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Journal of

Legal Knowledge Matters.

Volume 3. 1995 - 1998

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Colin Biggers & Paisley

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Legal excellence in all areas of environmental law and policy.

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Implementation of sustainable development by Australian local governments

Ian Wright

This article discusses the rise of sustainable development at an international level and how its conditions can be implemented by Australian local governments

February 1995

Sustainable development

The concept of sustainable development rose to prominence in the 1980s in response to a growing awareness of the need for action on global issues such as environmental degradation, resource depletion and socio-economic inequities.

In 1983, the 38th session of the United Nations resolved to create the World Commission on Environment and Development. This body was to be responsible for formulating a global agenda for change. In 1987 the Commission issued its final report entitled "*Our Common Future*"[1], which has become known as the "*Brundtland Report"* after its chairperson.

The Brundtland Report defines sustainable development as being development that meets the needs of the present without compromising the ability of future generations to meet their own needs.' As such, sustainable development comprises three interrelated goals:

- to ensure that all societies' needs (as distinct from wants) are met;
- to ensure that all members of society have their needs met; and
- to ensure that all development is sustainable over time in a social, economic and environmental sense.

It is apparent that at its broadest level, the concept of sustainable development requires fully integrated social, economic and environmental policies to be applied at local, regional, national and international levels.

In an attempt to achieve integrated management the leaders of 178 countries met at Rio de Janeiro in June 1992 as part of the United Nations Conference on the Environment and Development to endorse the principles of sustainable development as the ethos for governmental and community action. Together they finalised the Rio Declaration of Principles for Sustainable Development and Agenda 21 — the Global Action Plan to implement the Declaration.

Role of local authorities

Agenda 21 requires united action to be taken within and between countries, communities and regions to implement sustainable development. It recognises that many environmental problems and solutions have their roots in local authorities and that local authorities have a key role to play in achieving sustainable development.

Local authorities construct, operate and maintain economic, social and environmental infrastructure, oversee planning processes, set local environmental policies and help to implement national, State and regional environmental policies[2]. As the level of government closest to the people, local authorities also play a vital role in educating, mobilising and responding to the public to promote sustainable development.[3]

Agenda 21 therefore sets out a series of objectives to be achieved by local authorities at the international, national, regional and local levels:

- by 1993 a consultative process aimed at increasing co-operation between local authorities at the international level should have been initiated;
- by 1994 levels of co-operation and co-ordination between representatives of associations of cities and other local authorities should have increased so as to enhance the exchange of information and experience among local authorities; and

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1 World Commission on Environment and Development and the Commission for the Future, *Our Common Future* (Oxford University Press, Melbourne, 1990), p 87.

2 Australian Institute of Environmental Health (NSW), *Environmental Management: A Guide for Local Government in NSW* (Sydney, 1993), p 101.

3 M Keating, *The Earth Summit's Agenda for Change: A Plain Language Version of Agenda 21 and the Other Rio Agreements* (Centre for our Common Future, Geneva, 1993), p 47.

- by 1996 most local authorities should have undertaken a consultative process with their populations and achieved a consensus on a "*Local Agenda 21*" for their communities.

The objective of achieving increased international co-ordination between local authorities has been implemented by Australia and the world community through the establishment and support of bodies such as the International Association of Cities and Local Authorities, the United Towns Organisation, the International Council for Local Environmental Initiatives, the International Union of Local Authorities, the World Association of the Major Metropolises, the Summit of Great Cities of the World as well as United Nations Organisations such as the United Nations Centre for Human Settlements, the United Nations Development Programme and the United Nations Environment Programme. Together these bodies have and will facilitate greater co-operation between local authorities at the international level.

The objective of achieving greater co-operation and co-ordination not only between local authorities but between all levels of Australian government at national and regional levels is constrained by the current state of Australia's inter-governmental relations. Accordingly policy activity designed to implement this objective has been focused on the reform of Australia's inter-governmental relations. This process of reform is far from finished and is unlikely to be completed by 1994 as required by Agenda 21.

The objective of each local authority developing a Local Agenda 21 by 1996 is constrained by the fragmented structure and decision-making processes of Australian government. As a result, policy activity intended to implement this objective has concentrated on the reform of the organisational structure and decision-making processes of local governments through the development of an integrated strategic approval to environmental management. The central element of this policy of reform is Integrated Local Area Planning (**ILAP**).

Constraints to implementation of Agenda 21

Australian local government is currently unable to achieve the goal of sustainable development. Local authorities are constrained from integrating social, economic and environmental policy at the local level due to the problems of inter-governmental relations and their own internal structures and decision-making processes.

Under Australia's constitutional system, local governments depend on State governments for legislative powers; the Commonwealth government having no direct legislative powers in relation to local government. This system of inter-governmental relations has constrained the adoption of integrated strategic approaches at the local government level for several reasons:

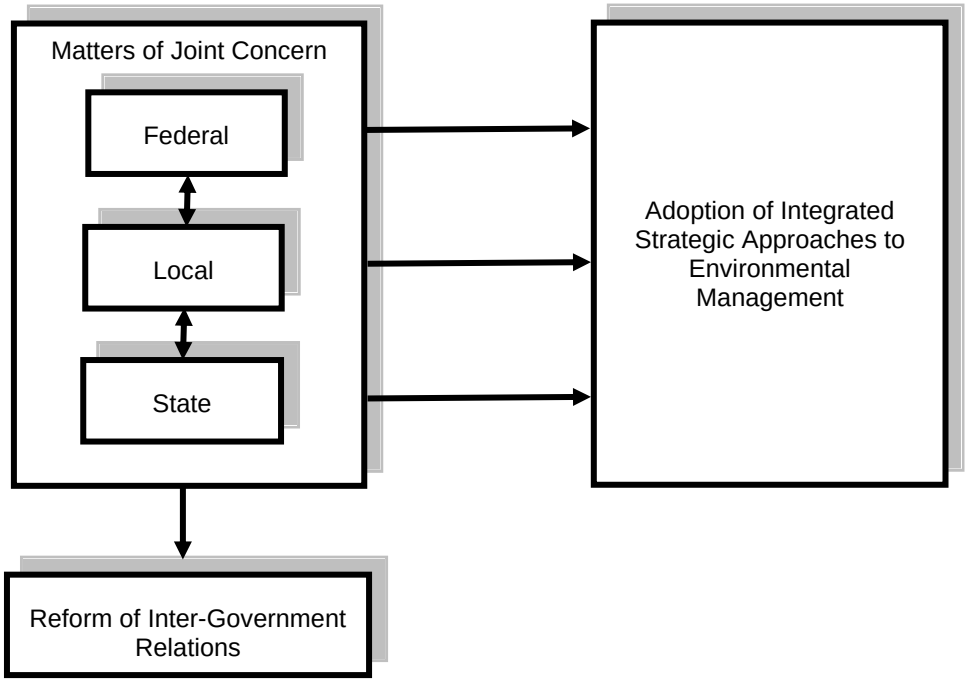
- local government has had inadequate involvement in policy development and implementation;
- inter-relationships between the spheres of government are based on individual functions such as roads and health;
- local government is used as an agent of State and federal governments;
- local issues and priorities have not been recognised by State and federal governments;
- funding and programme development is based on individual programmes such as roads and other capital works;
- the roles and responsibilities of each sphere of government are confused; and
- there is vertical fiscal imbalance and inequitable financial relations between the spheres of government.

In addition to the problem of inter-governmental relations, the internal structure and decision-making processes of local government have also constrained its ability to adopt an integrated strategic approach. For example:

- local governments are structured around departments where environmental management is the responsibility of one department or more often a division within a department;
- the limited term of elected members and their accountability to the electorate makes it difficult for them to adopt long-term broader strategic policies;
- local government is perceived as a service and infrastructure provider - "Roads, Rubbish and Rates" - rather than as a player in environmental management;
- the funding of local government is dependent on the development of property from which rates can be levied; and
- local government is constrained by high demand for limited financial resources and inflexible labour arrangements.

Australia's ratification of the Rio Declaration and its commitment to the implementation of Agenda 21 has resulted in a flurry of policy activity to address the problems of inter-governmental relations and the internal structure and decision-making processes of local governments. The overall focus of this policy activity is depicted in Figure 1.

Figure 1 Dimensions of reform, frameworks for local government in environmental management



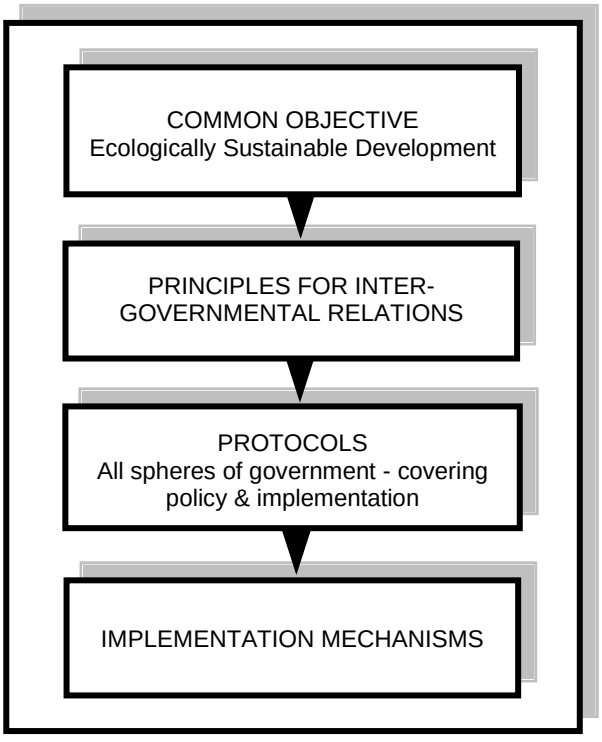
Source: TASQUE 1992:35

Reform of inter-governmental relations

Reform framework

The reform of Australia's inter-governmental relations is being conducted under the umbrella of the Council of Australian Governments (**COAG**). The inter-governmental reform framework adopted by COAG is depicted in Figure 2.

Figure 2 Elements of an inter-governmental relations framework



Source: TASQUE 1992:37

It comprises four elements:

- the acceptance of a common set of objectives for all spheres of government;
- the acceptance of a common set of principles defining the nature of inter-governmental relations;
- the development of protocols between and within each system of government setting out the rules and principles of interaction; and
- the use of agreed mechanisms to implement the agreed policies.

Various legal and policy initiatives have been undertaken by State and federal governments to implement the four elements of this framework.

Inter-governmental Agreement on the Environment

In early 1992, the Commonwealth, State and Territory governments and the Australian Local Government Association on behalf of all local governments signed the Inter-governmental Agreement on the Environment (**IGAE**). The IGAE sets out the objectives, principles, roles and responsibilities of Commonwealth, State, Territory and local governments across a wide range of environmental policy and management issues.

Sustainable development is identified as the basic principle of environmental policy and practice for all spheres of government. The integration of economic and environmental considerations into decision-making processes is to be achieved through the adoption of the following principles by all spheres of government:

- the precautionary principle — that is, the lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation where there are threats of serious or irreversible environmental damage;
- the intergenerational equity principle — that is, the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
- the conservation of biological diversity and ecological integrity;
- the inclusion of environmental factors in the valuation of assets and services;
- the polluter pays principle — that is, persons who generate pollution and waste should bear the cost of containment, avoidance or abatement; and
- the user pays principle — that is, persons who use goods and services should pay prices based on the full life-cycle cost of providing those goods and services.

The responsibilities and interests of each sphere of government in implementing sustainable development is also specified in the IGAE. The Commonwealth government has responsibilities and interests in relation to national environmental matters, such as foreign policy relating to the environment, trans-boundary environmental issues, national standards and the management of resources owned by the Commonwealth.

The State and Territory governments have responsibilities for environmental matters which do not significantly affect national environmental matters, as well as the management of resources within the States and Territories. They also have an interest in foreign policy matters and the development of national standards.

Local government, on the other hand, has responsibility for the development of local and environmental policies and has an interest in the environment of their localities and the development of policies which affect more than one local government unit.

The IGAE also seeks to minimise conflict arising from the competing interests of the various spheres of government by specifying procedures for co-operative setting of outcomes and standards, the accreditation of State and Territory systems by the Commonwealth, improved consultation processes and the elimination of functional duplication.

Schedules to the IGAE spell out mechanisms in a range of environmental areas to implement sustainable development and the agreed principles. Implementation mechanisms are specified in relation to the collection and handling of data, the assessment of natural resources, land-use decisions and approval processes, environmental impact assessment, environmental protection, climate change, biological diversity, the national estate, world heritage and nature conservation.

Commonwealth and State governments have sought to implement these mechanisms through various programmes:

- Development regulations have been reviewed by the Australian Uniform Building Regulations Co-ordination Council (**AUBRCC**), the Indicative Planning Council (**IPC**), the Review of Residential Development Regulations (the **Triple R Programme**), Local Approvals Review Programme (**LARP**), Green Street, the Australian Model Code on Residential Development (**AMCORD**), the Building Regulation Review (**BRR**) and Queensland's Integrated Development Approval System (**IDAS**).

