper prepared by the Endangered Species Advisory Committee in April 1999. An extensive consultation process was undertaken by the government with relevant interest groups including industry, conservation organisations and the States and Territories during the course of preparing the legislation.

The Act provides a framework for the protection of endangered and vulnerable species and ecological communities by promoting the recovery of species and ecological communities that are endangered or vulnerable, preventing other species and ecological communities from becoming endangered; reducing conflict and land management through readily understood mechanisms relating to the conservation of species and ecological communities that are endangered; providing for public involvement in and promoting and understanding of the conservation of such species and ecological communities; and encouraging cooperative management for the conservation of such species and ecological communities.

The Act is intended to enhance the cooperative relationship between the commonwealth and the State and Territory governments for the recovery and protection of endangered species and ecological communities as established through the Endangered Species Programme administered by the Australian National Parks and Wildlife Service. In the Prime Minister's December 1992 Statement on the Environment, the federal government will provide an additional $2.9 million of funding over the next four years to ensure the efficient administration of the Act.

In particular, the Act provides for the listing of native species, ecological communities and key threatening processes. Any person may nominate an item to be listed and the Minister for the Environment is prohibited from considering any matter not related to the survival of the species or community when deciding whether to list an item. Recovery plans are required to be prepared in respect of each listed native species and ecological community. A recovery plan describes the actions needed to arrest the decline and hence the recovery of an endangered or vulnerable species or ecological community so that its long term survival can be ensured. Threat abatement plans are also required to be prepared in respect of each key threatening process that is listed. These plans outline the actions to reduce the impact of key threatening processes to help the survival of affected species and communities and to prevent further species and communities from becoming endangered. The Minister may make conservation orders prohibiting or restricting specified activities. These orders may be made on an interim (28 days - 6 months) or a permanent basis. When making an order the Minister is required to minimise significant adverse economic and social impacts. Persons affected by an order may appeal to the Administrative Appeals Tribunal in respect of the Minister's decision. A penalty of $50,000 is imposed in respect of breaches of a conservation order.

The Act will impact on industrial and resource development projects in two related circumstances. Firstly, Commonwealth Ministers, Departments and Authorities are prevented from recommending or approving activities likely to further threaten with extinction listed species or ecological communities or significantly impede their recovery or from approving the sale, trade or use of such activities. Secondly, where activities approved by Commonwealth Agencies are relevant to the implementation of a threat abatement plan or recovery plan, approval of a development project may be conditional on compliance with the plan. In such circumstances provision may be made to require the proponent of a development project that requires approval to fund or otherwise assist in the implementation of the plan in so far it affects the area relevant to the approval and to the extent required to maintain or restore the status of the species to that applying before the development.

State legislation

The State government has introduced into Parliament the *Mixed Use Development Bill 1993*. The Bill is intended to provide a code practice which will facilitate the development of buildings for a range of uses including residential, commercial and office space. As such, the Bill attempts to satisfy the growing trend to establish developments with a number of uses as compared to the traditional approach of establishing a single purpose building under single ownership. Pursuant to the Bill, lot types would be decided according to the proposed use. Group or building unit title lots could all be incorporated into one development and each lot sold separately allowing for a range of uses within a development giving clear title to each purchaser. The Bill is expected to be passed in the May sittings of Parliament. The detailed provisions of the Bill will be examined in the next issue.

The Local Government Act has also been amended by the *Local Government Legislation Amendment Bill 1993*. The Bill was passed by Parliament on 19 March 1993 and royal assent is expected in the near future. The Bill provides for the amendment of the *Local Government Act 1936* and the *City of Brisbane Act 1924*. The amendments are intended to clarify the contents of references made by the Minister of Housing and Local Government Planning to the Local Government Commissioner for the review of local government matters. The Bill also extends the powers of the Governor-in-Council in relation to the implementation of the recommendations by

the Local Government Commissioner on reviewable local government matters. Provision is also made for local authorities to lease land to the providers of public utility services without having to go to public tender. In addition, the Brisbane City Council is allowed to assume responsibility for any bridge in or abutting the City.

The Department of Housing, Local Government and Planning has also released a building note which explains how by-law 9.9 of the standard building by-laws can be used to allow siting of class 1 and class 10 buildings under the provisions of AMCORD. The building note also provides a sample format for a local authority decision to allow the AMCORD siting provisions to be used in lieu of the provisions in part 9 of the standard building by-laws.

Recent publications

Environmental planning practitioners should also be aware of a number of recent publications that may be relevant to their area of professional practice. The first is Planning and Environment Law in Queensland edited by W D Duncan and published by Federation Press 1993. The book provides a comprehensive introduction to Queensland Planning and Environmental law. The book is intended to acquaint persons who are entering this field for the first time to the range of laws and policy documents that impact on planning and environmental issues in this State. The chapter by Newman and Meurling on town planning law is comprehensive and is a must for all students of Queensland planning law.

Second, the New South Wales and Victorian divisions of the Australian Chambers of Manufacturers have produced environmental handbooks for small industry. The handbooks are intended to assist users in conducting a waste and energy audit of their operations so as to assist in solving environmental problems and minimising costs. These handbooks will be of assistance to environmental health departments of local authorities.

Third, the Australian Bureau of Statistics has produced a book titled "*Australia's Environment: Issues and Facts*". The framework adopted by the Australian Bureau of Statistics examines the human activities which impact on the components of the environment and identifies subsequent human and natural responses to these activities. Of particular interest to planners will be chapter 6 on human settlements. The book is intended to provide a set of benchmark statistics for debate on environmental issues. As such the publication will complement the national state of the environment reporting system to be established by the Commonwealth Environmental Protection Agency.

This paper was published as a Planning Law Update in the Queensland Planner 33:2, 21-26, June 1993.

Mixed Use Development Act: A new subdivisional code

Ian Wright | Fiona Seines

This article discusses the introduction of the *Mixed Use Development Bill 1993* and its procedure

June 1993

Introduction

The *Mixed Use Development Bill 1993* is a subdivisional code which enables different types of land uses to be integrated into the one development. The Bill attempts to overcome the inflexibility of existing subdivisional controls in the *Local Government (Planning and Environment) Act 1990*, the *Building Units and Group Titles Act 1980* (**BUGTA**) and the *Integrated Resort Development Act 1987*. In delivering the second reading speech on 18 March 1993, the Minister for Housing, Local Government and Planning, the Hon TM Mackenroth, noted the Bill would enable a number of individuals with an interest in only one specific type of development to join forces and raise money for a mixed-use development as a joint venture, thereby avoiding the financial risk that is associated with current titling arrangements (Hansard, 18 March 1993, p 2423).

Procedure

A developer wishing to create a mixed-use development (cl 6) needs to apply to the relevant local authority for approval of a mixed-use scheme. The site to which the mixed-use scheme relates must be zoned so that the proposed uses are either permitted (as of right uses) or are permissible (consent uses), and have been approved by the local authority.

Where land is either not appropriately zoned or where town planning consent has not been obtained, a rezoning or town planning consent application will have to be lodged. The application for a mixed-use scheme can be submitted simultaneously and the procedure for determining such an application is set out in Pt 3 of the Bill. If a satisfactory approval is not obtained an appeal can be lodged with the Planning and Environment Court (cl 52).

Once the mixed-use scheme is approved, the whole of the land can be subdivided by means of a community plan (cl 11). A community plan (cls 3, 12) consists of:

- at least one community development lot, that is, land to be sold to individuals (cls 3, 13); and
- at least one community property lot, that is, common property used for access, roads etc.

A body corporate needs to be formed (cl 15) once the community plan is registered (cl 73) and the owners of the community development lots become the body corporate members (cl 24). Part 9 of the Bill gives the guidelines on how the bodies corporate are to operate whilst Pt 10 sets out the by-laws.

If the development is to be constructed in stages, the community development lot must be subdivided by a precinct plan (cis 3, 16) which must contain (cl 17):

- at least one precinct development lot (cl 3);
- a number of precinct property lots (cl 3); and
- a balance precinct development lot where the former lots do not comprise the whole of the community development lot.

A precinct development lot and balance precinct development lot may be subdivided by a group titles plan, building units plan and in the case of the former, by a precinct plan.

The community development lot, balance precinct development lot and precinct development lot may be subdivided by a stratum plan approved by the local authority.

Approval can only be granted where the voting entitlements equal the voting entitlements of the lot being subdivided; and there is access to a road/community thoroughfare; there is compliance with the mixed-use scheme provisions; and where essential services have been provided. The practical aspects of stratum subdivision are set out in Pt 6 of the Bill including the Bill's relationship with the Real Property Acts (cl 121). Once registered (cl 23) the owners of the lots become members of the body corporate rather than the original owner (cl 24).

The community development lot, balance precinct development lot and precinct development lot can also be subdivided by group titles and building unit plans (cl 22, note cl 78). Part 5 sets out the procedure for local authority approval and registration of the plans.

There have been modifications to BUGTA to accommodate anomalies which may arise (cl 85), and the words and expressions used in the Mixed Use Development Bill are to have the same meaning as that of BUGTA (cl 4). There is also the requirement for the creation of a body corporate (cl 24).

The inclusion of a number of different bodies corporate into the one development will ensure that each user-group is represented. "*The bill provides for the establishment of a community body corporate which will have as its members representatives from each of the precinct bodies corporate and community development lots*" (*Hansard*, 18 March 1993, p 2424).

Owners of land within the site will have voting rights and must belong to a body corporate which will have perpetual succession (cl 167(10)). Further, the cost of maintaining the common areas will be shared on a pro-rata basis according to use. The mechanics of bodies corporate is addressed in Pt 9 of the Bill, whilst the by-laws are set out in Pt 10.

Other areas covered by the Bill include land which is subject to tidal influence and thoroughfares, easements, canals and facilities.

Conclusion

The Mixed Use Development Bill is similar in style to the *Integrated Resort Development Act 1987*, and with the enactment of this Bill, the need for specialised legislation such as the *Sanctuary Cove Resort Act 1985* and the *Integrated Resort Development Act 1987* will disappear. The ability to house mutually supporting activities in the one development has been occurring since the mid 1950s in the US, and supporters of the idea say it represents a rediscovery of urbanity as well as commercial vitality.[1]

They "*are designed at the human scale and represent a positive attempt by the development community to achieve the public objective of keeping central cities alive and making cities a viable organism*".[2] These self-sustaining developments, however, have been criticised. Dr DJ Gifford[3] says such ideas are a "*slap in the face*" for fundamental planning principles and cast "*doubt on the credibility of the planning process itself*".[4] Irrespective of these differing views the Bill is a valuable attempt to address the inflexibility of existing planning and subdivisional laws.

This paper was published in the Australian Property Law Bulletin, June 1993.

1 Robert E Witherspoon, Jon P Abbett and Robert M Gladstone, *Mixed-Use Developments: New Ways of Land Use* (ULI, Washington DC, 1976), p 3. See also Richard Wakeford, *American Development Control: Parallels and Paradoxes from an English Perspective* (HMSO, London, 1990).