- The integrated management of resources has been considered by the Great Barrier Reef Marine Park Authority, the Murray-Darling Basin Commission, the Integrated Catchment Management Programmes of various States, the Resource Assessment Commission's Coastal Zone Inquiry, the SEQ 2001 Project in South-East Queensland, the FNQ 2010 Project in Far North Queensland, the Trinity Inlet Management programme in Cairns North Queensland and the Wet Tropics Management Authority in North Queensland.
- The need for improved information collection and dissemination has been addressed by the Environmental Information and Support Programme (**EIS**), the Australian Land Information Council, the Australian Resources Information Centre, the Environmental Resources Information Network, the State of the Environment Reporting Programme, the State of the Marine Environment Reporting Programme, the Environment Round Table, the Local Government Development Programme, the Environment Advisory Group, the Better Cities Programme, the Healthy Cities Programme and the Australian Urban and Development Review.

State and local government protocols

Apart from the IGAE, State and local governments have also entered into protocols covering various aspects of environmental management. Protocols have been signed in most States including South Australia, Western Australia, Tasmania and Queensland.

Whilst these protocols are generally consistent with the framework specified in the IGAE, the scope of each protocol varies from one State to another. In general the protocols provide for:

- recognition of both spheres of government as equal players;
- clarification of roles and responsibilities in relation to particular areas or functions;
- identification of mechanisms for inter-governmental relations; and
- periodic review of the protocol.

Reform of local authority decision-making

The reform of inter-governmental relations that have and will be effected through the IGAE and the various State and local government protocols are intended to produce a framework within which all spheres of government can undertake integrated environmental management.

As the reforms of inter-governmental relations are implemented, local government will come under increasing pressure to develop strategic plans (a "*Local Agenda 21*") for their communities. The preparation of a strategic plan will require local authorities to undertake ILAP for their communities.

The process of ILAP involves four elements:

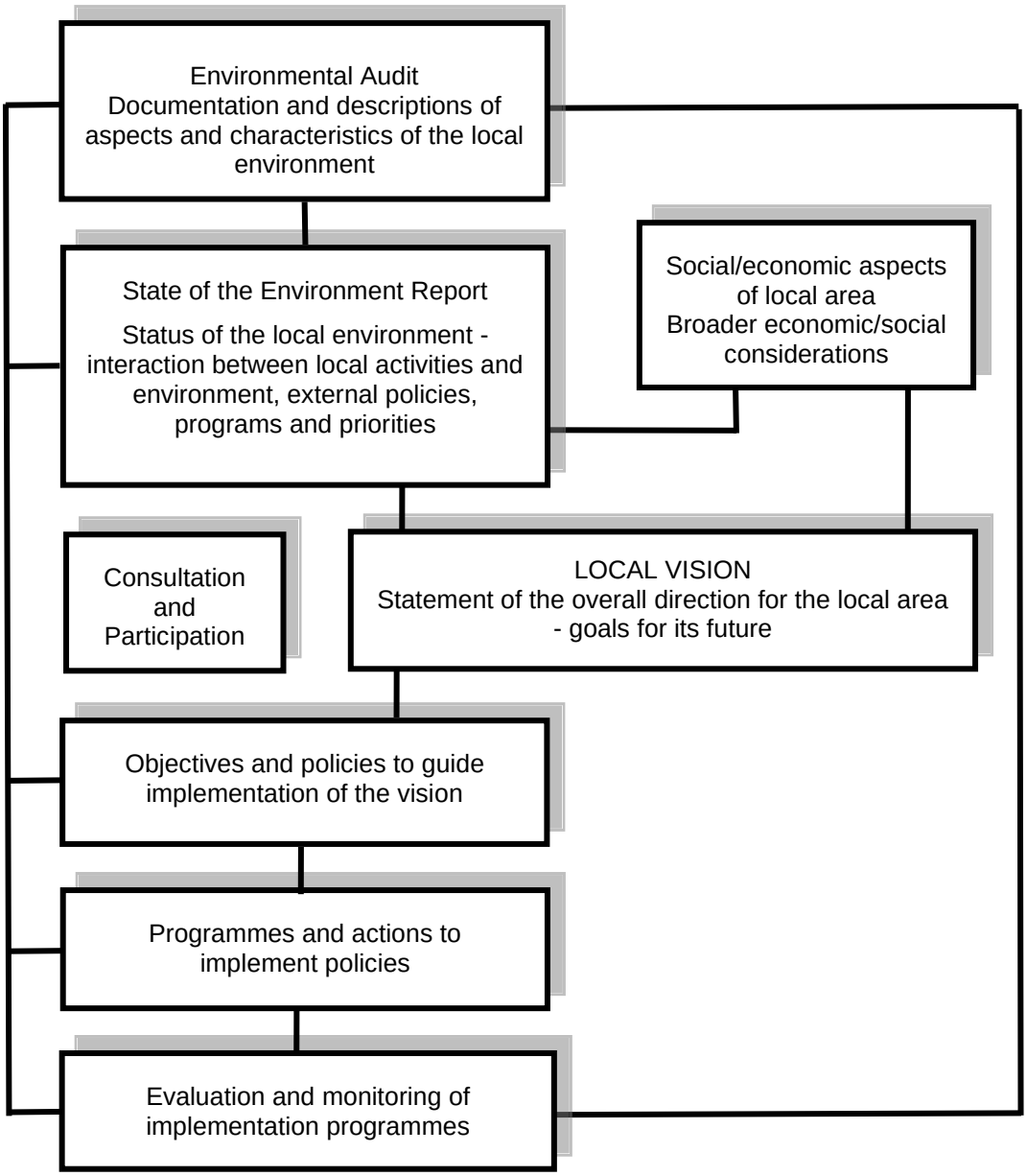
- community consultation to define problems, develop solutions, set priorities and implement programmes;
- the development of an adequate information base of the local authority;
- the preparation of a strategic plan setting out the local authority's vision for the community, the targets to be achieved, the policies to be applied to the local authority's activities and decision-making processes and the mechanisms to achieve the objectives and policies; and
- the development and use of indicators to monitor and evaluate progress towards the vision and the targets set by the community.

These elements of consultation, information, planning and monitoring are essential to the achievement of sustainable development at the local government level. The relationship of these elements is depicted in Figure 3.

Community consultation

Community consultation, to be effective, must take many forms and occur at many stages in the ILAP process as shown in Figure 3. Examples of ongoing community consultation processes are periodic public hearings, community forums, councils and round tables.

Figure 3 Integrated local strategy



Source: TASQUE 1992:30

Information base

The information obtained from community consultation should be augmented by an audit of the physical, environmental, economic, social and cultural conditions and trends facing the local authority. Matters to be considered include national standards, State/federal government policies, State/federal government programmes, international and regional concerns as well as local priorities and considerations. The audit should be documented in a local state of the environment report for inclusion in equivalent State and Commonwealth government reports.

Planning process

By considering the communities' priorities as identified in the consultation process, the results of the audit and the available resources, a strategic plan can be produced.

The strategic plan should outline the local authority's vision (goal) for its local area, set near and long-term targets (objectives) for various indicators to achieve its vision, specify policies to be applied to the local authority's activities and decision-making processes and detail mechanisms to achieve the targets and policies.

The task of vision-building should involve three steps:

- First, targets should be set for physical, environmental, economic, social and cultural concerns based upon sustainability principles. For example, targets could be set for a range of indicators of urban sustainability such as[4]:
  - population, urban size and density;
  - public and private transport use;
  - environmental quality — air, land and water;
  - native habitat protection and enhancement;
  - energy use and efficiency;
  - greenhouse gases and ozone depleting substances;
  - the reduction of resource consumption, for example, water and non-renewable resources;
  - recycling and waste minimisation;
  - product life cycles;
  - human health indicators;
  - economic resilience;
  - consumer awareness;
  - cost recovery for urban development; and
  - the extent of urban development.
- Secondly, scenarios of the local authority as a sustainable unit should be constructed and modelled against the targets and the indicators of urban sustainability.
- Thirdly, the urban form which incorporates sustainability characteristics should be adopted as the vision for the local authority.

Having built the vision for the local area and established targets based on sustainability principles, policies should then be created which can be applied to all the local authority's activities and decision-making processes. The mechanisms by which the local authority is to implement the targets and policies should then be detailed. Implementation mechanisms can include:

- specialised plans such as a planning scheme, local conservation strategy, economic development programme, public health plan, community services and facilities plan or an open space and recreation plan;
- a corporate plan which details management and decision-making structures;
- a budget which details funding options and an expenditure programme for services and infrastructure; and
- administrative and regulatory reform such as that envisaged in the LARP.

Monitoring

Having established a strategic plan, it is critical that programmes and methodologies be created to monitor the performance of the local area in terms of the sustainability targets. The results of this monitoring should be included in the state of the environment report and should be used to refine the sustainability scenarios. It is also critical that the regulatory aspects of the strategic plan be enforced to ensure that the targets of sustainability are being met.

Need for ILAP

The adoption of an integrated strategic management approach based on consultation, a sound information base, a strategic plan and monitoring, will enable local authorities to achieve sustainable development.

It is clear, however, that the current fragmented approach is proving unsuccessful in achieving sustainable development. This is the case for a variety of reasons:

- Community consultation is limited to the statutory planning process, calls for submissions, public meetings, open council meetings, deputations to council and advisory committees. Innovative processes such as joint committees, precinct and district committees, surveys and task forces are rarely used.

[4] K Buckley, M Buxton and F McKenzie, "*Towards Ecologically Sustainable Urban Development*", Urban Futures Special Issue No 4 (Department of Health Housing and Community Services, Canberra, 1992), p 51.

- Data collection is constrained by limited financial resources, the lack of data classifications to standardise reporting, the general absence of environmental databases, geographical information systems and natural resource inventories and the lack of guidelines to measure cumulative and regional impacts.
- Strategic plans are generally land-use based, contain no vision for the local area, specify targets which are qualitative as opposed to quantitative and are not based on sustainability principles, contain generalised policies that are not geographically specific and are produced as a result of a questionable methodology process in which scenarios are assessed against quantitative targets on the basis of best guess or warm inner glow.
- Planning schemes are based on broad land-use zonings which are incapable of implementing a local authority's vision for the local area and are unsuited to managing developments once established.
- Corporate plans are often confused as strategic plans, reflect a limited vision of the council's role, lack analysis of issues and needs and adopt a rear-vision mirror approach of repackaging and extrapolating the council's existing activities, with minor adjustments, without embracing a thorough review.
- Monitoring is almost non-existent with no assessment of impacts, no reporting of results, no evaluation of the output against the targets and limited enforcement.

The current environmental management process is therefore not only fragmented but it is not achieving those objectives to which all spheres of government have committed themselves in the IGAE and to which Australia has committed itself in the Rio Declaration and Agenda 21. Local authorities will therefore have little choice but to adopt an integrated local area planning approach in the future.

Implementation of ILAP

The implementation of ILAP will require substantial financial and human resources both in the short and longer terms. Resources will be required to undertake a number of additional activities not already being undertaken by local authorities. These include:

- sophisticated community consultation;
- local authority audits;
- state of the environment reports;
- a methodologically defensible vision-building process that produces a sustainable vision and quantitative targets that are based on sustainability principles;
- specialised plans and corporate plans that facilitate the achievement of a local authority's vision;
- the reform of local authority decision-making processes, regulatory systems, organisational structures and labour arrangements;
- the monitoring and reporting of the outputs of the strategic plan and evaluation and review of the local authority's vision;
- increased enforcement;
- the training and retraining of elected members and staff to improve their understanding and to develop the skills needed to implement an integrated approach;
- the establishment of community education and information programmes; and
- negotiations and consultations with other local authorities in respect of regional issues, catchment management, coastal management, information sharing, resource sharing, the achievement of local biodiversity, responses to State and federal policies, and participation in State and federal programmes.

The resource implications for local authorities and the enormity and complexity of these activities means that the 1996 deadline set in Agenda 21 for the preparation of local strategic plans for all local authorities will not be achieved in the absence of substantial financial and technical assistance from State and Commonwealth governments.

Unfortunately the poor budgetary position of both State and Commonwealth governments in the short and medium term means that only limited resources can and will be made available to local governments for this purpose.

Conclusions

The implementation of integrated local area planning at the local authority level and the reform of inter-governmental relations between and within all spheres of Australian government is necessary if the objective of sustainable development is to be achieved.

Australia, as a signatory to the Rio Declaration, has committed itself to the achievement of sustainable development. State, Territory and local governments have also committed themselves to the objective of sustainable development through the Inter-governmental Agreement on the Environment. Further, local authorities are required by Agenda 21 to prepare strategic plans by 1996.

To facilitate the preparation of these strategic plans, all three spheres of government have agreed through the IGAE and various other protocols to reform inter-governmental relations. This process of reform is far from complete and is expected to be ongoing for the remainder of the decade.

The reform of inter-governmental relations will ultimately clear the way for local authorities to undertake integrated local area planning. This will require local authorities to adopt a more strategic and sophisticated approach to community consultation, data collection, planning and monitoring. The commitment of financial and human resources necessary to undertake these activities will place substantial burdens on local authorities, particularly in the absence of funding from State and Commonwealth governments. The dilemma for local authorities in the 1990s will be how to implement the substantial policy changes that are being forced upon it in an environment of limited if not declining financial resources.

This paper was published in the Environmental and Planning Law Journal, February 1995.

Review of recent unreported decisions of the Planning and Environment Court

Ian Wright

This article discusses the recent unreported decisions of the Planning and Environment Court

March 1995

Introduction

In this article I review some unreported decisions of the Planning & Environment Court. Bearing in mind the time and money costs of litigation which must eventually be absorbed by the Queensland economy, some readers may wonder whether judicial review of the administration of planning in Queensland, as distinct from substantive planning decisions, is grinding exceedingly small.

Recent unreported decisions of the Planning and Environment Court

During 1994, approximately 60 matters came before the court. Those which are of significant legal import have been reported in the *Queensland Planning Law Reports*. Of those which are not reported, some are small matters which are not of great concern. Unreported decisions, however, do carry weight as precedents and are useful if an important legal point is made which cannot be found in a reported decision. Below are some unreported decisions which I believe are significant.

Re the jurisdiction of the Planning and Environment Court

Section 2.24(3) of the *Local Government (Planning and Environment) Act 1990* (**PEA**) provides that the Planning and Environment Court has jurisdiction to hear and determine proceedings for a declaration in respect of:

- a question of construction arising under a planning scheme;
- any act, matter or thing to be undertaken in respect of the planning scheme or the use of land; or
- any offence defined in section 2.23(1).

Planning and Environment Court does not have jurisdiction to hear matters concerning construction of Rezoning Deed

The court held in *Council of the Shire of Redland v Aquatic Paradise Pty Ltd & Anor* (unreported, Planning and Environment Court, P&E 94/026, O'Sullivan J, 28 March 1994), that construction of a Rezoning Deed does not arise under a Planning Scheme. Rather, these are matters of contract law to be decided in the general jurisdiction of the courts. Further, questions concerning whether or not conditions are binding and if they are, what sums of money are payable, do not fall with the court's jurisdiction contained in section 2.24(3)(b) of the PEA.

The court does have jurisdiction to interpret a provision of a Rezoning Deed, however, if the Deed defines the zone, which will, in turn be defined in the planning scheme

To determine what is permissible within a zone by reference to the Rezoning Deed does fall within section 2.24(3)(a) of the PEA: *Schroders Australia Property Management Limited v The Council of the Shire of Redland & Ors* (Planning and Environment Court, P&E 94/021, Skoien J, 24 March, 1994).

Planning and Environment Court only has jurisdiction to hear proceedings in respect of acts, matters or things which will be undertaken in the future

The phrase "*to be undertaken*" was held by Heiman J in *Thornridge Pty Ltd v Redland Shire Council* (unreported, Planning and Environment Court, P&E 94/044, Helman J, 2 June 1994) to refer to acts, matters or things which are to happen in the future. His Honour said that it is straining the natural meaning of the phrase to take it as referring to a past act, matter or thing.

The court has jurisdiction to hear a matter concerning the approval of engineering drawings and specifications pursuant to s.2.24 when the matter also concerns the validity of a local planning policy

In *Townacre Development Pty Ltd v The Council of the City of Thuringowa* (unreported, Planning and Environment Court, P&E 94/ 042, 12 April, 1994, Trafford-Walker J), a local planning policy provided that upon formal notification of an appeal, all matters relating to a subdivisional application would be suspended until the court decided the appeal or it was withdrawn. Engineering drawing and specifications were lodged with the

subdivisional application pursuant to section 5.2(1)(c) of the PEA. If consideration of the engineering drawings and specifications had been suspended, the respondents would have been out of time in gaining approval for them. It was argued that the applicant should have proceeded under the appeal provisions of section 5.2(6) of the PEA which provides that where the local government fails to decide an application within the period specified the applicant may appeal to the Planning and Environment Court. The Court held, however, that as this matter involved the validity of a local planning policy, the court did have jurisdiction to hear the matter pursuant to section 2.24 of the PEA.

Rezoning conditions imposed prior to the commencement of the Local Government (Planning and Environment) Act 1990 do not run with the land

Judge O'Sullivan in *Council of the Shire of Redland v Aquatic Paradise Pty Ltd & Anor* (unreported, Planning and Environment Court, P&E 94/026, O'Sullivan J, 28 March 1994) held that rezoning conditions imposed prior to the commencement of the PEA do not run with the land. In other words, these do not bind successors in title. (This has now been changed by section 4.5(12) of the PEA which provides that any conditions imposed on rezoning are binding on successors in title.)

What constitutes a "minor" modification to a rezoning approval or condition of approval?

Section 4.15(2) of the PEA provides that a local government is not to approve an application to modify an approval in certain circumstances. These include where:

- the modification is not, in the local government's opinion, of a minor nature;
- in the local government's opinion, the modification would adversely affect any person to a degree which would, if the circumstances allowed, cause that person to make an objection.

If the modification is not "*minor*", then the application will need to be readvertised under section 4.3(4) of the PEA, as it will become a fresh application for approval.

If a council suggests alterations to a proposed rezoning which are material, or which create a different concept or a substantially different application and those alterations are accepted by an applicant, the application will need to be readvertised

In the case of *Begley v Pine Rivers Shire Council & Ors* (unreported, Planning and Environment Court, P&E 94/057, 24 August, 1994), the council itself had suggested proposals in relation to a combined subdivisional/rezoning application which were accepted by the applicant. An objector claimed the accepted proposal, as altered, should have been re-advertised. Firstly, the court held that the differences between the two proposals did not reflect an application to the council seeking a modification as required by section 4.15 of the PEA but rather acquiescence on the part of the respondent by election to conditions proposed to be imposed by the council. Notwithstanding this, His Honour in that case went on to say that a council cannot impose conditions which have the effect of radically altering the proposal as advertised. The council may only impose alterations to the proposal which are "*immaterial*", which do not create a "*markedly different concept*" or a "*substantially different application*" or one which is "*materially larger or different*".

If the new proposal is different, the council should refuse it or require the applicant to apply for approval or a modification to the approval

If the arrangements differ from those originally proposed by the applicant, the council is obliged to refuse the application or require the applicant to apply under section 4.15 of the PEA to modify his application. In deciding an application, the council is to consider whether any plan of development attaching to the application pursuant to a requirement of a planning scheme should be altered, pursuant to section 4.4(3) of the PEA: *Barakat Properties Pty Ltd v The Council of the Shire of Pine Rivers & Anor* (Planning and Environment Court, P&E 94/043, 10 June 1994, McLauchlan QC, DCJ.)

Time limits interpreted strictly by the Planning and Environment Court

Section 7.1(2)(a) of the PEA provides that an appeal against a decision of a local government is to be instituted within 40 days from the date on which the decision was made or such longer period as the court may allow, where it is established that the Clerk failed to notify persons in accordance with this Act. This means that the court has a discretion to extend the time limit only where the Clerk has failed to notify the applicant of the local government's decision within the relevant time. The time limit set out in section 7.1(2)(a) of the PEA is interpreted strictly by the Planning and Environment Court. The time will only be extended by the number of days in which the Clerk failed to notify the applicant of the local government's decision.

The Clerk's error

In *Bruce Moon v Albert Shirt Council and Lakewoods Pty Ltd* (unreported, Planning and Environment Court, P&E 94/055, Helman J, 22 July 1994) the Clerk did not notify the objector within 10 days of the date of the decision as he was required to do under section 4.1(7) of the PEA. The court held that it has a discretion to permit an extension of time to ensure that the minimum period is restored to the applicant, but does not allow the court to go beyond that or put a particular appellant in any more advantageous position than any other applicant.

Where evidence can be adduced that the appeal was lodged

Where the council has no record of an appeal being lodged, but the person who lodged the appeal can produce evidence that the appeal was lodged in time, then the court may allow the appeal to proceed: *Hembrow v The Council of the Shire of Albert & Anor* (Planning and Environment Court, P&E 94/ 036, 6 May, 1994 Newton J).

"Frivolous or vexatious"

Section 7.6(b)(i) of the PEA provides that the court may, upon application made to it, order such costs where it considers the appeal or other proceedings to have been frivolous or vexatious.

Where proceedings are continued after the court has dismissed it previously

The court can award costs against a party if the appeal is "*frivolous or vexatious*", pursuant to section 7.6 of the *Local Government (Planning and Environment) Act 1990*. This phrase was held to apply where an applicant persisted in an appeal despite the Court of Appeal having previously dismissed it and costs were awarded against the applicant: *Stubberfield v Redland Shire Council and Paradise Grove Pty Ltd* (unreported, Planning and Environment Court, P&E 94/049, Judge Skoien, 17 June 1994).

Where a person who is not legally qualified conducts his own case which causes the trial to go for longer than it otherwise would have, this does not necessarily render the proceeding "*frivolous and vexatious*"

If delays are caused intentionally or there is no merit whatsoever in the proceedings, then it will be frivolous or vexatious. Even if some matter is irrelevant because a person does not have the necessary legal training to discern what is relevant and irrelevant, that does not necessarily render the action without merit: *Copley v The Beaudesert Shire Council* (Planning and Environment Court, P&E 94/024, O'Sullivan J, 8 February 1994).

Does the applicant need to make the application to the local government, or can an agent make the application?

Section 7(1)(b) of the Regulations to the Act set out the prescribed information which an application for an amendment to a planning scheme requires under section 4.3(3)(b) of the PEA. Included in this prescribed information is the full name and postal address of the applicant. Strictly speaking, the applicant's full name and address should appear on the face of the document. However, where the local government can be under no misapprehension as to the true identity of the applicant from, for example, correspondence passing between the local government and the applicant, then the court may allow an application notwithstanding that an agent has completed the application form. This happened in the case of *Grimley Pty Ltd v Gold Coast City Council and Villa World Limited* (unreported, Planning and Environment Court, P&E 94/010, Newton DCJ, 21 January 1994). The court did, however, point out that care should be taken to fully provide the prescribed information.

A developer should implement its proposal soon after gaining development approval so that a competitor does not step in

It is worthwhile to set out briefly the facts in *Jedfire Pty Ltd v Logan City Council & Ors* (unreported, Planning and Environment Court, P&E 94/047, Skoien J, 30 June 1994). On 20 December 1989 an approval to rezone land "A" to partly Central Business, partly Special Facilities (Tavern and Fast Food outlets) and partly Open Space was made. The rezoning was never gazetted because conditions imposed on the rezoning were never complied with. On 27 September 1993 the Licensing Court allowed a vacant licensed victualler's licence to be transferred to land "B". A similar application was made in respect of land "A" but was refused given that land "B" had obtained a licence. The owner of land "B" lodged an application to rezone with the council on 26 October 1992. The council refused the application having regard to land "A"'s approval. The court held that it is entitled to take into account the fact that an approval has been granted and is current for a similar shopping development. Further, whether the granting of any subsequent rezoning or approval would be likely to prejudice the likely development of the land already approved for its proposed purpose and when it is likely the approved land may be so developed. Notwithstanding this, the Planning and Environment Court in Jedfire held that since the owner of land "A" had done little to advance his intended development, the court could give no weight to the fact that land "A" had a pre-existing rezoning to permit the building of a tavern. The court said that although a planning court cannot abrogate the question of need to another body (the Licensing Court), it will take the opinion of that court into account in considering questions such as need. While the owner of land "B" has a liquor licence, no nearby land will get a similar one. Therefore, the existence of land "B"'s licence is most relevant. The court therefore allowed the appeal against the council's refusal.

Asphalt plant not necessarily "extractive industry, temporary quarry or an ancillary use"

An asphalt plant did not have to restrict its hours of operation as long as it remained outside the ambit of an "*extractive industry, temporary quarry or an ancillary use*": *Boral Resources (Qld) Pry Ltd and Boral Resources (Tasmania) Limited v Council of the Shire of Albert* (unreported, Planning and Environment Court, P&E 94/056, Quirk DCJ. August 1994).

Weight given to Planning Scheme

Section 4.4 of the PEA provides that the local authority may approve and apply to the Governor-in-Council for amendment of a Planning Scheme after consideration of all relevant matters.

In the case of *Reilly v Kilkivan Shire Council* (unreported, Planning and Environment Court, P&E 94/022, Judge O'Sullivan, 30 March 1994), it was held that considerable weight ought to be given to the Planning Scheme which had been introduced recently and which had been thoroughly prepared. In that case, it was held that there were not sufficient planning grounds to justify approval of the proposed amendment.

Tread on staircase does not form part of the "gross floor area" as defined in Brisbane City's Town Plan

The Planning and Environment Court in *Alan Richard Porter and David John Porter (trading as "Porter Co Design and Construction") v Brisbane City Council* (unreported, Planning and Environment Court, P&E 94/063, Skoien SJDC, 1 September 1994) held that the area of tread on each step in a staircase does not form part of the "*gross floor area*" which is defined in the Town Plan for the City of Brisbane.