2 Witherspoon, op cit 3.

3 Dr DJ Gifford, *The Dark Side of Town Planning* (1991) 11 Queensland Lawyer 200.

4 Ibid at 204. 0

COLIN BIGGERS & PAISLEY LAWYERS

The preparation and implementation of administrative procedures in relation to land contamination

Ian Wright

This article discusses the emerging national approach to contaminated land with reference to the provisions of the *Queensland Contaminated Land Act 1991* and the *Local Government (Planning and Environment) Act 1990*

August 1993

Abstract: The dramatic increase in the awareness of the environmental and human health impacts of pollution and the corresponding tightening of legislation and regulation has raised new issues and problems for environmental health professionals. This paper considers the emerging national approach to contaminated land, the provisions of the *Queensland Contaminated Land Act 1991* and *Local Government (Planning and Environment) Act 1990.*

Unless Things Change

When I see the scattered and anxious groups
of protestors against radioactive and/or toxic waste
at Redbank or Kingston, the home-made signs
(unlike the tidy signs protestors have in movies),
and the beards, the babies in pushers and young kids,
and the large awkward and neat blue cops
with their megaphones and wagons,
I think I am seeing the troubles of the twenty-first century in the making,
when larger and more fractious crowds will be moving in a continual frieze
across urban landscapes ticking like Geiger counters,
and somewhere then, too,
unless things change,
far removed from the poisoned residential areas and polluted beaches,
there will also be,
smiling comfortably from their expensively decontaminated zones,
slick bastards who are responsible for all this ...

(*Bruce Dawe (1990:63) This Side of Silence,*
Longman Cheshire, Melbourne 1990)

Introduction

The graphic vision portrayed in Bruce Dawe's poem "*Unless Things Change*" is a reality. Urban sprawl has seen the encroachment of residential development into residential, commercial and agricultural areas. The use of this land has resulted in environmental and human health risks as evidenced by the heavy metal contamination at Kingston in Logan City. This has led Commonwealth, State and local governments to introduce legislation and administrative procedures to deal with land contamination issues. This paper will consider the emerging national approach to contaminated land, the provisions of the *Queensland Contaminated Land Act 1991* and the *Local Government (Planning and Environment) Act 1990.*

National approach

The Inter-governmental Agreement on the environment

On 25 February 1992, the Commonwealth, the States and Territories and the Australian Local Government Association signed the Inter-governmental Agreement on the Environment (**IGAE**). Whilst the Australian Local Government Association was a party to the IGAE, the provisions of the IGAE do not bind individual local government authorities (clause 1.11). However, the States have agreed that they will consult with individual local government authorities in the application of the principles and the responsibilities contained in the IGAE to the extent that State statutes and administrative arrangements authorise or delegate responsibilities to a local government (clause 1.12).

The IGAE sets out the responsibilities and interests of the Commonwealth, the States and local government. In particular, a local government authority has:

- a responsibility for the development and implementation of locally relevant and applicable environmental policies within its jurisdiction in cooperation with other levels of government and the local community;
- an interest in the environment of its locality and in the environments to which it is linked; and
- an interest in the development and implementation of regional, State-wide and national policies, programmes and mechanisms which affect more than one local government authority (clause 2.4).

The IGAE also sets out the principles and considerations which should guide the development and implementation of environmental policies and programmes at all levels of government. In particular, the parties agreed that:

- Environmental considerations should be integrated into governmental decision making process by ensuring that:
  - environmental issues associated with a proposed project, programme or policy will be taken into consideration in the decision making process;
  - there is a proper examination of matters which significantly affect the environment; and
  - the measures adopted should be cost effective and not disproportionate to the significance of the environmental problems being addressed (clause 3.4).
- Policy making and programme implementation should be based on the following principles:
  - where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation – this is known as the "*precautionary principle*";
  - the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations – this is known as "*inter-generational equity*";
  - the conservation of biological diversity and ecological integrity should be a fundamental consideration – this is referred to as "*biological diversity*";
  - the valuation of assets and services should include environmental factors;
  - those who generate pollution and waste should bear the cost of containment, avoidance or abatement – this is known as the "*polluter pays principle*";
  - the users of goods and services should pay prices based on the full life cycle costs of providing goods and services including the use of natural resources and assets and the ultimate disposal of any waste – this is called the "*user pays principle*"; and
  - incentives should be provided to encourage parties to develop their own solutions and responses to environmental problems (clause 3.5).

The IGAE also establishes a ministerial council known as the National Environmental Protection Authority (**NEPA**) which will be responsible for the application and implementation of these principles. In particular, the council has the role of establishing general guidelines for the assessment of site contamination and the environmental impacts associated with hazardous wastes (clause 5(iv) and (v) Schedule 4). The Commonwealth and States have also agreed to introduce legislation to establish and implement these measures (clause 16 Schedule 4).

NEPA will be assisted in this role by the Australian and New Zealand Environment and Conservation Council (**ANZECC**) and the National Health and Medical Research Council (**NHMRC**). In January 1992, these bodies published the Australian and New Zealand Guidelines for the Assessment and Management of Contaminated Sites (**ANZECC Guidelines**).

ANZECC Guidelines

The ANZECC Guidelines provide a guide to the proper assessment and management of contaminated sites. They are of no legislative effect and as a result:

- legislative responsibility for the assessment and management of contaminated sites rests with the individual State and Territory governments; and
- each State and Territory government may implement the necessary controls in a different manner whilst attempting to ensure consistency between States and Territories.

The guidelines recommend that legislation relating to contaminated land should contain the following elements:

- notification to the relevant authority of the existence of contaminated sites and likely contaminated sites having regard to past use and management;
- provision of advice to prospective buyers or developers of contaminated sites;
- assessment and, if necessary, the remediation of contaminated sites;
- mechanisms to ensure the assessment, remediation and long term management of contaminated sites;
- financial incentives to assist owners in remediation works where appropriate;
- a register of contaminated sites which categorises sites having regard to their potential threat to human health and the environment; and
- a planning system which ensures that development does not cause land contamination and does not occur in relation to land that is adversely affected by land contamination.

To date, only Queensland had introduced legislation which implements the provisions of the IGAE and the recommendations of the ANZECC Guidelines.

Queensland approach

Legislative framework

The principal legislation in Queensland is the *Contaminated Land Act 1991*. This is complemented by other legislation including:

- the *Refuse Management Regulations 1983* under the *Health Act 1957* which deals with waste disposal;
- the *Workplace Health and Safety Regulations 1989* under the *Workplace Health and Safety Act 1989* which deals with the storage and handling of hazardous substances and asbestos;
- the *Metalliferous Mining Regulations 1985* under the *Mines Regulation Act 1964* which deals with the licensing of various hazardous and toxic substances on mining tenements; and
- the *Gas Act 1965*, the *Explosives Act 1952*, the *Radioactive Substances Act 1958*, the *Chemical Usage (Agricultural and Veterinary) Control Act 1988*, the Combustible and Flammable Liquids Regulations under the *Local Government Act 1936*, the *Poisons Regulations 1973*, the *Poisons (Fumigation) Regulations 1973*, the *Hazardous Substances (Chlorofluorocarbons and Other Ozone Layer Depleting Substances) Regulations 1988*, the *Hazardous Substances (Placarding) Regulations 1988* and the *Pest Control Operators Regulations 1977*, all under the *Health Act 1957* which deal with the use, storage, transport or disposal of various hazardous substances.

Notwithstanding this patchwork quilt of legislation, the most important piece of legislation in terms of day to day practice, particularly at the local government level, is the *Contaminated Land Act 1991* and the provisions of Section 8.3A of the *Local Government (Planning and Environment) Act 1990*.

Contaminated Land Act 1991

The *Contaminated Land Act 1991* (**Act**) was assented to on 11 December 1991 and commenced operation on 1 January 1992. The *Contaminated Land Regulation 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 who has delegated this responsibility to the Land Contamination Unit within that department.

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 of Act

The Act applies to persons who cause or permit land contamination "*polluters*", owners, occupiers, local authorities 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 matters in or on land that, in the opinion of the Director, 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, carcinogenicity, teratogenicity, mutagenicity, corrosiveness, flammability or physical, chemical or infectious characteristics may pose a hazard to human health or the environment when improperly treated, stored or disposed of or otherwise managed.

The Director has issued guidelines specifying thresholds for various substances beyond which land will be considered to be contaminated.

Occupier is defined to include a person in actual occupation or control of a 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 purposes of this definition. Owner is defined to mean the person who has the freehold estate in land or is entitled to possession of the land.

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 of contaminated land

The Director of the Land Contamination Unit 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, if the contamination occurred before 1 January 1992, by 1 January 1993 or within 30 days of becoming aware, whichever is the later;
- the owner, occupier, local authority or the State Crown within 30 days of becoming aware of the contamination or by 1 January 1993, whichever is the later.

In addition to this general obligation local authorities are required to notify the Director of that land which has been used for a purpose prescribed in the Regulations.

It is an offence under the Act to fail to notify the Director of land contamination.

The information received by the Director is placed on the 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 of the land 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.

Assessment, remediation and validation of contaminated land

The Director 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 authority, if the contamination arose because of an approval that the local authority 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 Contaminated Land Regulations that results in a hazard to human health or the environment.

The Director may also order the preparation of a validation report by the polluter, owner or local authority to ensure that the contaminated land has been successfully remediated.

The Director 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 Director have been exceeded.
- *Stage 2* involves the preparation of an environmental and health risk assessment where the preliminary investigation reveal 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 Director may cause a report to be prepared or the contaminated land to be remediated at the expense of the polluter, owner or local authority.

If the costs of the report or the remediation are not paid, the Director can take action to recover the sum as a debt. In respect of remediation costs, the Director can execute against the property to recover the costs in priority to all other persons other than the local authority 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 Director 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 Director.

Penalties are imposed in respect of the following offences:

- the contamination of land not expressly authorised by the Director or a statute;
- rejection of contaminated soil or hazardous substance by an approved place of disposal;
- disposal of contaminated soil or hazardous substance other than at an approved place of disposal;
- use of contaminated soil, hazardous substance or other contaminated matter without the Director's approval;
- use of a restricted site contrary to a restriction recorded on the Contaminated Sites Register; and
- local authority approval of the use of a restricted site contrary to the restriction recorded on the Contaminated Sites Register.

Persons authorised by the Director 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;
- require production of reports, books, plans, maps or documents; and
- require name and address.

Corporate liability

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 that 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.

Local Government (Planning and Environment) Act 1990

In addition to the *Contaminated Land Act 1991*, the State government has also amended the *Local Government (Planning and Environment) Act 1990* by the insertion of section 8.3A. This is consistent with the ANZECC Guidelines in that the State government has sought to use the planning system as a mechanism for managing existing land contamination and preventing future land contamination.