Bottle shop licence refused

A freestanding bottle shop licence may be refused on a basis that it is too close to a school. The Planning and Environment Court in *Kelly v Toowoomba City Council & Ors* (unreported, Planning and Environment Court, P&E CA94/038, Toowoomba, MacLaughlan DCJ, 31 May 1994) held that the Toowoomba City Council was justified in refusing a licence for a freestanding bottle shop as its close proximity to a school may affect the anti-social behaviour of teenagers and lead to vandalism.

This paper was published as a Planning Law Update in the Queensland Planner 35:1, 12-17, March 1995.

Review of papers presented at QUT seminar on 2 November 1994 on the criminal offences and evidential provisions under the Environmental Protection Act 1994 (EPA)

Ian Wright | Robert Milne

This article provides a brief overview on the papers presented at a QUT seminar concerning the criminal offences and evidential provisions under the *Environmental Protection Act 1994* (Qld)

March 1995

The Criminal Offences and Evidential Provisions, Robert Sibley

This article discusses the criminal provisions of the *Environmental Protection Act 1994* (**EPA**). It provides a good concise summary of the Queensland criminal law and overlays this with a discussion of the criminal provisions of the EPA. It specifically deals with the offences under the EPA and in the context of the Criminal Code (**Code**) and recent criminal law cases. It discusses the interaction of the EPA with the exculpatory provisions in Chapter V of the Code. It refers to the due diligence defence in the EPA. Reference is made to some of the landmark cases and a comparison is made with the *Nature Conservation Act 1992*. The due diligence aspects of the EPA will be very relevant when the Act comes into force and a more detailed discussion of due diligence would have been very useful to anyone reading this article. The extra territorial application of the EPA was also discussed. A more in depth discussion of the national and international implications of this Act would have been appropriate considering the corporate liability provisions of the EPA. The statutory limitation periods for proceedings relating to the commission of offences are provided to be within one year of the offence being committed or coming to the knowledge of the complainant but in no case more than two years from being committed. This begs discussion of the implications of this rule in the context of an environmental offence. When is an offence committed? For example, in the case of an underground tank that was installed negligently so as to cause the tank to leak, is the relevant date the time the tank was installed, when the tank started to leak, or when the leak was discovered? The article makes very good reference to other legislation including the Code and the *Nature Conservation Act 1992*. Specific comparisons are made between the Nature Conservation Act and the EPA. Recent and relevant case law is also well addressed.

The Structure and Direction of the Environmental Protection Act 1994 (Qld), D E Fisher

This article provides the context of the EPA and a detailed and very readable summary of the Act. It summarises the international historical context of the EPA and refers to the current climate change and biological diversity conventions of the Agenda 21 Rio de Janeiro Conference. It shows how the EPA fits into the Inter-Governmental Agreement on the Environment 1992 in terms of national environmental protection standards, guidelines, goals and associated protocols. This overview of the location of the EPA in the global environmental law context is a good reference for research into the national and international guidelines that form the basis for the EPA. The article provides a good summary of the EPA. It sets out how the Act works and how the different parts come together. It lacks a detailed examination of relevant case law but makes up for this in its thorough referencing to the EPA. The summary is not merely a rewriting of the Act but a well written introductory text to anyone wanting a good understanding of the EPA.

Mechanisms for Environmental Management, Poh-Ling Tan

This article provides a detailed examination of the Act with an abundance of specific headings. It is useful as a ready reference guide to the relevant provisions of the EPA. Up to date and relevant case references are provided as well as details of other sources such as overseas journals, parliamentary speeches and relevant legislation from other jurisdictions. The licence application process is well discussed. Page 13 sets out a useful table outlining the time constraints for licence applications and amendments. A useful case referred to is *Brown v EPA* (1992) 78 LGERA 119. This case discussed the term "*Best Available Technology Economically Achievable* (**BATEA**)". BATEA is the best technology already in commercial use or available for introduction commercially. A useful discussion is provided for voluntary Environmental Management Plans (**EMPs**). It outlines the process for EMPs and the degree to which privilege and immunity from prosecution can be gained. The relevant case of *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1994) 68 ALJR 122 is referred to. The High Court decided that corporations are denied a common law privilege against self-incrimination. The qualified immunity against criminal prosecutions for corporations under the EPA is therefore highly relevant. A useful discussion of

environmental evaluations is also contained in the article. It is open to the administering authority to reject an evaluation done by an underqualified person. This article is readable in its entirety but is also useful for its up to date references to detailed points of law under the EPA. It is very useful in providing direction in multi-disciplinary research.

Environmental Protection Act 1994 (Qld) – Appeals and Civil Enforcement, N Dixon

This article examines:

- what decisions may be reviewed and appealed against;
- the review of decisions and appeals;
- judicial review of decisions made under the EPA: and
- enforcement.

A thorough list of the type of decisions that can be reviewed and appealed against is provided. References are made to relevant cases and environmental protection legislation in other States. The article provides a thorough discussion of the judicial review of decisions made under the EPA. The jurisdiction of the court to hear *Judicial Review Act 1991* applications is well set out, and standing of persons, especially environmental groups, is very well discussed with particular reference to recent Queensland case law. The options for enforcement are set out with particular reference to those persons who are entitled to bring an action to remedy or restrain an offence under the EPA. This article provides extensive and detailed advice on the options for appeal and review of decisions under the new legislation. It provides a good documentary on the applications of legislation such as the Judicial Review Act and the common law.

Impact of Environmental Protection Act 1994 on day to day conveyancing transactions, W D Duncan

This article is essential reading for all lawyers and other professionals involved in real estate transactions. It gives examples of how the Act is to apply to everyday transactions instead of merely summarising the text of the Act. Specific practical examples are given from the perspective of both the purchaser and the vendor. Detailed advice is given on both contractual terms and liabilities. The transfer of a property subject to a licence, EMP or court imposed restraint order is discussed. The article covers industrial, commercial and residential conveyances and examines the position of mortgagees. A discussion of common law rights is also included. Transitional arrangements under the *Clean Waters Act 1971*, *Clean Air Act 1963* and the *Mineral Resources Act 1989* are addressed. This was the most practical and readable article presented at the Seminar. A working understanding of the EPA and the *Contaminated Land Act 1991* is essential for any practitioner involved in any way with transfers of property.

This paper was published in the Queensland Environmental Practice Reporter, March 1995.

Review of the most recent developments in planning law across Australia

Ian Wright

This article discusses the recent legislative and policy updates across Australia regarding planning law

June 1995

National House Energy Rating Scheme

The National House Energy Rating Scheme has been adopted by State and federal governments. Based on specifically developed computer software the scheme will help architects and builders to design new houses on a five star rating system and help owners improve the rating of their houses when they remodel or trade up. The scheme was adopted at the 2nd September meeting of the Australian and New Zealand Mineral and Energy Council (**ANZMEC**). The council comprises State and federal ministers. The ministers also agreed that the Commercial Building Energy Code currently being developed is to be a voluntary code. Governments will consider adopting the code for their own construction or major refurbishment projects once it is completed. ANZMEC agreed to communicate further on the adoption of Mandatory Energy Performance (**MEP**) standards for refrigerators, freezers and electric storage hot water heaters following further discussions with industry and consumer groups. Victoria has proposed voluntary rather than mandatory MEP standards. This will result in a delay in the introduction of MEP standards.

Revision of AMCORD

Work has begun on the development of a new Australian Model Code for Residential Development (**AMCORD**) resource document for residential development. The document will be a national resource document for implementation across Australia. Additional material is being incorporated to address a number of new issues and strengthen existing ones. Some of these include:

- ecologically sustainable development;
- social planning considerations relating to residential development and neighbourhood planning;
- physical infrastructure considerations relating to neighbourhood planning;
- the relationship between urban form and transport; and
- cross-cultural issues relating to appropriate housing environments.

AMCORD 95 as it is known will retain the performance approach adopted in the original AMCORD and AMCORD URBAN is expected to be complete in May 1995.

Victorian Catchment and Land Protection Act 1994

The Catchment and Land Protection Bill was introduced and passed in the 1994 autumn session of Parliament. It replaces the *Conservation and Land Utilisation Act 1958* and *Vermin and Noxious Weeds Act 1958*. Under the Act a Victorian Catchment and Land Protection Council will be formed. The Council will advise the Minister on:

- matters relating to catchment management and land protection;
- the condition of the State's land and water resources;
- the State wide priorities to be given to catchment management and land protection programmes; and
- the facilitation of the operation of regional catchment and land protection boards and their effectiveness.

The Act enables the establishment of 8-9 catchment and land protection boards which will:

- prepare a regional catchment strategy for the region;
- prepare special area plans for areas in the region;
- promote the co-operation of individuals and organisations involved in the management of land and water resources in the region;
- advise the Minister on regional priorities for activities and resource allocation, guidelines for integrated management of land and water, matters relating to catchment management and land protection and, the condition of land and water resources in the region;
- promote community awareness and understanding;

- make recommendations to the Minister about the funding of the implementation of the regional catchment strategy and special area plan; and
- make recommendations about actions to be taken on Crown land by the private sector.

Drinking water guidelines

The National Health and Medical Research Council and the Agricultural and Resource Management Council of Australia and New Zealand have released guidelines for Australian drinking water. The guidelines define drinking water as "*water intended primarily for human consumption in whatever form but which has other domestic uses*". Appearance, taste and odour are general indicators by which the public judges water quality. The guidelines are a use and need specification. They are intended to provide the Australian community and the water supply industry with guidance on what constitutes good quality drinking water as distinct from water which is acceptable. The guidelines are concerned with the safety of water from a health point of view and with its aesthetic quality. The guidelines are applicable to any water intended for drinking (except bottled or packaged water) irrespective of the source or where it is used. The guidelines provide:

- an authoritative Australian reference on good quality drinking water and a framework for identifying acceptable quality water through community consultation;
- information on the significance of a range of water borne micro-organisms which can cause disease;
- guideline values for a wide range of chemical and irradiological substances and physical properties which affect water quality to ensure that drinking water does not pose any significant health risk to the consumer and is aesthetically of good quality;
- advice to operators of water supply systems on the significance of water quality characteristics for the operation of a system;
- procedures for developing and monitoring programmes; and
- procedures for assessing performance of a water supply stem and advice on reporting performance to the public and to health authorities.

The guidelines do not address:

- packaged water and ice which are regulated by standard 5 of the Food Standard Code; and
- water for specialised purposes such as renal dialysis and some industrial uses where water of higher quality than that specified by the guidelines may be required.

Draft Business Zones – Victoria

The Department of Planning and Development has invited comment on a set of five draft business zones for their explanatory report. Proposals for new residential and industrial zones were released during 1994. The aim of this latest group is to replace the numerous commercial and business zones and planning schemes throughout Victoria.

New South Wales Waste Disposal Act

The New South Wales government is to amend the Waste Disposal Act to incorporate its "*No Time to Waste*" policy. Relevant changes include:

- setting up of the Regional Waste Management Council;
- expanding the operational area of the Act from metropolitan area to the whole of the state; and
- incorporating the industry waste reduction plans.

These amendments will also allow the Environmental Protection Authority (**EPA**) to enforce the use of hazardous waste docket and approval systems across New South Wales. The EPA is currently preparing to implement the policy. New project officers have been employed to research the industry reduction plans, their task, in part, being to find what waste can be feasibly reduced or recycled.

Nature Conservation Act

The Nature Conservation Act was fully proclaimed in December 1994. Some provisions of the Act were proclaimed in 1992. The provisions proclaimed in December 1994 are mainly concerned with licences, permits and authorities and declarations of protected areas. The Nature Conservation Act replaces the former Fauna Conservation Act, National Parks and Wildlife Act and Native Plants Protection Act. There are significant differences between the Nature Conservation Act and these previous acts including:

- wildlife permits, licences and authorities are subject to appeal over who is fit to be a holder and which type is appropriate;
- landholders entitled to claim compensation for action taken under the Act;

- the Act protects a species as well as its habitat;
- management principles are specified for classes of protected animals and wildlife;
- the government is bound by the management principles set out in the legislation;
- conservation plans apply to particular species;
- some conservation plans incorporate a tagging and licensing system which will enable buyers of native plants to determine if they are derived from a legal source; and
- the Department of Environment and Heritage will assume responsibility for marine mammals and reptiles such as dugongs and turtles.

National Rural Tourism Strategy

The Federal government has released a National Rural Tourism Strategy. This strategy is intended to assist the development of the rural tourism market through a range of initiatives such as planned tourism development and marketing a range of country experiences and packages. The strategy examines the importance of rural tourism as an industry and looks at how planning, development and management can contribute to its growth. The strategy sets the direction for three million dollars of funding initiatives over the next three years. The tourism strategy identifies economic, environmental and social benefits from the development of rural tourism and encourages an integrated approach to help maximise these benefits. The strategy proposes development of add-on attractions to traditional packages providing access to other attractions or pursuits in the region. It also recommends standards and accreditation be developed as well as an emphasis on education and training to ensure a good quality product. There is also a discussion on the issue of transport and infrastructure and the various benefits that providing access for tourists can have for a community. The need for a thorough analysis of the tourism market and transient and rural tourism is also noted and further analysis is encouraged and funded.

Dual Occupancy Manual

The New South Wales Department of Planning has released a new dual occupancy design solutions manual. The manual contains six case studies including two demonstration projects on a variety of sites – sloping, short, narrow, corner, radial and already over-developed. The studies take the reader through a design process that analyses existing site development, inherent site conditions, design opportunities, and preferred design solutions. Key issues such as privacy, over-shadowing, noise, views, solar access and landscape are addressed in both the site analysis and design solution section of each study. Each design solution is tested against the key issues identified as relevant to each site.

National State of the Environment Report

The Commonwealth will produce the first National State of the Environment Report in late 1995. The report will be prepared in accordance with the framework established in the report entitled "*State of the Environment Reporting: Framework for Australia*". That report identified a four yearly national report as a major outcome of the reporting system. The report is to address the pressures on the environment, its condition and the response measures taken in the light of those conditions and trends from a continental perspective. The objective is to document changes in the condition of Australia's atmospheric, terrestrial, fresh water, marine, rural, urban and heritage environments. In order to prepare the report seven expert reference groups have been established to prepare an independent assessment of the status of Australia's environment. Although the report will comment on environmental trends it will not make policy recommendations. The first part of the report will set out the, context for readers whilst the main body of the report will address the major components of the Australian environment from a State and societal response perspective. The last part of the report will discuss the key national issues.

The Commonwealth Endangered Species Protection Act 1992

The *Endangered Species Protection Act 1992* directly protects endangered and vulnerable species and endangered ecological communities in Commonwealth areas. The *Endangered Species Protection Act 1992* also applies to Commonwealth actions and where a Commonwealth decision is needed for the approval of a proposal.

The *Environment Protection (Impact of Proposals) Act 1974* has been amended to take into account certain Commonwealth obligations under the *Endangered Species Protection Act 1992*. Section 5A of the *Environment Protection (Impact of Proposals) Act 1974* extends the definition of "*matters affecting the environment to a significant extent*" to include a matter that could threaten with extinction or significantly impede the recovery of a list of native species or list of ecological communities. The result of this amendment is that in assessing whether a project as a whole has environmental significance the impact of the proposal on listed native species and ecological communities must be determined.

Queensland Planning Law Reports

In QP's March edition Planning Law Update set out a number of cases which at the time of writing were unpublished. These cases have subsequently been published in the Queensland Planning Law Reports. It should be noted that the Queensland Planning Law Reports seeks to report all decisions of the Planning and Environmental Court and readers are encouraged to peruse those reports on a regular basis in order to advise as to the recent decisions of the court.

This paper was published as a Planning Law Update in the Queensland Planner 35:2, 8-11, June 1995.

Environmental decisions and the Administrative Appeals Tribunal

Ian Wright | Robert Milne | Emma Commins

This article discusses the Environmental Decisions and the Administrative Appeals Tribunal (AAT) report released by the Administrative Review Council. This article highlights the issues raised by the report, the scope of the merits review of environmental decisions and the powers and procedures of the AAT

June 1995

Introduction

On 15 June 1994 The Administrative Review Council (**council**) released a report entitled Environmental Decisions and The Administrative Appeals Tribunal. The report is a response to a recommendation made in the Steering Committee's report – "*The Review of the Administrative Appeals Tribunal*" - that the council examine the current review procedures in respect of environmental decisions. It specifically addresses problems with the merits review of environmental decisions by the Administrative Appeals Tribunal (**AAT**).

The report sets out:

- a summary of matters raised in the council's discussion paper and the submissions responding to those matters;
- the council's recommendations regarding the scope of AAT review in environmental matters; and
- the council's recommendations regarding the powers and procedures of the AAT in reviewing decisions on environmental matters.

Issues raised by discussion paper

Costs and delay in procedure

The report addresses the defects and shortcomings of current AAT merits review procedures in relation to environmental decisions. "*Merits review*" is defined as the reconsideration of a decision by a body that can substitute its own decision for the original decision. The council recognises the importance of a merits review procedure which is "*timely, accessible and fair*".

When reviewing a decision, the AAT "*stands in the shoes*" of the original decision-maker and decides the matter afresh. Due to the nature of this procedure, problems of time and cost which may have been present during the primary decision-making process often re-occur during then merits review process. The report discusses the Great Barrier Reef Marine Park case, highlighting the shortcomings of the review procedure which resulted in substantial delays in that case.

The need for public consultation

One of the main reasons for delay in the review of decisions is the necessity for public consultation. The council recognises that public consultation in environmental decision-making is desirable, in that it promotes fairness and ensures that the decision-maker is fully informed of the potential impact of the decision. The council's discussion paper questions the extent to which public consultation should be required during a merits review process, bearing in mind the aim of reducing the potential for cost and delay.

The council's preliminary view was that the merits review procedure should involve a review of all aspects of the original decision in a timely and cost effective manner without repetition of public consultation.

After consideration of the submissions received in response to the discussion paper, the council reaffirmed its view regarding the importance of public consultation in decisions affecting the environment, but recommended that the merits review available in respect of environmental decisions should not be limited to a review of the level of public consultation undertaken.

Scope of merits review of environmental decisions

The council imposes a prima facie test for determining whether a review on the merits is appropriate in respect of a statutory decision-making power. The test is whether the decision "*will or is likely to affect the interests of a person*". Once the prima facie test has been satisfied, it is irrelevant that the decision may affect the general community or sections of the general community rather than an individual. Most environmental decisions are thought to satisfy this prima facie test, which is broadly interpreted by the council as not being limited to property,

financial or physical interests but extending to intellectual and similar interests. Applying this broad interpretation to an organisation, a decision would satisfy the prima facie test if it affected a matter of environmental interest which was within the objects of the organisation.

Environmental decisions are thought to be inherently unsuited to merits review due to their "*political nature*". This is because the decisions involve detailed consideration by the responsible Minister of Parliament who in turn is held accountable by Parliament. It is therefore the Minister's responsibility to decide whether a decision should be resolved within the political system.

The council's guidelines recommend that merits review be excluded if the decision in question involves a "*major political controversy*". The phrase "*major political controversy*" is thought to arise only in very limited circumstances. A decision involving a political aspect or the application of government policy would not be sufficient.

The council recognises however, that it would be unfair to exclude all decisions made under a decision-making power from merits review when it is only a few decisions which might involve a "*major political controversy*".

The exclusion is therefore limited to decisions made by a Minister personally and is effected by that Minister issuing and tabling in Parliament a certificate detailing the particular decision to be excluded from review, together with the reasons for the exclusion. The exclusion is to take effect from the date of tabling of the Minister's certificate.

A further recommendation by the council is the amendment of the *Administrative Appeals Tribunal Act 1975* (**AAT Act 1975**) by the insertion of a schedule identifying decision-making powers already subject to the jurisdiction of the AAT, the exercise of which could substantially affect the environment. The schedule is to be prepared after consultation with relevant departments, users of relevant legislation and the council.

The report also contains a recommendation that a further "*test*" be imposed on the AAT before it reviews a decision on its merits. Once the decision-making power has been identified as one listed in the proposed schedule to the AAT Act, the AAT should consider whether the decision-making process included or should have included public consultation.

The council recommends that the AAT should remit the decision to the primary decision-maker if the decision-making process should have involved public consultation but failed to do so, and this issue had not been considered by the primary decision-maker.

Also, the decision should be remitted to the primary decision-maker if, since the time of making the decision, evidence or factual material which substantially alters the basis of the primary decision has evolved.

"*Public consultation*" involves three elements:

- adequate public notification of the intention to make the decision;
- opportunity for a response from members of the public; and
- consideration by the decision-maker of the response from the public and incorporation of the comments received into the reasons for the decision.

In determining whether public consultation was warranted, the AAT should refer to any criteria spelt out in the relevant legislation under which the decision is made and, in all other cases, the criteria listed in paragraphs 3.1.2 – 3.1.3 of the Environment Protection (Impact of Proposals) Administrative Procedures.

Powers and procedures of the AAT

Standing

The standing requirements of the AAT Act will be satisfied if it is established that a person's "*interests*" are "*affected*" by the decision. The test will be satisfied in respect of an organisation if the decision relates to a matter included in the objects or purposes of the organisation.

The council received submissions on whether the test for standing should be extended to include "*genuinely interested persons*". The council recognised the difficulties which would result from this broader definition in distinguishing applications which were genuine from those which were "*frivolous and vexatious*". These difficulties could interfere with the aim of the suggested reforms to make the AAT review procedure less complex and more cost efficient.

Accordingly, the council recommended that the test for standing in environmental matters should not be extended.

Implementation of environmental decisions pending merits review

A further issue dealt with was the fact that an application for the review of a decision does not affect the operation of the decision or prevent the implementation of the decision. The council recognised the difficulties flowing from the very nature of environmental decisions in that the implementation of a decision pending an application for merits review could have an irreversible or long term effect on the environment. The rationale behind the review process is to prevent the occurrence of irreversible or long term effects on the environment. This rationale would be contradicted if a decision could be implemented before the lodgement of an application for review.

The council recommended that a decision which may have an "*immediate, irreversible and substantial effect upon the environment*" may not be implemented until 28 days after the date on which the decision is made, subject to the AAT's discretion to permit the implementation of the decision having regard to:

- possible hardship resulting from a delay in implementation of the decision; and
- whether the decision, if implemented, would cause an immediate, irreversible and substantial effect on the environment.

The council's recommendations for hearing procedures

Section 34 of the AAT Act gives the AAT power to implement pre-hearing processes with a view to resolving the substantive matters in dispute or ensuring that the hearing proceeds with minimum delay and interruption.

The council recommends that the pre-hearing procedures should be concerned with identifying matters in dispute and isolating matters which are not in dispute.

The council recognises the advantages of mediation processes as a method of reducing the costs of environmental proceedings. With this in mind, the council recommended that, at pre-hearing conferences, the member presiding over the conference may make orders in relation to details of evidence to be relied upon by the parties, subject to presentation by each party of a written submission.

The outlining of principal arguments to be relied upon and matters upon which oral evidence and cross-examination will be permitted.

A further recommendation of the council was that the membership of the AAT include at all times at least two members experienced in environmental law and environmental science. This is so as to avoid the possibility of the sole member of the AAT with the relevant experience being precluded from sitting at a hearing on environmental review.

Conclusion

The report is aimed at reducing the delays and increasing the efficiency of the current merits review procedure by:

- maintaining the current "*standing*" requirements for applicants;
- excluding decisions involving a "*major political controversy*";
- avoiding repetition of the public consultation procedures wherever possible;
- encouraging mediation and resolution of issues at the pre-hearing conference stage.

The council's recommendations, if implemented, should improve the current situation making merits review of environmental decisions more readily available.

This paper was published in the Queensland Planner, June 1995.

What is the PEDA Bill and how will it impact the Integrated Development Assessment System?

Ian Wright

This article discusses the statutory framework to be established by the PEDA Bill and the Integrated Development Assessment System

September 1995

The PEDA Bill

By now most RAPT members will have read the draft Bill. Nevertheless, as the discussion period draws to a close members and other QP readers may welcome the following summary refresher.

The Planning, Environment and Development Assessment Bill (**PEDA**) was released on 10 May 1995 for public comment. The Bill brings together the Local Government (Planning and Environment) Act, the Building Act, Standard Building Law, and parts of the Sewerage and Water Supply Act and Regulations, and replaces the development assessment provisions of the Integrated Resort Development Act and the Mixed Use Development Act. The Bill's objective is the management of land use and development and how that promotes sustainable land use, development and the economic, social and physical wellbeing of people. The Bill envisages that this objective will be achieved through the preparation of planning instruments and the development assessment process.

The Bill empowers local governments to prepare planning schemes and planning scheme policies. Planning schemes are to have the status of local laws under the *Local Government Act 1993* whilst planning scheme policies are to have the status of a local law policy. Although the structure of planning schemes is not prescribed, they must identify State, regional and local elements; features of environmental, visual, economic or heritage significance; and future infrastructure, land use and transport requirements.

The process of preparing planning schemes requires the participation of the State and the local governments, the public and any relevant Regional Planning Advisory Forum. These forums are designed to achieve a co-ordinated approach to issues which extend beyond a single local government area. They will be established by the Minister after consultation with local governments and relevant interest groups about the terms of reference, composition of the forum and arrangements as to participation in and support for the forum. The Bill also empowers the State to prepare State planning policies which must be applied when preparing planning schemes or planning scheme policies and when considering certain development applications.

Development is defined to mean: building work; plumbing or drainage work; operational work (which includes activities such as engineering, extractive or forestry operations, damage to trees, excavation and filling); subdivision and amalgamation of a lot; and a material change in the use of premises (which includes the start of the use, the re-establishment of a discontinued use or a range in the character, intensity, scale or other aspects about the use of premises that is likely to have a material effect on the environment).