Section 8.3A provides that town planning and subdivisional applications in respect of land that has been used for a purpose prescribed in the *Local Government (Planning and Environment) Regulations 1991* must be supported by a site contamination report prepared by the Land Contamination Unit within the Department of Environment and Heritage. The *Local Government (Planning and Environment) Regulations 1991* set out those uses which are known to have caused contamination in the past. It should be noted that the purposes listed in the *Local Government (Planning and Environment) Regulations 1991* differ for some inexplicable reason from the list of purposes specified in the *Contaminated Land Regulation 1991* which local authorities are required to notify to the Land Contamination Unit.

Implementation of a national approach

It can be seen that the approach adopted by the State government in relation to land contamination issues is consistent with the terms of the IGAE and the ANZECC Guidelines.

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COLIN BIGGERS & PAISLEY LAWYERS

Aboriginal and Islander issues in park and recreational management

Ian Wright

This article discusses the Aboriginal and Island issues in park and recreational management by analysing the events which caused the land rights movement in Australia with reference to the *Aboriginal Land Rights* (*Northern Territory) Act 1976* and other State land rights legislation. The article then provides a discussion on the implications of Mabo

September 1993

Introduction

The theme of this year's conference is track to the future. Before we commence our journey down that track it is necessary to appreciate the track over which we have passed already and the destination to which we are heading.

The destinational goal is sustainable development. It is defined simply as development that meets the needs of the present without economising the availability of future generations to meet their own needs.

As a goal it is beyond challenge. However the manner in which we achieve that goal is debatable. What is clear is that sustainable development involves the integration of environmental values economic development in both public and private decision making processes.

> *If we are to achieve ecological sustainability it will be necessary to integrate conservation interests with the concerns of Aboriginal people in the management of parks and recreational assets*.

Until recently little recognition has been given to the cultural and social dimensions of ecological sustainability. As a result parks have been conceived and managed as pristine wilderness or natural landscapes which must be preserved from all human activity. This fails to recognise that parks are cultural landscapes brought about by thousands of years of Aboriginal management. Therefore if we are to achieve ecological sustainability it will be necessary to integrate conservation interests with the concerns of Aboriginal people in the management of parks and recreational assets.

Having described our destination it is relevant to consider how far down the track we have come.

Gove Land Rights case

It is pertinent that we commence our journey with an analysis of the events which sparked off the land rights movement in Australia. In 1971, Mr Justice Blackburn of the Northern Territory Supreme Court handed down his judgment in the case of *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 otherwise known as the Gove land rights case.

Mr Justice Blackburn held as a matter of fact that:

- Australia had been settled rather than conquered; and
- Australia was terra nullis, that is, the indigenous inhabitants of Australia had no system of law or land tenure.

Based on these findings of fact, His Honour concluded as a matter of law that:

- upon settlement the Crown acquired sovereignty over Australia and English domestic law including the common law of England became the law of the colony;
- the common law of England provided that the Crown held the ultimate or radical title to all land in Australia; and
- the radical title of the Crown was not subject to any form of Native Title as the indigenous inhabitants had no system of law or land tenure.

As a consequence of these findings of fact and law, His Honour declared that the Aboriginal community in question had no legal entitlement to prevent Nabalco from mining parts of Arnhem Land on the Gove Peninsula.

Northern Territory Land Rights Act 1976

From a social justice point of view the Gove land rights case was clearly wrong. Everybody knew that including the then Whitlam labour government. As a result it proposed the *Aboriginal Land Rights (Northern Territory) Act 1976* (**Northern Territory Land Rights Act**). Eventually passed in 1976 by the Fraser Liberal/National party

coalition after the dismissal of the Whitlam government in 1975, the Act provided for the recognition of Aboriginal traditional rights to certain land in the form of a grant of statutory freehold title.

Aborigines have acquired land under the Northern Territory Land Rights Act in three ways:

- First, certain lands described in schedule 1 of the Act being lands held by the Crown for the use of and benefit of Aborigines were required by the Act to be granted to Aborigines.
- Second, other unalienated Crown land were permitted to be claimed by traditional Aboriginal owners. Once a traditional right to forage over the land and a continued traditional attachment to that land is shown the Commonwealth Minister for Aboriginal Affairs must balance the advantages of a grant against any detriment to other persons before deciding whether to grant the land or not.
- Thirdly, Aborigines have acquired lands as a result of the amendment of schedule 1 of the Act to include specified parcels. This has occurred for different historical and political reasons in relation to portions of Kakadu National Park and Uluru National Park.

The lodgement or threat of a prospective land claim has allowed Aborigines in the Northern Territory not only to obtain title to land over which national parks have been declared but also to participate jointly in the management of those national parks. Examples include the Coburg Peninsula, Kakadu, Katherine Gorge and Uluru National Parks.

Whilst there are still differences in legal mechanisms adopted in respect of the management of each of these national parks there are common features:

- The national parks are legally owned by the traditional Aboriginal owners. In the case of Cohourg National Park the grant is a grant in perpetuity as this land was granted by the Northern Territory government as a compromise of a land claim under the Northern Territory Land Rights Act. In the case of Katherine Gorge, Kakadu and Uluru National Parks which were granted under the Northern Territory Land Rights Act the grant is one of statutory freehold title.
- The national parks have been leased back to the Commonwealth government in the case of Kakadu and Uluru and to the Northern Territory Conservation Commission in the case of Katherine Gorge. Interestingly, Coburg Peninsula National Park is not leased back to the Northern Territory government.
- The period and conditions of the lease are agreed upon between the parties. The period of the lease in each case is 99 years and there are variable rental arrangements. In the case of Kakadu, the rental is $175,701 plus 25% of park revenue whilst Uluru is $75,000 plus 20% of the receipts from entrance charges.
- The terms of the leaseback are reviewable at agreed intervals.
- Management policies are decided on by a board of management comprising the representatives of traditional owners, government, conservation and tourism.
- Aboriginal people have a majority of representatives on the boards of management.
- The boards of management are required to approve plans of management.

The day to day management and implementation of the plans of management are a responsibility of the Northern Territory Conservation Commission in the case of Coburg Peninsula and Katherine Gorge National Parks and the Australian National Parks and Wildlife Service in the case of Kakadu and Uluru National Parks.

The joint management model that has evolved in the Northern Territory has a variety of advantages for Aboriginal people.

They have ownership of the park, control of cultural sites, the use of subsistence resources, management of the park, finances for land management and community infrastructure and income for tourism.

However there are disadvantages. Aborigines are prohibited from degazetting or closing the national park, they have limited control of tourist numbers and reduced options for economic development. These disadvantages however are minor in comparison to the difficulties that are faced by Aboriginal and Torres Strait Islanders in other Australian States in achieving control over Aboriginal lands within national parks.

Land Rights Legislation in other States

Since the enactment of the Northern Territory Land Rights Act, all States have moved some way towards implementing land rights legislation with varying degrees of commitment. As a result there is a legal patchwork of Aboriginal land rights and heritage protection legislation across Australia. Despite this the Commonwealth government has not sought to introduce national legislation as the coalition is opposed to this and has indicated that it would repeal such legislation if elected.

As a result it is necessary to consider the legislative and administrative structure of each State to determine the extent to which Aboriginal interests have been accommodated in national parks and protected areas. In Western Australia where legislation confers few land rights on Aborigines, joint management arrangements have been entered into between the Western Australian government are traditional owners in the case of the Bungle Bungles National Park, the Hamsley Range National Park and the Buccaneer Marine National Park. These arrangements

involve the lease of land to or the vesting of an Aboriginal reserve in Aboriginal owners and the joint management of the national parks in accordance with management plans.

In South Australia a joint management plan has been finalised between the South Australian National Parks and Wildlife service and traditional owners in relation to Witchera National Park in the Simpson Desert.

In Victoria and Tasmania there has been slower progress. However in Queensland and New South Wales legislation has been recently introduced which enables national parks to be returned to traditional owners.

The relevant New South Wales legislation is the *National Parks and Wildlife (Aboriginal Ownership) Amendment Act 1992*. The applicable Queensland legislation is the *Aboriginal Land Act 1991* and the proposed *Nature Conservation Act 1992*.

Despite some differences in the legal mechanisms adopted by each State parliament there are common features:

- Unlike the Northern Territory Land Rights Act, Aborigines cannot make claims in relation to unalienated Crown land. The only land that is claimable is that specified by the government.

  The New South Wales legislation limits the claimable land to Mungo National Park, Mootwingee Historic Site and National Park, Coturaidndee Nature Reserve, Mt Grenfell Historic Site and Mt Yarrowyck Nature Reserve.

  The Queensland government has indicated that Archer River, Rokeby CroII, Cape Melville, Alice Mitchell, the Simpson Desert, Jardine, Cedar Bay, Flinders Island, Lakefield, Iron Range, Forbes Island and Cliff Island national parks are claimable.

- Similar to the Northern Territory Land Rights Act, traditional land owners who are able to establish their entitlement are granted a statutory freehold title. However the test of historical association in the Queensland Land Rights Act is not as strict as the traditional attachment test under the Northern Territory Land Rights Act.

- Like the Northern Territory national parks, State governments are entitled to leasebacks of national parks granted to Aboriginals. However apart from the restrictions as to inalienability the terms of the leases are different to those utilised in the Northern Territory in two important respects. Firstly the period of the lease is not limited to 99 years as with the case of the Northern Territory leases. In Queensland they are granted in perpetuity whilst in New South Wales they are granted for 30 years with an unlimited number of 30 year options. Secondly the rental is specified to be a peppercorn rental. This can be contrasted with the Northern Territory leases where the larger rental payments have been used for land management and community infrastructure.

- Unlike the Northern Territory leases, the proposed leases of national parks are not reviewable at regular intervals by the parties. In Queensland they are not reviewable at all whilst in New South Wales they can be reviewed either by agreement or by an act of parliament.

- Similar to the joint management arrangement adopted in the Northern Territory, management policy is determined by a board of management comprising representatives of Aboriginal people. However unlike the Northern Territory, Aborigines are not guaranteed a majority on the board.

- The day to day management of national parks is similar to the Northern Territory in that the relevant government agency manages the park in accordance with the management plan prepared by the board of management.

It is clear from this analysis that the Queensland and New South Wales legislation differs from the Northern Territory model. As a result the bargaining power of Aborigines in relation to the management of lands gazetted as a national park is subsequently weaker than that of Aborigines in the Northern Territory.

A local example of this is provided by the world heritage listing of the Wet Tropic Rainforests in North Queensland. This listing was opposed by local Aborigines who saw the prohibition of logging as defeating their rights to establish a saw milling operation to log rainforest trees from their lease at Yarrabah. The situation was not helped by the government's failure to consult with Aboriginal people prior to the nomination.

Whilst the Queensland government has attempted to overcome problems with participation in the management of national parks through the establishment of consultation protocols such as the accord which has been reached with the Badtjala people of Fraser Island, the reality is that Aboriginal people have minimal bargaining power from a legal perspective.