There are three primary categories of development, namely *exempt* development, *non-assessable* development, and *assessable* development, plus a fourth category namely *government* development. Exempt development is as declared under a regulation. *Non-assessable* development is development not requiring technical based assessment and either declared by regulation to be non-assessable development or declared under a planning scheme to be development not requiring impact-based assessment by the development manager. The local government will usually be the development manager. *Assessable* development is development other than non-assessable development and exempt development. *Government* development is development carried out by the State or local government for non-commercial purposes.

Development applications

In order to carry out assessable development, an application must be made to the development manager. The development manager will be the local government unless otherwise prescribed by regulation. An application may be made for preliminary approval, a development permit or both. A preliminary approval does not authorise the development because a further application for a development permit is necessary before the right to carry out the development accrues. A development permit authorises assessable development to be carried out. It is not necessary for exempt development, non-assessable development or government development on designated land. Although an application is not required for non-assessable development, it must still comply with building, plumbing and drainage standards and the standards fixed by planning schemes, local laws and other laws.

Development assessment

The assessment of a development application may be technical or impact based.

A technical based assessment is made against a technical assessment code. Technical based assessment is either known as a Development Manager Technical Assessment or Referral Agency Technical Assessment depending upon which body undertakes the assessment. Development Manager Technical Assessment is necessary if the development is building work, plumbing or drainage work, subdivision construction or otherwise declared under a regulation or a planning scheme to require technical assessment. Referral Agency Technical Assessment is required if a referral agency has technical referred jurisdiction for the development.

An impact based assessment considers the effects of a development. Impact based assessment is called either Development Manager Impact Assessment or Referral Agency Impact Assessment depending upon the body carrying out the assessment. Development Manager Impact Assessment is necessary unless a regulation or planning scheme states that impact assessment is not required for the development. Referral Agency Impact Assessment is necessary if the referral agency has impact referral jurisdiction for the development.

The level of impact assessment to be undertaken by a development manager will depend on whether the development is preferred, controlled or discretionary. Development is preferred development if it is:

- expressed to be so in a planning scheme;
- expressly or impliedly considered under the planning scheme to be acceptable in terms of its environmental, social and economic effects and complies with any development standards in the planning scheme;
- stated to be a preferred development in a previous preliminary approval; or
- prescribed by regulation.

A preferred development is assessed against the planning scheme, State planning policies, and all other laws and policies for which the development manager has responsibility.

Development is *controlled development* if it requires impact assessment and there is no planning scheme for the local government area or the development is not expressly or impliedly dealt with under the planning scheme.

The controlled development is assessed against the suitability of the site, the development's likely effect on the environment, the character and amenity of the area, the objectives of the planning scheme for the area, and relevant development standards, State planning policies and laws and policies for which the development manager has responsibility.

Development is discretionary development if it is expressly or impliedly dealt with under the planning scheme but is not preferred development. A discretionary development is assessed to determine the suitability of the site and the likely effect of the development on amenity, the objectives of the planning scheme in respect of the area and present and future infrastructure demands.

Integrated Development Assessment System (IDAS)

IDAS is intended to integrate all development assessment processes administered by State and local governments into a single approval system. IDAS involves four stages, namely the *Application* stage, the *Referral* stage, the *Public Consultation* stage and the *Decision* stage. The process is to be managed by a development manager which in most circumstances will be the local government.

Application stage

The IDAS process is initiated by the lodgement of a development application with the development manager who is required to undertake a preliminary assessment to determine:

- the nature of the development;
- whether the development is preferred, discretionary or controlled;
- the relevant referral agencies and whether they are an advice or concurrence agency;
- whether Development Manager Impact Assessment or Technical Assessment is required; and
- whether any Infrastructure Charges Code applies.

This information is then provided to the applicant along with details of the referral agencies and the appropriate public consultation requirements.

Referral stage

The referral agency process gathers a number of approval processes under the umbrella of the development application. This is intended to reduce the number of separate approvals required but has the potential to add significantly to the complexity and cost of an application in the event that a multiplicity of referral agencies having an interest in the application are involved. The applicant is required to lodge a copy of the development application, the preliminary assessment information and the relevant application fee with each referral agency. A

referral agency may be either an advice agency which is advisory only or a concurrence agency which has both relevant concurrence (ie the right to require refusal of the application or to impose conditions) and advice powers. The development manager and referral agencies may request further information from the applicant. The applicant may then provide all or part of the information requested, ask that the information request be mediated if the applicant feels it is unreasonable, or give notice asking the development manager to proceed without the information being supplied.

Public consultation stage

For both discretionary and controlled development public consultation is required and submissions may be made by third parties. Persons making submissions to the development manager are empowered to appeal in respect of the development manager's decision.

Decision stage

Once public consultation is completed the development manager is required to assess the development application and make a decision. The development assessment process has been discussed previously. If a concurrence agency has refused the application the development manager must refuse the application. If the concurrence agency has proposed any conditions then any approval must be subject to those conditions. Where the applicant appeals against a decision of the development manager then any concurrence agency that required a refusal or imposed conditions must defend the appeal.

Call in power of the Minister

The Bill also proposes that the Minister will have the power to call in a development application if the development involves an interest which affects an economic, social or environmental interest of the State or a region. Where a Minister exercises the call in power the decision cannot be appealed, and any appeal that has started is taken to have not been made. However, a person who has lodged an appeal may make a submission to the Minister.

Charges for applications

The Bill empowers local governments to impose infrastructure charges on development applications in accordance with principles that are intended to ensure the charges are fair and reasonable (ie the charge must be proportional to the anticipated demand for the services). Infrastructure charges may be made in respect of matters established in a regulation which will include water supply; sewerage; environmental and stormwater works; road, cycleways and pathways; and local community land. An Infrastructure Charges Code must be prepared for public consultation and adoption by local government before an infrastructure charge can be imposed. If development is proposed in an area in which there is no Infrastructure Charges Code, the development manager may require the developer to prepare an Infrastructure Charges Code for adoption in the local government area. A local government can, in its planning scheme, add to the list of development infrastructure items for which a charge will be made if the item can be demonstrated to be necessary for the health and safety of the residents, and needs to be provided at the time development occurs.

The appeal process

A new court known as the Land, Planning and Environment Court is to be created as a new division of the District Court pursuant to separate legislation. The court will be under the direction of a judge and will be staffed by judges and non-judicial assessors. The non-judicial assessors will be allocated matters of merit. For instance, appeals on refusal of conditions resulting from technical assessment will be heard by a non-judicial technical assessor. The court will have the power to hear appeals from the decisions of the development manager. The development manager will be the respondent to an appeal even where the decision has been dictated by a concurrence agency.

Of particular note is the fact that the court must confine its decision to the information available to the development manager at the time of the decision, disregarding any concession the appellant is prepared to make, unless the respondent is given reasonable time to consider any concession the appellant makes during the proceeding. The court also has the power to grant a declaration in relation to the construction of a planning scheme or development approval.

When can approvals be changed?

The Bill provides for applications to change a development approval. The development manager may approve a change where:

- the change is not substantial;
- the interests of a person would not be adversely affected to more than a minor degree;
- there are sound planning grounds to make the change, and it is not too late to make the change. A change to a concurrence agency condition (ie one imposed on the approval by that agency) cannot be made without the consent of that agency.

When will compensation be available?

The Bill provides for compensation for injurious affection. Compensation will be available where the use to which premises can be put, other than land in a prescribed area, is changed by a planning scheme, and the market value of the land is reduced. The draft regulation provides that prescribed areas will include Beach Control Districts, Coastal Management Control Districts, Marine Parks and World Heritage Areas. An owner is not entitled to compensation unless: the owner was the owner at the time the use to which the premises could be put was changed; the owner makes an application for development that was "*as of right*", consent, preferred, or discretionary under the previous planning scheme provisions but not under the changed planning scheme provisions within 2 years of the zoning change; the application indicates that a compensation claim may be made if the application is refused; and the development manager refuses the application.

Conclusion

This summary outlines the statutory framework to be established by the Planning, Environment and Development Assessment Bill. The Bill provides a framework for Integrated Planning and Development Assessment intended to facilitate the management of land use and development and promote sustainability and the economic, social and physical wellbeing of people. The new system is complex and utilises new concepts and procedures.

This paper was published as a Planning Law Update in the Queensland Planner 35:3, 12-14, September 1995.

Queensland and Victorian water regulation and policy and the National Environment Protection Council's role in its development

Ian Wright | Vanessa Plumpton | Howard Coombes

This article discusses the new changes to water regulation and policy across Queensland and Victoria and the role of the National Environment Protection Council

March 1996

Queensland water quality

Tough new standards for water quality in Queensland have been released by the former Minister for Environment and Heritage, Molly Robson. The Environmental Protection Policy (Water) specifies water quality standards for all of Queensland's rivers, creeks, estuaries, bays, and groundwater. Specific standards are proposed for more than 100 Queensland waterways from the Brisbane River north to the Barron River and west to Coopers Creek. The Environmental Protection Policy (Water) will operate together with the new *Environmental Protection Act 1994* which provides for heavy fines and possible imprisonment for breaking the new laws.

The new water policy:

- requires waste minimisation and maximisation of re-use and recycling;
- imposes strong controls over the release of contaminants to Queensland waterways;
- protects groundwater supply;
- limits release of contaminated water and now treated sewerage into wetlands;
- protects creeks, rivers, beaches and bays from uncontrolled urban stormwater runoff;
- penalises owners of boats which pollute or who throw garbage into non tidal waters; and
- restricts the disposal of all chemicals, pesticides and poisons into gutters and stormwater drains.

The draft policy puts a range of commitments on local governments to develop environmental programs for important issues such as sewerage and urban stormwater.

Victorian water regulation

The Victorian Environment Protection Authority has released three State Environment Protection Policies (**SEPP**) for public comment. These policies are for the groundwaters of Victoria, the waters of Port Phillip Bay and the waters of Central Gippsland.

The SEPPs are similar to the Environment Protection Policies that are proposed under Queensland Environmental Protection legislation. They identify beneficial uses of the environment, establish environmental quality indicators and objectives to protect those beneficial uses, and set out guidelines for actions to achieve and maintain the desired environmental quality.

National Environment Protection Council

The National Environment Protection Council was established by joint proclamation of complementary and uniform Acts in the participating States and Territories in the Commonwealth in September 1995. The council has the role of introducing national environment protection measures which will be statutory framework instruments very much like Queensland's environmental protection policies. These environment protection measures may include standards, goals, guidelines and protocols. The NEPC consists of a minister nominated from each State and Territory (with the Commonwealth Minister as chair). It should be noted that Western Australia is currently the only State not participating in the NEPC. The NEPC legislation outlines the process for developing environment protection measures involving public consultation and impact assessment. Measures are made by a two-thirds majority vote of the council.

Individual State governments are responsible for implementing and adopting national measures through their own environmental legislative regimes. In Queensland it is anticipated environment protection measures will be adopted as environment protection policies under the *Environmental Protection Act 1994*. Each State is required to report to the NEPC on the implementation of national measures and their effectiveness within that State's jurisdiction. The NEPC was an outcome of the 1992 Inter-Governmental Agreement on the Environment.

Tasmanian Heritage Act

A Heritage Protection Bill has been introduced into the Tasmanian parliament. The object of the Bill is to conserve places of historic cultural heritage significance, to bring certainty of process to development proposals involving heritage places, and to integrate heritage conservation into Tasmania's resource management planning and local government system.

The Bill establishes a historic heritage register administered by a heritage council and provides for heritage agreements and assistance and incentives to owners of heritage places. The Bill does not purport to cover Aboriginal heritage. The heritage register includes places that satisfy criteria prescribed in the Act as well as heritage areas which may be declared to provide interim protection until heritage places are identified and dealt with in planning schemes. The register includes historic shipwrecks in Tasmanian waters that are not covered by the Commonwealth Historic Shipwrecks Act. Owners are entitled to object to a listing but the grounds of objection are limited to disputing the heritage significance of the place. Like the Queensland Heritage Act, works likely to affect the heritage significance of a listed place or area require the approval of the Heritage Council. Similarly the Heritage Council has the power to delegate its powers to local government councils where appropriate. Furthermore, the Heritage Council has power to issue stop work orders and orders to repair damage. Like the Queensland legislation the Bill also provides for the payment of $1 million penalties for illegal actions.

Marine Pollution Act

The new Queensland Transport Operations (Marine Pollution) Bill is being developed by the Queensland Department of Transport. The object of the Bill is to implement the International Marine Pollution Convention (**MARPOL**) at a State level, complementing Commonwealth legislation. It is intended that the new Bill will repeal the *Pollution of Water by Oil Act 1973* and will make provision for dealing with the five annexers of the MARPOL convention. These annexers are oil, noxious liquids, harmful package substances, sewerage and garbage.

Commonwealth coastal policy

The Commonwealth government has released its coastal policy entitled "*Living on the Coast*" and has announced a $53 million package of measures aimed at improving the management of Australia's coastline over the next four years. The policy is a response to the 1993 final report of the Resource Assessment Commission Coastal Zoning Inquiry and the 1991 Commonwealth Report "*The Injured Coastline*". The policy sets out detailed objectives in relation to sustainable resource use, public participation, and resource conservation knowledge and understanding.

A number of management initiatives have also been announced in conjunction with the policy and these include the establishment of a community coastal action program known as "*Coastcare*" to provide opportunities and resources for residents, volunteers, business and interest groups to participate in coastal management; a national coastal advisory council to advise the Commonwealth on coastal management issues; funding to State and local governments for co-operative projects demonstrating development and implementation of local water quality management plans; increasing coastal management expertise and the development of integrated coastal management strategies based on partnerships between the three levels of government, the community and industry.

This paper was published as a Planning Law Update in the Queensland Planner 36:1, 17-18, March 1996.

Colin Biggers & Paisley

Infrastructure agreements

Ian Wright | Vanessa Plumpton

This article discusses the impact of infrastructure agreements on the development process and planning practice

March 1996

Introduction

The *Local Government (Planning and Environment) Act 1990* has been amended by the *Local Government (Planning and Environment) Amendment Act 1995* which commenced operation on 22 November 1995. The amending Act inserts a new Part 6 Division 2 which provides for infrastructure agreements.

An agreement will constitute an infrastructure agreement for the purposes of the amending Act if:

- it is concerned with infrastructure for the development of land included in a development control plan; and
- the State, a government corporation or a local government is a party to the agreement; and
- the agreement provides for:
  - the repayment of amounts paid, reimbursement of amounts expended and the amendment or cancellation of obligations if development entitlements on which obligations are based are changed without the consent of the person who has to fulfil the obligation and how obligations are to be fulfilled if there are changes in ownership of the land the subject of the agreement; and
  - matters prescribed under regulation.

Infrastructure is defined to include facilities, services, land and works used in connection with economic activity or the environment. A development control plan on the other hand is defined by the Act to mean a plan for the orderly growth, development or conservation of an area, that conforms with section 2.5 of the Act and is approved by the Governor-in-Council. Infrastructure agreement is also defined to include the original agreement and any subsequent amendments.

Impact on the development process

An infrastructure agreement may lawfully limit the exercise of a discretion of a local government which is a party to the agreement. Where an infrastructure agreement limits the exercise of a local government's discretion, the local government is required to give effect to that limitation in accordance with the provisions of the infrastructure agreement (see section 6.8). Furthermore the amending Act expressly provides that section 6.1 of the Act is not to apply to an infrastructure agreement. This has two effects. Firstly, a local government which is a party to an infrastructure agreement may impose on an approval or permit under the relevant development control plan a condition that is not relevant or reasonably required by the proposed development. Secondly, the infrastructure agreement is not unlawful for the reason that it imposes obligations on parties that would not be relevant or reasonably required by the proposed development. The amending Act therefore allows a local government and a developer to negotiate and enter into an infrastructure agreement with the commercial certainty that the entitlements provided and the obligations imposed under the infrastructure agreement are legally enforceable.

This is reinforced by section 6.7 of the amending Act which clarifies that the State, a government owned corporation and a local government have and have always had the power to make and amend infrastructure agreements. This is further clarified by section 6.13 which provides that where section 6.7 declares that a local government has and always had the power to make or amend infrastructure agreements, that does not imply that an agreement will be unlawful merely because it is about infrastructure for land not included in a development control plan or is made before the commencement of this section.

Furthermore section 6.11 provides that any infrastructure agreement made prior to this legislation need not meet the definitional requirements in section 6.5. In relation to those agreements negotiated in respect of Springfield in the western suburbs of Brisbane, the amending Act provides that all sections of the amending Act are to apply with the exception of section 6.6(4) which requires the agreement to provide for circumstances where development entitlements or land ownership change.

Impact on planning practice

Where the owner of land has consented to the development obligations being attached to the land or is a Party to the agreement, the development obligations contained in the infrastructure agreement attach to the land and bind the owners and owners' successors in title.

To evidence this the owners' consent must be endorsed on the agreement or the local government must be given a consent document evidencing this consent as soon as practicable (section 6.10). Where a local government has an infrastructure agreement or an owner's consent document the local government must keep these open for inspection and must make copies available for purchase at its public office at cost price (section 6.12).

This paper was published in the Queensland Planner, March 1996.

State level impact assessment in Queensland

Ian Wright | Howard Coombes

This article discusses State level impact assessment in Queensland

March 1996

Introduction

The Queensland government has recently released draft guidelines to supplement the statutory requirements for State level Impact Assessment (**IA**) for development proposals which involve major State or local government works or major State approvals. The guidelines provide advice on the processes and procedures of IA. IA is the process through which a proponent provides appropriate levels of information to approval agencies and the general public about the nature of the development proposal, its expected impacts and the way the project will be managed.

Legislative basis for the Impact Assessment system

Applications for development will be dealt with under the draft Planning, Environment and Development Assessment Bill (**PEDA**) which was released for public comment in May 1995, under which a system of assessment categories will be built into planning schemes. However, when a proposed development could have significant impacts, it may be appropriate for it to be assessed through a rigorous State level process. These new State level procedures have status under a regulation to the State Development and Public Works Organisation Act (**SDPWO Act**). The amendments seek to satisfy an election commitment to provide a consistent and credible Impact Assessment (**IA**) process for major public sector works and private sector development projects in Queensland. The regulation introduces mandatory requirements which:

- integrate with the Integrated Development Assessment System (**IDAS**) to provide a system which incorporates IA as an integral component of development assessment;
- broaden the scope of IA to include social, economic and cumulative impacts and consideration of feasible alternatives;
- establish a uniform and consistent assessment and decision-making process for all private and public sector development proposals;
- provide a manager to manage the application and assessment process; and
- complement the referral and concurrence mechanism established under PEDA ensuring the interests of all government agencies are addressed.

Triggering the IA process

There are a few avenues by which State level impact assessment under the proposed regulation to the SDPWO Act may be initiated:

- The development manager for an application under the IDAS may determine the need for State level IA where a State referral agency has received initial advice and decided there is likely to be a major development impact.
- A department could determine the need for State level IA via the ministerial "*call in*" powers provided in section 5.2.1 of the PEDA Bill.
- Where a State department is proposing public works that department would determine the need for State level IA according to the SDPWO Act and Regulations and section 5.1.3(i) of the PEDA Bill.
- Under the Mineral Resources Act, the Department of Minerals and Energy would assess mining development proposals against "*trigger*" criteria when assessing the need for an impact assessment study.

An initial evaluation is followed by the application of a set of questions based on the trigger criteria. The initial evaluation involves the consideration of two basic questions to determine whether an IA is required. Those questions are:

- Is there a need for the proponent to conduct specific rigorous studies overseen by the State government in order to examine and document impacts and evaluate alternative development and environmental management scenarios?
- Is there a need for a greater level of public participation in the assessment process than that which would otherwise occur?

If the answer to these questions is "*yes*" then the proposal will be further assessed against the set of trigger criteria. These criteria are:

- character of the environment;
- nature of the proposed development;
- potential development impacts having regard to the proposed management practices that may mitigate the effects of the proposed development;
- the level of confidence in predicting potential development impacts without having an IA prepared;
- availability and feasibility of alternatives;
- actual or potential community interest in and controversy about the proposal;
- relevant planning schemes or policy frameworks; and
- potential impact on relevant public infrastructure.

The trigger criteria are applied through a series of "*trigger questions*". The responses to these questions result in a numerical score which will indicate whether the proposal has significant environmental, social or economic implications or is likely to be controversial, in which case an IA should be triggered.

The Impact Assessment process

The trigger scoring system determines whether a proposal should be assessed through IA or should go through the standard PEDA approval process. Draft terms of reference are then established taking into account issues identified during the triggering process. A draft Impact Assessment Study (**IAS**) is then prepared by the proponent. Its availability is advertised and public submissions are called for within two months. The final IAS, once prepared, is evaluated by the process manager and an evaluation report prepared. The evaluation report must be completed and made available within 42 days of receipt of the final IAS. The evaluation report:

- addresses the adequacy of the final IAS;
- states recommendations about the suitability of the development; and
- states the conditions, if any, on which approval of the development might be given.

A decision on the proposal is made by the approval authorities on the basis of the evaluation report. The decision may place conditions on the approval, such as requirements for ongoing monitoring or management strategies. Appeals against the decision or conditions of the approval may be made under the legislation in which the approval is given. If the decision is made under the PEDA legislation, parties with standing to appeal include the proponent and other interested parties. Individuals or groups who have made a submission on the proposal will have standing as interested parties.

Public involvement

Public involvement is an integral part of the IA process. Communities, groups and individuals likely to be affected by or having an interest or expertise in a development proposal are consulted and, where appropriate, are able to participate in elements of impact assessment.

The public involvement process generally involves two stages. Firstly, there is a need for the proponent to identify broad issues of concern to the community and/or specific interest groups. This involves carrying out preliminary consultation to inform the public about the proposal and the anticipated assessment process and to seek an initial understanding of the major issues of concern. Secondly, there may be a need for a more focused and detailed consultation to allow issues to be considered, conflicts resolved, and mitigation or monitoring strategies to be developed with the input of interested parties.

Making a submission

In the new IA process public submissions are requested in response to the draft terms of reference and the draft IAS. Under the regulation submissions will not be considered unless they're properly made. To make a submission it is important to know:

- when and where the project proposals are advertised;
- how to obtain or view a copy of the draft terms of reference and the draft IAS;
- the options for the form of a submission;
- how to prepare an effective submission; and
- how to deliver the submission.

Conclusions

The single most important effect of the amendments to the SDPWO Act and proposed draft regulations is the imposition of a mandatory obligation, rather than a mere discretion, on governmental departments to require the preparation of an IA where a proposal is likely to have major development impacts. Therefore, when the government intends to undertake works itself or where it must determine an application for development, and the application of criteria specified in the regulation leads to the conclusion that there are likely to be major development impacts, the department must itself prepare or demand the preparation of an impact assessment.

The proposed amendments and draft regulation formalises administrative procedures in an effort to ensure consistent application of IA policy across government. The IA process will provide key stakeholders and the public with an opportunity to comment on major development projects while at the same time provide a mechanism for taking account of a wide range of potential impacts. It is the government's intention that the amendments will enable the federal government to accredit Queensland's IA systems pursuant to the Intergovernmental Agreement on the Environment and in accordance with the ANZECC-endorsed "*Basis for National Agreement on Environmental Impact Assessment*".

In brief

- The contemplated transfer of the Social Impact Assessment Unit from Family Services to DHLGP appears unlikely to eventuate. This will allay some misgivings and be generally applauded. On the other hand, unless town planning, social planning and environmental planning can be meshed and meaningfully integrated at a regional level, continuing professional and functional disaggregation may accentuate the impression prevailing in some quarters that town planners are unduly pre-occupied with promoting physical development.
- It appears that the BCC and other councils contemplating updating their planning schemes have been putting their town plan reviews on hold while the State remains in political limbo and the future of PEDA remains in doubt. It would be a pity if such reviews are held back indefinitely. One view is that the BCC – which has become a front runner under its present administration – should seize the opportunity (well before the next local government elections) to tailor a soundly conceived new town plan to meet Brisbane's perceived needs and effectively pre-empt any obligation to comply with possibly unwelcome strictures and impediments in whatever new planning legislation the State eventually produces.
- Cynical readers of the brief discussion paper circulated last October by the Hon. Jim Elder on the proposed role and functions of the South-East Queensland Transit Authority (SEQTA) were left wondering what real powers the Authority would be given to implement its laudable mission to "*increase public transport usage in South-East Queensland and ensure that the transport system preserves the liveability of the Region*". The Authority's proposed role seemed rather less specific than that of the late and unlamented Metropolitan Transit Authority of the Petersen era. Recent advertisements for highly paid executive positions, however, suggest real teeth and a genuine commitment, reinforced by the indications that the Authority will in fact formulate and control Queensland Transport's budget for roads and public transport in SEQ.
- "*Young Planners*" groups have emerged in NSW and Victoria in recent times as offshoots of their respective Divisions with their own newsletters. Traces of an emphasis on social activities evoke, perhaps unfairly, suggestions of a parallel with the Young Liberals. On the other hand it may be merely a symptom of the growth of the profession. Nevertheless one hopes that the attitudes, interests and practices of the mainstream "*older*" planners have not become dated to the extent that the interests and needs of young planners warrant special recognition, with the consequent risk of fragmentation and dissipation of the Institute's impact and influence. The demographics of the profession may be different in Queensland where, as a legacy of history, there are in fact very few old or middle-old planners. QP would be similarly inclined to doubt the need for separate recognition of women planners.
- In the September/October issue of NEW PLANNER the NSW Division published a series of draft "policy statements" and sought membership responses which to date have apparently been somewhat tardy. Possibly because the drafts are rather bland and hard to disagree with. While the initiative is commendable, some readers may wonder what they'll really achieve and to whom they're directed, or ought to be directed. Far more difficult to formulate and agree upon than motherhood policies would be actual **planning principles**. But they would be far more likely to increase public understanding and awareness and provide communities with tangible yardsticks to monitor the performance of their governments and councils.