Mabo

This was at least the case up until 3 June 1992 when the judgment of the High Court of Australia in the case of *Mabo v The State of Queensland* was handed down. That case concerned an action by the representatives of the Meriam people claiming Native Title in relation to the Murray Islands which are located in the eastern most part of the Torres Strait. The case required the High Court to consider for the first time whether Native Title was part of the common law of Australia. In doing so it had to review the 1971 decision of *Milirrpum v Nabalco*.

The court held that the acquisition of sovereignty of Australia by the Crown was an act of the State that could not be challenged in the domestic courts of Australia. As a result Aboriginal claims that the English Crown did not validly acquire sovereignty to Australia in 1788 must now be canvassed before the International Court of Justice a jurisdiction to which Australia must consent before an action can be commenced.

It is for these reasons that the Mabo decision has generated such consternation amongst the business community in particular the mining and pastoral industries.

In relation to *Milirrpum v Nabalco*, the High Court rejected the finding of Mr Justice Blackburn that Australia was terra nullis, that is, it had no system of law or land tenure. As a result it held that the ultimate or radical title acquired by the English Crown upon settlement is subject to Native Title.

The High Court recognised that Native Title may be claimed by Aborigines or Torres Strait Islanders in relation to land if three matters can be proven:

- Firstly, that people claiming Native Title must have been an identifiable community which had a traditional connection with the land at the time of settlement. This may be established through what is called traditional evidence such as statements of parents and relations and other historical records.
- Secondly, the identifiable community must have substantially maintained its traditional connection with the land. An identifiable community is established by showing biological descent and mutual recognition by the members and elders of the community. Traditional connection is established by showing the continued observance of the community's laws and customs although these may have changed with time. Continued physical occupancy of the land is not required.
- Thirdly, the Native Title has not been voluntarily surrendered to the Crown as part of the sale or other arrangement or otherwise extinguished by the Crown.

In relation to extinguishment, the High Court held that a legislative or administrative action which is clearly inconsistent with the continuing right to enjoy Native Title will extinguish Native Title to the extent of the inconsistency. As a result Native Title will be extinguished by the grant of freehold title and the appropriation and use of Crown land for public purposes such as roads and schools. However the grant of leases over Crown land or lesser interests such as authorities to prospect for minerals or mining leases will not necessarily extinguish Native Title. In each case it will be necessary to consider whether the rights granted are inconsistent with the continued traditional use and enjoyment of the land by Aborigines or Torres Strait Islanders.

Where Native Title has been shown to have existed but has been extinguished a majority of the High Court (4 to 3) held that no compensation will be payable to traditional owners. At this point you may be wondering what all the fuss is about. Clearly it will be difficult to establish Native Title and even if it is shown to have existed no compensation will be payable in respect of any extinguishment.

However what the High Court did not consider was the impact of the Racial Discrimination Act an initiative of the Whitlam government which commenced operation on 31 October 1975. That Act prohibits acts of racial discrimination and then confers rights and privileges on excluded racial groups to the same extent that they are possessed by the rest of the community. On the basis of these provisions, two propositions have been propounded:

- Firstly, a legislative or administrative action after 31 October 1975 which has the effect of discriminating against Aboriginal people by extinguishing Native Title is inconsistent with the Racial Discrimination Act and as such is invalid under section 109 of the Constitution.
- Secondly, where Native Title is extinguished after 13 October 1975 Aboriginal people will have the same rights to compensation as would any other person where rights are similarly extinguished.

It is for these reasons that the Mabo decision has generated such consternation amongst the community in particular the mining and pastoral industries.

Joint management agreements in respect of Northern Territory national parks may restrict traditional rights of Aborigines.

Implications of Mabo

What then are the implications of the Mabo decision in relation to the management of parks? This is best considered under two headings:

- Firstly, is State park legislation invalidated through being inconsistent with the Racial Discrimination Act?

  Legislation relating to parks, generally provides for the administration, control and management of those parks. It is clear that Native Title is not extinguished by a law which merely regulates the manner in which traditional property rights may be enjoyed. As a result State Acts relating to park management are not invalid on this ground alone.

  Park management legislation also generally includes provisions which declare cultural and natural resources to be the property of the Crown. It is considered that Native Title is not, extinguished by such provisions as there is no clear or plain intention to extinguish Native Title. As a result the State Park Management Acts would not be valid on this basis.

  Parks management legislation also includes legislation which prohibits persons from dealing with cultural resources or hunting or taking flora and fauna in a park without a permit.

It is considered that such a provision would not be construed to apply to Native Title holders as to do so would be barbaric. In any case the provisions would not evidence a clear and plain intention to extinguish Native Title.

As a result I am of the opinion that State acts relating to park management are in all likelihood valid.

- Secondly, are executive actions taken under State Park Legislation Acts invalidated through being inconsistent with the Racial Discrimination Act?

  State parks legislation generally grants authority to the Minister and the Governor-in-Council to appropriate land for national parks and other protected areas. Under Mabo, a reservation or appropriation by the Crown will only extinguish Native Title where the use of the land under the appropriation is inconsistent with Native Title. As a result Native Title will be extinguished where the management regime operating in the park does not permit the continued enjoyment of traditional rights.

  This may well be the case in relation to some world heritage areas such as the wet tropics. In such a case the executive action of appropriation or reservation may be invalid as inconsistent with the Racial Discrimination Act.

  It would therefore be imperative that park managers ensure that Native Title holders participate in the management of parks.

What then are the implications of the Mabo decision in relation to the participation of Aboriginal people in the management of parks. This is best described under two headings:

- Firstly, will the claim for land within a national park under existing land rights legislation constitute an abandonment or extinguishment of Native Title?

  Land rights legislation generally grants statutory title to traditional occupiers of land. The grounds of establishing entitlement to land are broadly consistent with the common law requirements. Since the grant of the statutory title is neither inconsistent with Native Title nor indicates a clear and plain attention to extinguish Native Title it is considered that Native Title remains unaffected by the grant of a statutory title under existing land rights acts.

- Secondly, can a joint management agreement entered into between the government and Native Title holders constitute an abandonment or extinguishment of Native Title?

  As indicated earlier joint management agreements in respect of Northern Territory national parks may restrict traditional rights of Aborigines. As a result it is considered that Native Title will be abandoned or extinguished to the extent that leases or management plans prepared pursuant to those leases restrict the enjoyment of traditional rights. It would therefore be necessary for Aborigines who are negotiating with State or Federal Governments to ensure that they fully understand and accept any diminution in Native Title rights that may result from entering into a lease or management plan with the State or Federal government.

Having considered the impact of Mabo on park managers and Aborigines alike we have almost come to the end of the track.

Commonwealth Act

That was the case until Prime Minister Keating released in September an outline of the proposed legislation of the Native Title. This outline has been the subject of much intense debate during September and October of this year culminating in the Prime Minister's historic statement that a compromise had been reached by all the major stakeholders. Although the details of the legislation which gives effect to this compromise have yet to be released, it is important to note that the proposed legislation will undoubtedly empower the States to validate those executive actions of park managers which have extinguished Native Title provided the Native Title holder is compensated by the State for any extinguishment or impediment of Native Title that results from the validation of the executive action. This merely confirms the right to compensation which would have existed under the Racial Discrimination Act in respect of the extinguishment of Native Title after 31 October 1975.

Conclusion

Having come to the end of our journey it is necessary that we look forward to the future. Mabo gives Aborigines power particularly in relation to national parks and other areas not subject to existing land rights legislation. It also represents a paradigm shift in the underlying legal and moral assumptions of European colonisation. Together these matters will have a substantial impact on the future management of national parks and protected areas in this country.

This paper was presented at the Royal Australian Institute of Parks and Recreation National conference, Cairns, September 1993.

The Queensland Supreme Court and Planning and Environment Court: Recent decisions and the application of the law

Ian Wright | Rosanne Meurling

This article discusses a number of recently decided cases surrounding local government and planning policies and also discusses a number of new legislative and policy changes

September 1993

The flow of new legislation, decided cases, discussion papers and policy pronouncements has continued at an alarming rate. This issue examines a number of cases recently decided as well as various legislative and policy changes.

Recent cases

Validity of council's by-laws

In the first six months of this year, Mr Justice Thomas of the Queensland Supreme Court has handed down three important decisions regarding the validity of local authority by-laws.

Paradise Projects Pty Ltd v Gold Coast City Council [1993] QSC 121 concerned a council by-law which prohibited a person without a permit from selling any article on any road or land under the control of the council. The council had refused to issue permits to people to distribute leaflets in streets advertising local night clubs. His Honour held that the by-law was not limited to the control of the advertising or the distribution of hand bills but denied ordinary commerce and therefore was in excess of power and invalid.

The matter of the Gold Coast City Council by-laws also concerned the same by-law. His Honour stated that the by-law was a great example of overkill and that it had no reasonable relation to the purposes for which the power under the Local Government Act was granted and therefore was invalid.

In *Kwiksnax Mobile Industrial and General Caterers Pty Ltd v Logan City Council* [1993] QSC 122 the court was concerned with a by-law which prohibited a person from setting up any stall or stand for the sale of goods without a permit. His Honour held, amongst other things, that the by-law was extraordinarily wide in that it sought to apply to all structures such as restaurants, shops, snack bars and most commercial enterprises used for the sale of goods and therefore was invalid in accordance with the provisions of the Local Government Act.

Drafting of planning schemes and by-laws

Pine Rivers Shire Council v Dorfler concerned a by-law which prohibited subdivision in a particular zone unless road works were constructed in accordance with the council's design manual. The Planning and Environment Court held that the relevant subdivision condition was not prescribed by the by-law because it relied on a design manual which was not part of the by-law or council's planning scheme. On appeal the Court of Appeal held that a gazetted by-law was valid notwithstanding that it incorporates other ungazetted documents provided the identity of the incorporated documents is clear and the incorporated material is subsidiary rather than essential to the by-law.

Rezoning conditions under the Local Government Act

The matter of *Giant Supermarket Properties Limited* concerned a declaration that conditions imposed by the Planning and Environment Court on a rezoning approval under the Local Government Act as a result of an objector appeal were not binding on the subsequent owner of the land. The planning and environment court held that the conditions were not binding on the applicant and therefore did not restrict or qualify the applicant's right to use the subject land in accordance with the town plan.

Validity of planning schemes and town planning and by-law

Makucha v Albert Shire Council concerned Council's town planning by-law which prescribed information to be contained in a town planning application which was different to that prescribed by the Regulations to the Act. The court held that the by-law did not conform with the Act in that the extent of the information required by the by-law was additional to that required by the Regulations and to this extent it was of no force and effect. Therefore an application which did not comply with the requirements of the by-law but did comply with the requirements of the Regulations was held to be valid.

Makucha's case has been considered in two subsequent cases. In *Fitzgerald v Logan City Council* it was argued that an application failed to comply with a planning scheme requirement that it be accompanied by an economic impact assessment in the case of a shopping centre less than 5,000 square metres. The Act at that time did not require an economic impact assessment for shopping centres with a floor area less than 6,000 square metres. The court held that the planning scheme added to the provisions of the Act and to that extent were of no force and

effect and that the application was therefore properly made. *Heilbron & Partners v Pine Rivers Shire Council* concerned a condition requiring a park contribution to be made in accordance with a council by-law where the land to be subdivided was to be used for rural purposes. The court held that park contributions are dealt with by section 5.6 of the Act and that the provisions of the by-law were of no force and effect to the extent that they required a park contribution to be made.

Gemcrest Pty Ltd v Gold Coast City Council concerned a refusal of an application to extend a lawful existing use pursuant to the lawful non-conforming use provisions of the council's planning scheme. The application made was not one which was required by section 3.1 of the Act. The court held that those provisions of council's planning scheme did not conform with the Act and therefore were of no force and effect. As a result the application was not authorised by law and the appeal was dismissed.

Stubberfield v Brisbane City Council concerned an appeal to the Court of Appeal in respect of a declaration granted by the Planning and Environment Court in relation to the status of the use of land placed on the register of non-conforming uses under the council's town plan. Amongst other things the Court of Appeal held that the provisions of the Act relating to the register of existing uses did not displace the provisions of the Brisbane town plan relating to the register of non-conforming uses. The court held that these provisions of the Act should serve as a statutory minimum designed to supplement the provisions in the planning scheme that are more restrictive or less favourable than those contained in the Act. Accordingly an entry in the register under the town plan should be given its full effect.

Status of non-statutory documents

Cridland & Ors v Whitsunday Shire Council concerned an objector appeal against a combined application to rezone and subdivide land at Cannonvale. The case concerned whether a proposed road complied with the Australian Model Code for residential development and the Queensland Streets Code. Quirk J accepted that these documents do not have any statutory force but are a valuable set of guidelines which assist the designer.

Peter Upham & Ors v Brisbane City Council concerned an objector appeal against the council's approval of an apartment building in St Lucia. The proposal complied with the council's residential design guidelines. Quirk J held that the status of the guidelines was not clear but were certainly well short of that of a formally adopted policy and accordingly they should be approached on the basis that they do no more than indicate how council's discretion to offer relevant relaxations might be exercised by employing proper town planning principles. His Honour distinguished the case of *Conroy & Ors v Brisbane City Council* where the court found itself unable to accept that the guidelines as a whole reflect sound town planning principles. His Honour held that in any appeal whether the draft guidelines can be regarded as a valid and relevant expression of town planning opinion must be established on the evidence and that in the circumstances of this case the expert town planning opinion was in favour of the guidelines.

Strategic plan

Cridland & Ors v Whitsunday Shire Council as indicated above concerned an objector appeal against the council's approval of a combined application to rezone and subdivide land at Cannonvale. In dismissing the appeal the court held that conflict with the strategic plan is a matter of some consequence and if it is to defeat a proposal it must be apparent on a proper construction of the plan. Accordingly artificial or ad hoc approaches to the interpretation of a strategic plan will not be regarded favourably by the court.

Amendment of concept plan

Garrick Wells & Ors v Maroochy Shire Council concerned the amendment of a subdivisional concept plan lodged with the rezoning application after public notice had been completed. The council held that the Regulations to the Act did not require a concept plan to be lodged with the rezoning application and accordingly whether it was amended or not was a matter of no significance. The application for a declaration was therefore dismissed.

Interpretation of planning scheme

HA Bachrach Pty Ltd v Caboolture Shire Council involved an appeal to the Court of Appeal on the basis that the Planning and Environment Court had made an error or mistake of law in construing the strategic plan. The Court of Appeal held that the opinion of a town planner upon a question of construction whether the question is one of law or fact is irrelevant. Therefore it was inappropriate for the Planning and Environment Court to make a decision about the meaning of the scheme provision by listening to all town planning witnesses and then choosing one interpretation. The interpretation of a planning scheme was held to be a question of law for the Judge to decide.

Redland Shire v Seymour Land Pty Ltd also involved an appeal to the Court of Appeal on the basis that the Planning and Environment Court had erred in law in interpreting the council's planning scheme. The Court of Appeal again confirmed that the interpretation of planning scheme is a matter for a Judge. However in this case unlike Bachrach's case there was no indication that the Judge had merely adopted the view of one town planner rather the Judge after hearing the evidence of the planners had considered the question of construction carefully and applied the interpretation that she thought was relevant.

Construction of roads and public open space zone

Dorfler v Redland Shire Council concerned a declaration to have a subdivision ruled invalid on the basis (amongst other things) that it involved a subdivision and the construction of a road through land zoned public open space. The court held that the road does not of itself give rise to questions of impermissible use and that once dedicated the road is not subject to zoning and is simply taken out of the zoned area of the planning scheme. Accordingly the court held that there was no overriding objection to the subdivision of land in the public open space zone including the excision of land for road.

Costs

Tamborine Mountain Progress Association Incorporated v Beaudesert Shire Council concerned an order against an objector appellant to pay costs in respect of an unsuccessful application brought by the applicant to have the appeal struck out on the basis that the appellant had failed to comply with the provisions of the Association's Incorporation Act in relation to lodgement of the appeal. The court of appeal held that the Planning and Environment Court had power to order costs and that that power had been properly exercised. The court left open the question of whether a failure to comply with the requirements of another Act could give rise to a costs order under the provisions of the *Local Government (Planning and Environment) Act 1990*.

Resumption

Little v The Minister of Land Management concerned an application by an objector to a notice of intention to resume seeking adjournment of a hearing in the absence of an expressed statutory right to an adjournment in the Acquisition of Land Act. The Supreme Court held that the Act clearly conferred a power on the constructing authority to destroy, defeat or prejudice a person's rights, interests or legitimate expectations and as such the court would ordinarily apply the principles of natural justice. Therefore the actions of the constructing authority in having a hearing immediately upon the notification of the notice of intention to resume and thereby not allowing the objector any time to prepare their case was a denial of natural justice. Accordingly the objector was entitled to an adjournment to properly prepare their case including the preparation of expert evidence if necessary.

Road layouts within subdivisions

Proctor v The Brisbane City Council concerned a combined application to rezone and subdivide and for town planning consent to erect attached houses and parking and recreational facilities. The appeal was lodged by an objector who adjoined the land subject to the application. The appellant contended that there should be a condition of approval that access should be provided to his land through the subject land. The court held that in the absence of the appellant's land being land locked or rendered sterile such a condition was not reasonable or relevant. It was established in evidence that the council had an overall layout plan which showed a preferred pattern of layout for the future roads in the area. The proposed access to the subdivision did not conform with the proposed layout. It was submitted by the appellant that there was a public benefit in the provision of a link in the overall road layout to his land. The court stated that it was not satisfied that the public benefit to be gained by the access road proposed by the appellant was such as to make it a relevant or reasonably required condition of the proposed subdivision. The case established that a local authority cannot require a subdivider to provide a road connection to adjoining land unless the planning scheme requires that such a road be provided, that the land will be rendered sterile or the land will otherwise be landlocked. The case also affects the ability of a local authority to plan for the future road network in an area in the absence of formal recognition of the proposed future road network in its planning scheme.

Legislation

The *Local Government Legislation Amendment Act (No. 2) 1993* provided for the amendment of the *City of Brisbane Act 1924*, the *Local Government Act 1936* and the *Local Government (Planning and Environment) Act 1990*. The amendment of the *City of Brisbane Act 1924* validated certain ordinances made by the Brisbane City Council. It would appear that the council failed to follow the statutory procedures for the gazetting of its ordinances and the amendment is designed to validate those ordinances.

The amendments to the Local Government (Planning and Environment) Act are intended to reform the planning and development decision making process of local authorities and the Department of Housing Local Government and Planning. In particular the amendments provide for the following changes:

- Planning schemes are recognised as local government instruments whilst State planning policies are recognised as subordinate legislation.
- The amount of land to be dedicated or monetary contributions to be made for park provisions during subdivision may be established by local planning policies, planning scheme provisions or by-laws.
- Local authorities are given a general power to delegate decision making or planning matters.
- Allotments without access can be approved by council to ensure the performance of external works and contributions without the taking of bonds.
- Applicants for subdivision are required to pay outstanding rates before their applications are determined rather than all of the rates that are levied.

- Local authorities without divisions may nominate specific members to receive notifications of planning applications.

Policies

Practitioners should be aware that the Department of Housing, Local Government and Planning has issued circulars in relation to cattle feedlots, the rezoning of Commonwealth land, the *Local Government Legislation Amendment Act (No. 2) 1993* and alternatives to bondings.

In addition it should be noted that the Australian government has ratified the convention on biological diversity on 18 June 1993. The convention was signed by Australia at the Earth Summit in Rio de Janiero on 15 June 1992. The convention provides a framework for global action to conserve and the sustainable use of biological diversity. The convention contains guiding concepts such as the precautionary principle and each country being responsible for the conservation and sustainable use of its biological resources.

The Regional Planning Advisory Group (**RPAG**) has also released its draft regional framework for growth management in South East Queensland. The framework includes a preferred pattern of urban development to the year 2011.

The Brisbane City Council has also adopted a New Signs Guideline and will shortly introduce a New Signs Ordinance in the city. The Department of Housing Local Government and Planning has also issued a building note in relation to the privacy of information relating to building applications and approvals. In summary the note provides that any person with the consent of the owner or the local authority may inspect any document in a building application. It is also permissible for local authorities to issue lists of building applications unless the applicant has indicated that the release of the information is not acceptable in the applicant.

This paper was published as a Planning Law Update in the Queensland Planner 33:3, 9-11, September 1993.

Legal aspects of treated wastewater reuse and disposal

Ian Wright | Mark Lynch

This article discusses the unsustainable existing philosophy of water treatment in Australia and asserts that with the implementation of ecologically sustainable development a new integrated approach to water management can be adopted

November 1993

Introduction

The existing philosophy of water treatment is unsustainable in both financial and environmental terms. The big pipe in – big pipe out approach we have adopted over the last 50 years has meant that up to 85% of capital investment has been in low value added pipes and pumps and less than 15 to 20% in water treatment (ESD Intersectoral Report 1991: 122). In addition, the continual flux of nutrients and toxic substances being transferred from land to natural water systems and food chains is not sustainable.

Ecologically sustainable development

As a result, the concept of ecologically sustainable development has been adopted by Commonwealth, State and local governments as the philosophical basis which will underpin future approaches to water infrastructure and technology.

Ecologically sustainable development is defined simply as development which meets the needs of the current generation without compromising the ability of future generations to meet their own needs (WCED 1990: 8).

This paradigm was embodied in the Inter-governmental 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. Pursuant to the agreement, the parties have agreed that ecologically sustainable development will be implemented by ensuring that policy making and program implementation is based on four principles:

- The lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation – this is often referred to as the precautionary principle.
- The present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of existing and future generations – this is often referred to as intra-generational and inter-generational equity.
- Biological diversity and ecological integrity should be conserved.
- Environmental costs and benefits should be internalized within the development process through the valuation of environmental assets and the adoption of polluter pays, user pays and incentive mechanisms – this principle is often called the internalization of externalities.

Local waste water management

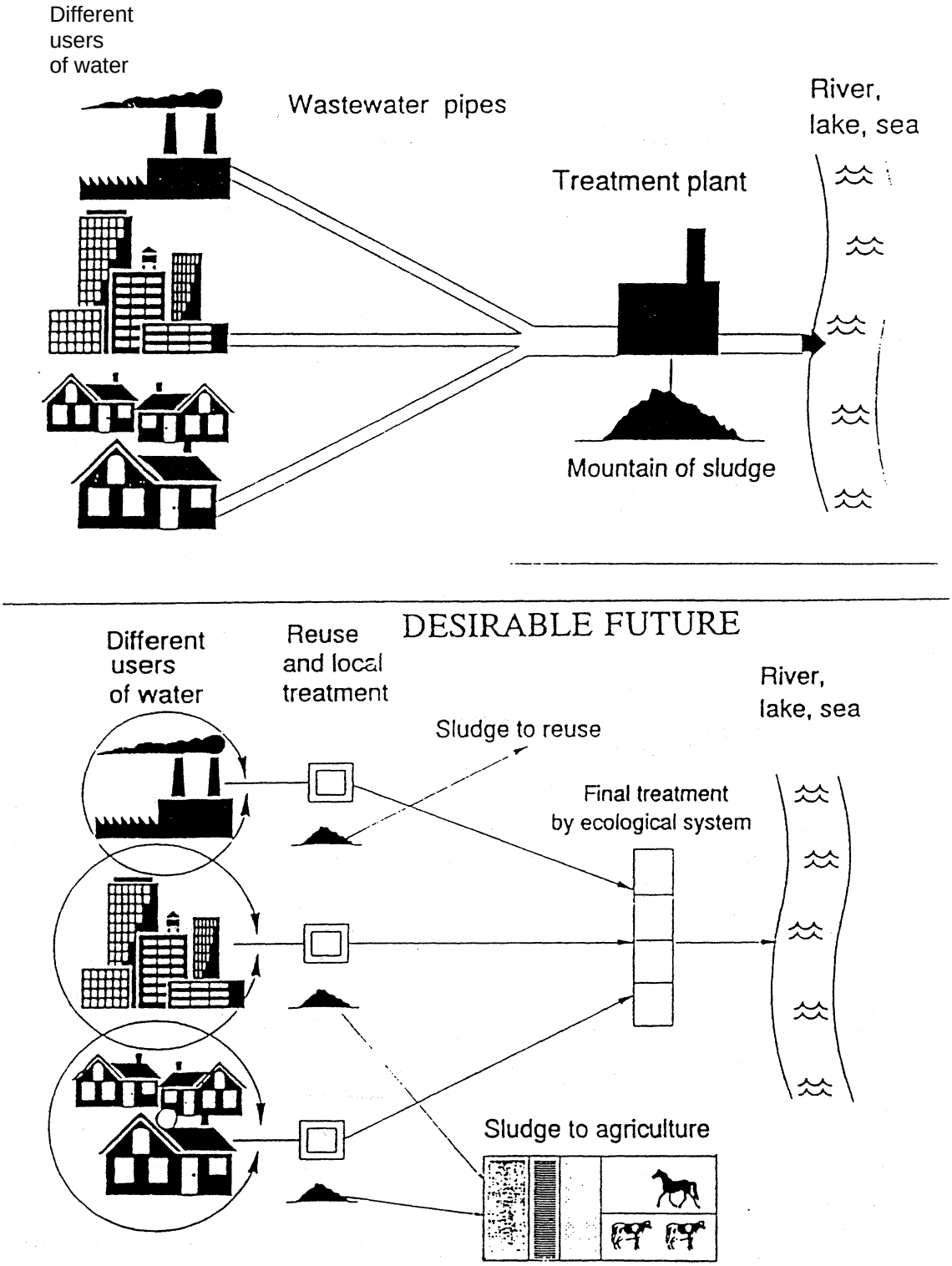
The implementation of ecologically sustainable development will result in a new approach to water management which will include the following elements:

- integrated system approaches with both structural and non-structural elements as opposed to narrow-minded technological approaches;
- multi-disciplinary cooperation in order to solve complex problems;
- small scale in contrast 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.

Changed engineering philosophy

The new approach to water management will require engineers to adopt a different philosophy; one which is based on fitness for purpose. The challenge for engineers in the future will be to integrate local supply substitution, that is the reuse of stormwater and wastewater for a range of uses. The characteristics of the shift that is required in engineering practices is illustrated in Figure 1.

Figure 1 Present Situation Diagram



Source: Newman and Nouritz 1992:33

Legal implications

The localised disposal and reuse of wastewater raises a variety of legal issues for industrial activities which generate wastewater, local authorities who are primarily responsible for the treatment of this wastewater and their respective employees, officers and consultants.

The purpose of this paper is twofold:

- to examine the legal and administrative instruments that regulate the disposal and reuse of wastewater; and
- to examine the legal liability of industry and local authorities in relation to the disposal and reuse of wastewater.

Legal instruments

The disposal and reuse of wastewater is regulated by a complex amalgamation of statute and judge made law (otherwise known as the common law).

Common law

The common law allows an individual or a group of individuals who have suffered damage or loss as a result of the disposal or reuse of wastewater to seek relief before a judge for an injunction to stop the action or for a monetary payment to compensate for any damage. There are five common law causes of action that may be available to a person who has suffered damage or loss as a result of the disposal or reuse of wastewater as follows:

- *Negligence* – This action arises where a person has suffered reasonably foreseeable damage as a result of the breach of a duty of care owed to that person. For example, it has been held by the court that a statutory authority which failed to warn a riparian owner of dangerously high levels of chemicals in the water flowing through his property was liable in negligence (*Scott-Whitehead v National Coldwaxd* (1987) 53 P & CR 263).
- *Nuisance* – This action arises where the use of land causes an unreasonable and substantial interference with a person's use or enjoyment of land (known as private nuisance) or the right of the public at large to health, safety, property and a quality of environment (known as public nuisance). In order to have legal standing to bring an action for public nuisance a person 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 (*Allan v Guff Oil Refinery Limited* (1981) AC 100). However, this defence of statutory authority does not apply where an 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. It is unnecessary to prove damage to the person, land or goods but the interference must be part of the defendant's act and not merely a consequence of it. Therefore, sewage deposited on a person's land from a sewerage works via the natural flow of a river has been held to be 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 trespass as the injury was consequential not direct (*Southport Corporation v Esso Petroleum* (1954) 2 QB 182).
- *Strict Liability* – This action arises where a plaintiff's person, land or goods is damaged as a result of the escape from land of a dangerous substance which would not naturally be there. Unlike nuisance and trespass, the reasonableness of a defendant's actions is not considered when determining liability and a defendant may be liable even where all due care and diligence was used to prevent the escape of the substance.
- *Breach of Statutory Duty* – This action arises where a person has suffered loss or damage as a result of the breach of a statutory obligation which was intended by the Parliament to give rise to a civil action for damages. To date, no actions have been taken for the breach of a statutory duty in relation to any environmental statute in Australia. This being so it is a matter of speculation whether any provision of the *Contaminated Land Act 1991*, the *Clean Waters Act 1971* or the draft *Environmental Protection Bill 1993* would be seen to give rise to personal actions for breach of statutory duty.

It can be seen that the common law is very much concerned with the maintainment of private property 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. There are also procedural, evidential and conceptual difficulties associated with the application of the common law doctrines which limit their usefulness in practice. As a result governments have and will continue to play a major role in formulating wastewater policies and programs and implementing these through legislative activity.

Legislation

Commonwealth, State and local governments have introduced legislation to control the disposal and reuse of wastewater. Traditionally, governments have adopted a regulatory approach to wastewater disposal and reuse.

Legislation has therefore limited the range of decisions potentially open to wastewater agencies and private persons by reference to certain criteria designed to protect the public interest. For example, the current *Clean Waters Act 1971* is essentially negative in conception in that the discharge of waste directly or indirectly to any waters is prohibited unless a licence is issued by the Chief Executive of the Department of Environment and Heritage. The Department is therefore responsible for the protection of the public interest.

In exercising its statutory power the Department is sometimes guided under the *Clean Waters Act 1971* by general statements of policy and on other occasions is required to apply specific legal criteria. This is best illustrated in relation to applications for a licence to discharge wastes into waters. Section 24(2)(c) of the *Clean Waters Act 1971* requires the Department to have regard to a range of policy matters such as the character and flow of the receiving water; the best available practical methods of treating the waste; the present and future requirements for quality and quantity of such water; any prescribed water quality plans standards criteria or objectives; policies regarding the conservation of the environment or the location of industries; the location of treatment plants; the conditions of a mining lease; the requirements for future waste discharges to such water; the combined effects of the discharge and any other discharges of wastes to such water; the effect of periods of no flow in a watercourse; tidal effects; the effects of changes in weather; the effects on trade waste of changes in raw materials, processes and operations; the desirability of recycling or reusing the wastes; alternative means of disposal; and the effects on the environment. In addition, regulation 26 requires the Department to have regard to specific legal criteria such as water quality objectives, water quality criteria and water quality plans.

Whilst the regulatory approach has the advantages of being administratively simple and relatively cheap, it is inflexible and essentially negative in its focus. As a result governments have sought to adopt a more interventionist approach in respect of wastewater disposal and reuse.

Legislation has therefore empowered public authorities to require wastewater agencies and private persons to achieve certain public interest objectives. For example, the draft *Environmental Protection Bill 1993* which was recently released by the State government, empowers the Department of Environment & Heritage to prepare an environmental protection policy in respect of water which will set out water quality goals for the receiving environment and prescribe the quality and concentration of pollutants which may be discharged during a certain period. This legislation is therefore based on the relationship between the wastewater discharge and its effect on environmental quality. The manner in which the environmental goals are achieved is left to the wastewater agency and the private person. However the Bill does empower the Department to issue non legally binding guidelines which prescribe best practice management practices such as product technologies, the use of certain substances and the prescribed level of treatment that is considered appropriate to achieve the specified environmental goals.

Legal instruments

The interventionist approach as illustrated in the draft Environmental Protection Bill has led to the utilisation of a greater range of legal instruments. Regulatory legislation such as the existing *Clean Waters Act 1971* is based on an act of Parliament and regulations which prescribe the policies and criteria under which wastes are to be discharged to waters.

The draft Environmental Protection Bill on the other hand utilises three legal instruments:

- a Bill;
- environmental protection policies; and
- non-legally binding guidelines.

The Bill establishes the legal framework and provides for the proclamation of subordinate legislation in the form of legally binding environmental protection policies.

Environmental protection policies may cover the State or an area such as a catchment as well as issues such as air, noise, water and waste. It is intended that the environmental protection policy in respect of water quality will prescribe a water management strategy in respect of the State (Ricketts 1993: Pers.Comm). The strategy will specify principles, goals, objectives, implementation strategies and evaluation methodologies.

The principles underlying the water quality policy will be based on the philosophy of ecologically sustainable development in accordance with the State government's obligations under the Inter-governmental Agreement on the Environment. The goals prescribed in the Environment Protection Policies will identify the environmental values or beneficial uses of water resources. The Australian and New Zealand Environment Council and the Australian Water Resources Council have recognised that water is necessary for ecosystem protection, drinking, recreation and aesthetics, agricultural uses and industrial uses (ANZECC and AWRC 1992a).

The objectives set out in the Environment Protection Policies will specify the water quality criteria appropriate to particular classes of water. This process of setting objectives will involve three steps. Firstly, waters will, following a public consultation process, be classified in accordance with their environmental values. Secondly, water quality criteria would be derived. Water quality criteria are parameters of maximum levels of contamination which can be tolerated based on scientific evidence and informed judgment for the protection of environmental values (ANZECC and AWRC 1992b: 11). Finally, water quality objectives based on the water quality criteria will then be specified in respect of particular classes of the water.

The implementation strategies contained in the Environmental Protection Policies will focus on the prevention of degradation in water quality as well as the management of waters that have or are being degraded. Prevention strategies include the provision of buffering around sensitive areas such as water catchments or aquifer recharge areas as well as the integration of water quality issues into the land use planning process. The integration of water and land use planning will be an important challenge for local authority engineers and their consultants.

Management strategies will include the licensing of water pollution from point sources such as industrial activities and wastewater treatment plants. This will involve the setting of water quality standards and the preparation of environmental management programs for waste generating activities. Water quality standards are the limits or tolerances prescribed in relation to the quality and rate of discharge of wastes to any waters. An environmental management program is a timetable of performance indicators prepared by the person disposing of the waste and approved by the Department which provides for the phased improvement of environmental performance.

The environmental protection policy will also provide for the evaluation of implementation strategies to ensure that they are achieving the water quality objectives. Evaluation methodologies will include self-audits and monitoring by licensed holders either as a condition of the licence approval or at the direction of the Department. In addition the Department will commence regular state of the environment reporting.

The Bill and the Environmental Protection Policy in respect of water quality are supported by guidelines. These are not legal requirements and simply are a source of information to which regard should be had in developing water quality standards, environmental management programs, monitoring and auditing protocols, water quality criteria and water quality objectives.

In addition to any water quality guidelines that are produced by the Department of Environment and Heritage a number of water quality guidelines have been produced in other jurisdictions. Examples include:

- Australian Guidelines for Recreational Use of Water – the National Health and Medical Research Council;
- Recommended Water Quality Criteria – the Environment Protection Authority of Victoria;
- Water Quality. Criteria for Marine and Estuarian Water – Bulletin 103 Environmental Protection Authority of Western Australia;
- Draft National Water Quality Guidelines – Australian and New Zealand Environment Council October 1990;
- Guidelines for the Use of Reclaimed Water in Australia – National Health and Medical Research Council and the Australian Water Resources Council 1987;
- Guidelines for the Disposal of Wastewater by Land Application – State Pollution Control Commission New South Wales;
- Guidelines for the Disposal of Wastewater on Land by Irrigation – Environment Protection Authority Victoria 1990;
- Environmental Guidelines for the Discharge of Waste to Ocean Waters – Environment Protection Authority of New South Wales 1993;
- Guidelines for the Use of Treated Sewerage for Agricultural, Irrigation and Recreational Areas and Impoundments – Water Quality Committee Queensland 1977;
- Draft Guidelines for Sewerage Systems: Effluent Management – Australia and New Zealand Environment and Conservation Council and Australian Water Resources Council 1992; and
- Australian Water Quality Guidelines for Fresh and Marine Waters – Australia and New Zealand Environment and Conservation Council 1992.

Liability for disposal and reuse of wastewater

Disposal options

The wastewater treatment process produces an effluent that is primarily water with some residuals (ANZECC and AWRC I992b: 8). The disposal of effluent involves its return to the water cycle. This can occur by:

- the reuse for irrigation, aquifer recharge or other uses;
- discharge to land where the effluent eventually reaches the ground water or is released to the atmosphere by evaporation or evapotranspiration; and
- discharge to water, being either inland waters or the ocean.

Disposal to land

The disposal of effluent to land other than for the process of reuse may give rise to land contamination as well as degradation of surface and ground waters.

In relation to land contamination, the *Contaminated Land Act 1991* provides that it is an office for a person to cause land to become contaminated land (section 30(1)). Contaminated land is defined to include land that in the opinion of the Chief Executive is affected by a hazardous substance so that it is a hazard to human health or the environment (section 4).

To assist in the determination of whether the land is contaminated the Chief Executive has issued guidelines which set out investigations threshold or background levels below which land is not considered to be contaminated.

If the investigation thresholds are exceeded the land is considered to be contaminated and the person disposing of the effluent to the land as well as the owner and the occupier must notify the Land Contamination Unit within the Department of Environment and Heritage of the contaminated land. Irrespective of the existence of land contamination, local authorities are also required to notify the Land Contamination Unit of all uses which are used for a purpose prescribed in the regulations to the Act (section 17(4)). It is important to note that land used for commercial waste storage or treatment, hazardous waste fills and sanitary landfills are required to be notified to the Land Contamination Unit (section 17(5) and regulation 3).

Where the land is notified to the Land Contamination Unit as being contaminated, it is placed on the Contaminated Sites Register as a possible site and in the case of a prescribed purpose, a probable site. The Chief Executive may require the person depositing wastewater, the owner and the local authority to investigate the land and where appropriate to remediate the land (sections 19 and 20). Land which is assessed as being contaminated is classed as a confirmed site while land which is not contaminated is classed as a release site. Land may be classed as a restricted site if it can be used for limited purposes or as a former site if it is remediated.

The financial cost of contamination can be extremely high. A penalty of $60,000 is prescribed for persons causing land contamination whilst the cost of remediation may potentially be in the order of hundreds of thousands or perhaps millions of dollars.

In addition to land contamination, effluent disposal on land may also result in contaminated surface water and groundwater. In such circumstances a licence is required under the existing *Clean Waters Act 1971* (sections 23(1) and (8)). A licence or approval would also be required under the draft *Environmental Protection Bill 1993* (clauses 30 and 31). The Chief Executive is required to consider various policy matters in determining to grant a licence or approval (section 24 of the *Clean Waters Act 1971* and clause 34 of the *Environmental Protection Bill 1993*) where a licence or approval is granted subject to conditions. The Chief Executive may specify legally binding water quality standards based on non-binding guidelines. It should also be noted that a person may be liable under the Health Act for a penalty where wastewater has been allowed to run from any premises so as to cause an offensive smell.

It should be noted however that in practice these legal requirements have little impact as land application is rarely feasible other than in semi-arid and arid regions for small communities due to the limited capacity of such schemes to absorb flow rates.

Disposal to water

The limited opportunity for disposal of effluent to land and the concentration of Australia's population around the coastal regions means that the majority of effluent is discharged to river estuaries and the ocean. The ocean is particularly favoured as a method of disposal due to its large assimilative capacity and the opportunity for dilution and dispersion.

Whilst the effect of most discharges in the oceans are statistically insignificant there may be local significant effects where effluent is disposed in river estuaries and near shore areas.

The disposal of effluent to inland or marine waters is required to be licensed under the existing *Clean Waters Act 1971* (section 23). A licence or approval would also be required under the draft Environmental Protection Bill (clauses 30 and 31).

Effluent reuse

Unfortunately the disposal of effluent to land and waters involves large amount of capital investment that is not sustainable in the longer term. As a result, options for reusing effluent are gaining attention. Research is ongoing into the use of effluents for aquaculture, silviculture, agriculture and horticulture, industry, urban non-potable uses such as parks and gardens, household gardens and toilets and the recharge of aquifers and urban wetlands.

The potential legal liabilities associated with the reuse of effluent is identical to those applicable to land and water disposal. Land contamination will give rise to liabilities under the *Contaminated Land Act 1991*. Activities which give rise to public nuisances may also be liable under the Health Act whilst authorisations are required under the existing *Clean Waters Act 1971* and the draft *Environmental Protection Bill 1993* in respect of discharge to aquifers and urban wetlands.

Of greater moment however are the changes that will be required to the strategic planning system and the sewerage and water supply codes in order to implement effluent reuse.

The Sewerage and Water Supply By-laws under the *Sewerage and Water Supply Act 1949* will have to be substantially amended to provide for dual water supply systems, one of high quality and one of a low quality perhaps reclaimed from wastewater. In conjunction with this, the by-laws will also have to be amended to allow for the on-site treatment of wastewater utilising technology such as composting toilets, aerobic treatment systems (such as biocycle) and modified septic tank systems with soil amendment around the leach drain to neutralise nutrient contamination (Newman & Mauritz 1992:35).

The by-law will also have to be flexible enough to allow the utilisation of high tech solutions involving UV disinfection, chemical and bio-gas technologies as well as ecological engineering techniques such as wetland systems, aquaculture and hydroponics (Newman & Mauritz 1992:35).

At the strategic planning level, it will be necessary to make provision for the integration of land use and water planning under a new set of goals. It will also be necessary to focus on the structure of our urban areas as effluent reuse technologies will require the development of decentralised water management systems. To implement this urban structure planning instruments such as strategic plans and development control plans will have to be focused more on community planning and urban villages. It may well be that our future lies not with the commonly held vision of urban consolidation and high densities but with the establishment of new urban villages on the urban fringe which do not need to be linked to the existing centralised treatment systems.

Conclusions

The existing engineering approach of big pipe in – big pipe out is not ecologically sustainable. In accordance with the obligations under the Inter-governmental Agreement on the Environment, Commonwealth, State and local governments will be required to change their approach to the disposal of wastewater.

This new approach will involve the establishment of small localised water management systems focused on source control as opposed to existing large scale centralised systems focused on end of pipe control.

The implementation of this approach will require the introduction of interventionist legislation by both State and local governments. The introduction of the *Contaminated Land Act 1991* and the draft *Environmental Protection Bill 1993* by the State government and the adoption by local government of new strategic planning instruments based on integrated land use and water planning at the local level will go part way towards achieving the goal of ecologically sustainable development.

However policymakers and lawyers can only provide the institutional framework within which this goal can be achieved. Ultimately it will be up to the engineering profession to provide cost effective solutions to the disposal and reuse of wastewater. This is the immediate challenge for engineering professionals.

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Deciphering the Environment Protection Bill

Ian Wright

This article discusses the recent release of the draft Environment Protection Bill by the State government. This article analyses how this draft Bill will implement ecologically sustainable development and how it will manage environmental contamination and degradation

December 1993

Environmental protection legislation

Policy framework

The State government has recently released a draft Environment Protection Bill for public consultation. The draft Environment Protection Bill is intended to implement the concept of ecologically sustainable development. This concept refers to the use of natural resources in a way which meets the needs of present generations without compromising the ability of future generations to meet their needs.

The need to implement the concept of ecologically sustainable development arises from the Inter-governmental Agreement on the Environment signed on 25 February 1992 by all State and territory governments, the Commonwealth government and the Local Government Association of Australia.

As a party to that agreement, the Queensland government has acknowledged that the development and implementation of its environmental policies and programmes should be guided by the concept of ecologically sustainable development.

The Queensland government has also agreed that the promotion of ecologically sustainable development requires policy making and programme implementation to be based on the following principles:

- *Precautionary principle* – environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.
- *Intergenerational equity* – the present generation should ensure that the next generation is left with an environment which is at least as healthy, diverse and productive as the one the present generation experiences.
- *Irreversibility* – public and private decisions need to be based on careful evaluation to avoid, wherever possible, irreversible damage to the environment.
- *Valuation of environmental assets* – the valuation of environmental assets should take into account all relevant values including economic, ecological. aesthetic and social values.
- *Polluter pays* – those who generate or benefit from pollution should bear the cost.
- *User pays* – the users of goods and services should pay prices based on the full life cycle costs of providing them, including the use of natural resources (including the global commons) and the ultimate disposal of any wastes.

These principles form the policy basis upon which the draft Environment Protection Bill has been developed.

Scope of legislation

The draft Environment Protection Bill is intended to be introduced into parliament in the first session of 1994 but will not commence until mid-1994.

The legislation is intended to control environmental contamination and degradation. The legislation will repeal the *Clean Air Act 1963, Clean Waters Act 1971* and the *Noise Abatement Act 1978*. The legislation is complemented by the *Contaminated Land Act 1991* which commenced operation on 1 January 1991.

The draft Environment Protection Bill applies to both the private and public sectors. The Bill provides a broad framework specifying mechanisms for:

- the development of environmental standards;
- the management of environmental contamination and degradation;
- the enforcement of the legislation; and
- the administration of the legislation.

The legislation however, does not deal with environmental impact assessment. This will be the subject of separate legislation. The proposed Environmental Impact Legislation will establish mechanisms for evaluating the environmental significance of human actions whether they be development projects, policies, plans, products or programmes. An analysis of that legislation is beyond the scope of this article.

With this qualification in mind, it is now appropriate to consider each of the elements of the draft Environment Protection Bill.

Environmental standards

Environmental standards will not be specified in the legislation. Rather, they will be set out in subordinate legislation to be known as environment protection policies. These are not policies in the conventional meaning: of the word. They are prescriptive legally enforceable documents that contain standards, management techniques and penalties.

Environment protection policies will be developed by the Chief Executive of the Department of Environment and Heritage who is required to give public notice of proposed policies and to consult with relevant local authorities and other parties affected by the policies.

Environment protection policies could cover general topics such as waste minimisation or CPCs as well as specific topics like water quality of the Brisbane River catchment or air quality in the Brisbane air shed.

The first environment protection policies will relate to air, water, noise and waste management and in accordance with the Inter-governmental Agreement on the Environment will impose standards that are consistent with those in other States. After these policies have been declared, other more specific policies will be developed on a needs basis such as for transport, noise, cattle feedlots and litter.

In order to provide certainty for industrial investment whilst at the same time ensuring that environment protection policies keep pace with technological innovations, environment protection policies will be reviewed periodically but at least every seven years.

Environmental management

In addition to setting standards, the draft Environmental Protection Bill also provides mechanisms for managing environmental contamination and degradation. At least seven management mechanisms are envisaged by the Bill.

Firstly, a general duty is imposed on all persons not to or omit to do anything that causes or is likely to cause environmental harm unless they take all reasonable and practical measures to prevent or minimise the harm.

Secondly, a person must give notification of severe or material environmental harm that is caused or threatened as soon as reasonably practical after becoming aware of the event or condition involving the harm. A penalty of $6,000 is imposed for failing to comply with this obligation.

Thirdly, activities which are described as being environmentally relevant must be either licensed (level 1 activities) or approved (level 2 activities). Persons who carry out environmentally relevant activities without a licence or an approval are subject to a penalty of $6,000. In relation to licensing, this will occur in three ways:

- First, where the proposed action is subject to a State government approval process such as that applicable to mining, a separate licence will not be issued by the Department of Environment and Heritage or the Department of Minerals and Energy. Rather, environmental considerations will be addressed by the Department of Minerals and Energy in consultation with the Department of Environment and Heritage in the course of determining whether to issue a mining tenement.
- Second, where the proposed action is subject to a local government approval process such as town planning or building, the environmental issues will be addressed by the local authority in consultation with the Department of Environment and Heritage in the course of considering whether to grant approval.
- Third, where the proposed action may have environmental impacts beyond the boundaries of individual local authorities, a separate licence will be required from the Department of Environment and Heritage. To ensure certainty, a list of premises. which will have to be separately licensed by the Department of Environment and Heritage will be prepared. This list is being refined from interstate lists and bears some resemblance to the schedule of designated developments under the *Local Government (Planning and Environment) Act 1990*.

If an application for a licence from the Department of Environment and Heritage are required to be publicly advertised, members of the public are entitled to make submissions. If a licence is issued by the Department, it will be life of project as is the case with mining and town planning permits rather than annual renewal. The licensee will be required to undertake self-monitoring and to submit compliance certificates to the Department. A register of licences will be maintained by the Department and information will be available to the public. A new fee structure designed to provide an incentive to industry to minimise environmental contamination and degradation will also be introduced pursuant to the Bill.

Fourthly, the Chief Executive of the Department or a local authority with devolved power can require an environmental audit to be prepared where there is non-compliance with the provisions of a licence, an environmental protection policy or an environmental management program. The audit can be prepared by the operator or by consultants who will have to endorse the report and, as such. will be subject to the false information provisions of the Bill. Failure to undertake an audit is an offence subject to a $6,000 penalty and the Chief Executive or a local authority with delegated authority may reject an inadequate audit.

Fifthly, the Chief Executive or a local authority with devolved power can require an environmental investigation to be carried out where an activity is causing or is likely to cause serious or material environmental harm which is defined as any adverse effect or potential adverse effect on an environmental value that results in costs of more than $5,000 (material environmental harm) or $50,000 (serious environmental harm) to prevent, minimise, rehabilitate or restore the environment.

Sixthly, where a business is unable to comply with the conditions of a licence or the standards set out in an environmental protection policy, the business can negotiate an environmental management program with the Department or a local authority with devolved authority. Environmental management programs are binding contracts which set out a transitional programme of works to achieve compliance. Environment management programs are developed by the operator and approved by the Department or the relevant local authority. If the Department or the local authority agrees to the plan, it becomes a legal condition of the operator's licence. It, like the licence, is also a public document.

Finally, the licensing authority, whether it be the Department of Environment and Heritage, the Department of Minerals and Energy or local authorities can require, as a condition of a licence or a term of environmental management program, that a financial assurance be provided to ensure compliance with the licence, environmental management program or the provisions of the legislation. Financial assurances may be in the form of a bank letter of credit, bonds, a bank guarantee or insurance policy. Guidelines will be prepared to assist local authorities with the calculation of bonds. These guidelines will be similar to those prepared by the Department of Minerals and Energy in relation to the setting of securities for mining tenements.

Enforcement

These environmental management mechanisms will be complemented by stringent enforcement provisions. These will be of three types.

- First, the Bill creates a variety of offences including:
  - causing serious or material environmental harm or environmental nuisance without lawful authority;
  - wilfully and unlawfully causing serious environmental harm (Penalty $250,000),
  - material environmental harm (Penalty $100,000) or environmental nuisances (Penalty $50,000);
  - wilfully contravening an environmental protection policy (Penalty $100,000 - $5,000);
  - contravening an environmental protection policy (Penalty $50,000 - $3,000);
  - releasing prescribed contaminants into the environment without authority (Penalty $10,000);
  - placing contaminants in a position that could reasonably cause serious material environmental harm or environmental nuisance (Penalty $10,000);
  - interfering with monitoring equipment (Penalty $10,000).

  In addition to these environmental offences, the Bill also creates offences for the provision of false information and the failure to comply with conditions of an environmental protection policy, licence, approval or environmental management program as well as the provisions of the Bill. Liability is also imposed on corporate officers for offences committed by corporations. The only defence to such prosecutions will be that the offence was committed by the company without the knowledge or consent of the officer and that they took all reasonable steps to ensure that the body corporate complied with the Bill. In order for corporate officers to rely on this defence, it will be necessary to ascertain the corporation's potential liabilities by means of an environmental audit and to adopt appropriate solutions.
- Second, the Chief Executive or a local authority with devolved responsibility may issue an environmental protection order requiring certain action to be undertaken.

  An environment protection order may issue where a person has failed to prepare an environmental audit, environmental investigation or an environmental management program. has caused or is likely to cause serious or material environmental harm or has breached the general environmental duty to notify, the provisions of an environmental protection policy or the conditions of a licence. A penalty of $100,000 is imposed for failure to comply with an environmental protection order. Environmental protection orders will be noted on the Administrative Advice file maintained by the Registrar of Titles.
- Finally, the Department or a local authority with devolved responsibility will be able to seek a restraining order from the Planning and Environment Court in respect of breaches of the legislation. A breach of a restraining order is considered to be a contempt of court and is punishable by imprisonment.

Administration

The legislation will be administered by the Department of Environment and Heritage which has been designated as the lead agency for environment and conservation management by the Public Sector Management Commission. As of 1 July 1992, the Department of Environment and Heritage has also been responsible for the administration of the *Contaminated Land Act 1991* which is intended to complement the Environmental Protection Bill.

The Bill provides that the Governor-in-Council may devolve to a local authority the enforcement of an environmental protection policy, the issue of environmental licences and approvals and other matters under the Bill. The Department has been negotiating with the Local Government Association of Queensland in respect of devolution. It is expected that a protocol will be signed between the Minister and the Local Government Association of Queensland shortly. A guideline will also be distributed to local authorities in relation to this matter.

The Bill also gives jurisdiction to the Planning and Environment Court to hear appeals in respect of applications for licences or approvals, prosecutions for breach of the legislation and for restraining orders.

It should be noted that the Bill is still in draft form and, as such, will be subject to further consultation and review. Notwithstanding this qualification, it is not unreasonable to assume that the final legislation will be recognisable from the outline provided in this article.

This paper was published as a Planning Law Update in the Queensland Planner 33:4, 5-7, December 1993.

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