This paper was published in the Queensland Planner, March 1996.

Environmental law – Role of the lawyer

Ian Wright

This article discusses the role of the lawyer when practising in environmental law. It focuses on the growth of environmental law, the future directions of environmental law and the role of lawyers in environmental issues

May 1996

Growth of environmental law

Reasons for growth

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

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

Scale of environmental conflicts

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

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

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

Role of environmental law

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

- Environmental law establishes the rights of individuals and governments and in particular establishes rights to clean air, clean water and sound land use. Environmental law is at the forefront of establishing public as opposed to private rights - that is rights which reflect on an individual's societal interests rather than his proprietorial interests.
- Environmental law has commenced the difficult task of applying rights to other living creatures and inanimate objects. In doing so it reflects the shift from an anthropocentric world view to a holistic ecological view. The attaching of rights to other species reflects a legal acceptance of the philosophy expressed by Aldo Leopold of a land ethic and approach resting upon the premise "*that the individual is a member of a community of independent parts*" and a land ethic that "*enlarges the boundaries of the community to include soils, waters, plants and animals or collectively, the land*".
- Environmental law establishes the framework, the processes and the mechanisms to ensure that actions meet the standards and objectives of environmental protection. As such environmental law is the fundamental implementation mechanism of all environmental policies and strategies.
- Environmental law provides the capacity to enforce environmental policies and strategies by the application of sanctions and remedies to repair and make good any harm and to punish those whose actions do not comply with policies and strategies.

Growth of environmental law in Australia

Modern environmental law has developed at an uneven pace in different jurisdictions. Modern 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 and international 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

General directions

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

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

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

International focus

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

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

The declaration's principles demanded that the earth's natural resources be safeguarded for the benefit of present and future generations through better planning and management, education research and international cooperation. 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 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 under the chairmanship of the Swedish Prime Minister Gro Bruntland. The Bruntland Commission as it became known was charged with defining common international environmental concerns and the proposed long-term strategies for responding to these concerns in a manner that facilitated sustainable economic growth.

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

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

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

Developments such as these in the international arena over the last 20 years has resulted in international law becoming increasingly important. The most familiar form of international law is international treaties or conventions. These treaties may be bilateral, regional or multi-lateral and once signed, ratified or acceded to are binding on the parties.

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 of the properties of the persons therein, when the case is of serious consequence and the injuries established by clear and convincing evidence*.

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

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

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

Centralisation of power

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

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

However, since it is the Commonwealth and not State and local governments which will be held internationally accountable for Australia's actions, the Commonwealth must ensure 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 CIRI (Tasmanian Dams case), *Richardson v The Forestry Commission* (1988) 164 CLR 261 (Lemonthyme and Southern Forests case) and *Queensland v The Commonwealth* (1989) 167 CLR 234 (Wet Tropics case).

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

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

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

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

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

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

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

Movement away from anthropocentric bias

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

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

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

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

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

Integrated legal frameworks

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

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

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

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

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

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

Alternative dispute resolution

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

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

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

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

Impact on business

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

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

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

- the protection of the biosphere;
- sustainable use of natural resources;

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

Best practical means

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

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

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

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

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

This approach 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 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 re-use, and 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 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.

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

Accountability of government agencies

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

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

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

Increased enforcement

New environment legislation will be characterised by increased enforcement mechanisms.

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

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

Public participation

Environmental laws will increasingly either encourage or direct greater public participation.

Increased public participation will be achieved in a number of ways:

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

Full project life cycle

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

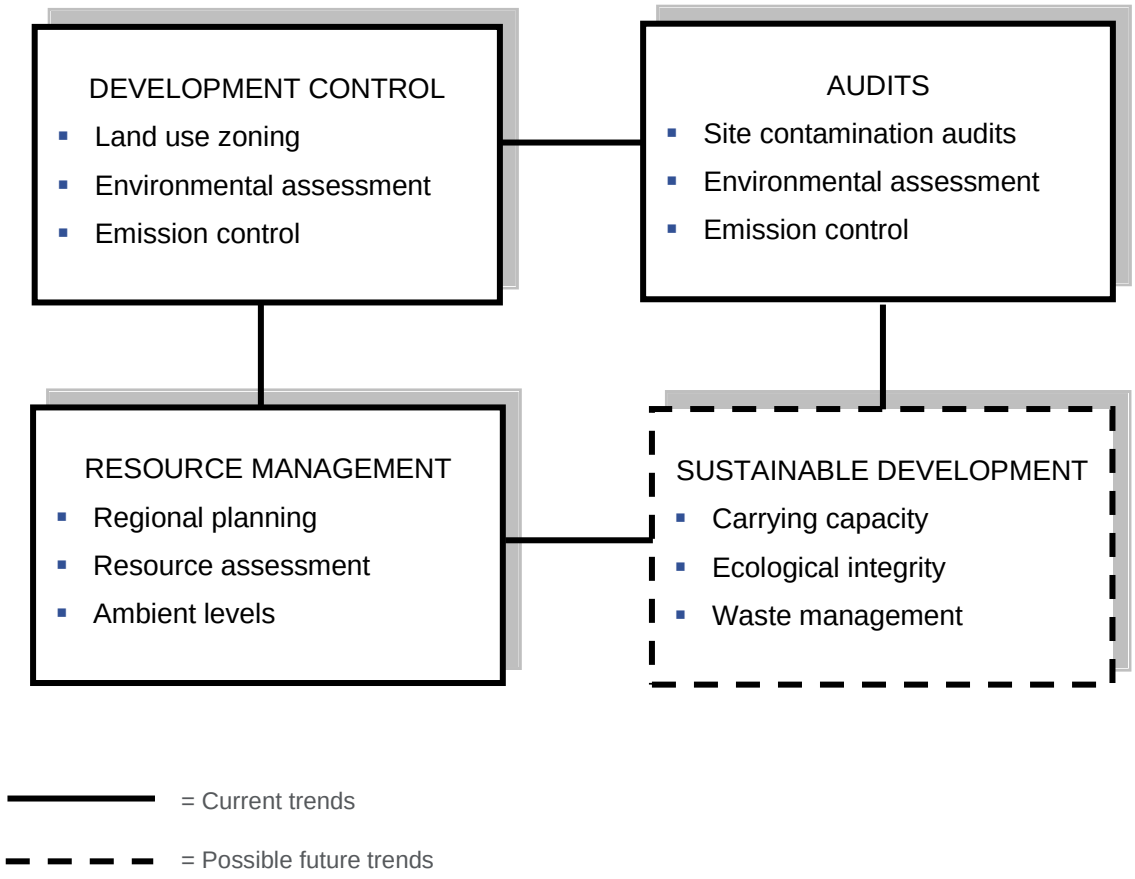
Historically environmental regulation has been achieved by development controls through land use zoning, the environmental assessment process and emission control requirements. These environmental regulations focus upon the planning stage of industrial development.

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

- Firstly the geographical scale at which development projects are to be assessed has been increased. As a result, development controls which focus on site specific issues are being complemented by mechanisms which focus on regional issues. For instance land use zoning is being complemented by regional planning, environmental assessment is being complemented by resource assessment and emission control is being complemented by the management of airsheds and watersheds.
- Secondly the temporal scale at which development projects are to be assessed is also being increased. As a result development projects which focus on the planning stages of the development of an industrial development are being complemented by measures which focus on the whole life cycle of the project. This is being achieved through environmental audits. There are three main types of environmental audits:
  - Audit of environmental impact – this audit is undertaken as part of the project commissioning to ensure that the commitments made in the environmental impact 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 requirements.
  - 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 bio-productivity 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; and
  - emission controls will be increasingly seen in terms of waste management such that emissions are recycled and re-used and possibly even reborn for another life.

These trends are illustrated in Figure 1.

Figure 1 Environmental Laws: Current and possible future trends



The role of lawyers in environmental issues

Opportunities for lawyers

The growth of environmental law and the future direction that it is likely to take indicates that environmental law is not just a passing fad. Environmental law offers tremendous opportunities for qualified young lawyers.

For example my law firm has the largest environmental law practice in the State with some 11 professional staff comprising 3 partners, 4 solicitors, 2 articled clerks and 2 part-time research assistants.

When I started with the firm as an articled clerk in 1988, environmental law was not recognised as an accepted area of professional practice. However within seven years the fees attributable to environmental law have grown from less than $250,000 in 1989 to in excess of $1.7 million in 1995/1996; an increase of some 15%.

It may be argued that a growth in the fee base of some 15% is nothing special. However when this is contrasted against the significant decline in legal fees that has taken place in other areas of professional practice such as banking and finance and property transactions, it can be seen that a growth rate of 15% is in fact significant. Furthermore, unlike other areas of professional practice which are considered to be mature markets, environmental law is very much a market in its infancy.

Market niches

Having identified environmental law as an emerging market capable of significant growth it is important to identify those sub-markets within environmental law which offer the greatest potential.

To date most of the professional fees generated in the field of environmental law are related to planning law, pollution law and local government law. However there are a number of areas within environmental law which will merge into major areas of professional practice in the early part of the next century. These areas include:

- coastal and marine law;
- due diligence/transactional law;
- environmental health;
- food and drug law;
- heritage law;
- impact assessment law;
- indigenous law;
- international environmental law;
- occupational health and safety law;
- project facilitation and approval;
- resource management law;
- transport infrastructure; and
- waste management.

Comparative advantage

In order to exploit these opportunities individual lawyers must have a comparative advantage which would distinguish them from their peers. In my experience comparative advantage involves two elements. First – attitude, second – skills.

In relation to attitude Ralf Nader (1971), the famous US environmental and consumer rights advocate, has described lawyers in the following terms:

> *Lawyers are a most cautious breed. This is particularly the case where retainers are slim or non-existent. Several conditions can help change the stagnant, unimaginative posture of lawyers in the pollution area. First is the emergency of citizen outrage and action orientated concern. Second is the understanding by citizens that lawyers do not always level with them about the possibility of legal action against entrenched economic interests. Lawyers are very often part of this establishment or they do not like to take new kinds of cases with which the law is not familiar or they do not like to take cases where the fee is speculative or the labour is long*.

Whether these criticisms are justified or not, such is the perception of your future clients namely the general public. Therefore if you are going to make environmental law your career you must be prepared to punt your judgment and take risks because as an environmental lawyer you will be going where few, if any, lawyers have been before. That is the exhilaration and fear of practising in an area at the vanguard of legal practice.

Whilst attitude is a necessary attribute of an environmental lawyer, it is not of itself sufficient. It is the skills of the environmental lawyer which in the final analysis will determine the success or otherwise of that lawyer.

In order to understand the skills that are required by environmental lawyers it is essential to have an appreciation of the environment. The world of environmental management and protection is a multi-disciplinary one involving such distinct topics as biology, zoology, botany, chemistry, economics, geography, geology, engineering and town planning to name but a few.

Therefore in order to effectively practise in the area of environmental law a lawyer must have at least three qualities:

- first, the perspectives and analysis of the law;
- secondly, the illuminating information that is available from other disciplines; and
- thirdly, the ability to adopt a comprehensive or integrated approach to development projects.

At my law firm we have systematically sought out lawyers with these qualities. For example:

- as a partner I have a Geography, Planning and Law degree;
- my fellow partner has all but completed a Masters of Environmental Law degree;
- two of our solicitors have all but completed Town Planning degrees;
- one of our solicitors is in the course of completing a Masters of Environmental Law degree;
- our fourth solicitor has degrees in Science and Law and will be undertaking a Masters in Environmental Management degree next year;
- one of our articled clerks has degrees in Natural Resource Management and Law;
- our two research assistants are currently studying law and will be undertaking Town Planning degrees whilst they are undertaking their articles;
- the articled clerk which will be starting with our group in January 1997 has degrees in Science, Planning and Law; and
- the articled clerk which will be starting with our group in January 1998 has degrees in Environmental Science and Law.

These people have the requisite skills to be great environmental lawyers. With the proper training and guidance and with the right amount of attitude they will forge successful practices in what is the fastest growing area of law in professional practice today.

Enactment of legislation and policies concerning planning and environmental issues

Ian Wright

This article discusses the changes and enactment of new pieces of legislation and policies concerning planning and environmental issues

June 1996

Power to stop drinking

The Queensland Minister for Local Government and Planning has released Local Law 51 which authorises council officers or police to charge anyone drinking alcohol in public and to confiscate the alcohol.

This approach may be contrasted with that of the New South Wales government. On 22 December 1995 the *Local Government Amendment (Alcohol Free Zones) Act 1995* (New South Wales) commenced operation. The Act authorises councils to establish alcohol free zones in public places, public roads or car parks in order to promote the use of these thoroughfares in safety without interference from irresponsible street drinkers. A council may be requested to establish an alcohol free zone by any person living or working in an area, the local police or a local community group. Before the council can make a resolution there must be evidence that the public's use of the roads or car parks has been compromised by street drinkers. Evidence could include examples of malicious damage to property, littering, offensive behaviour or other offences. Furthermore an alcohol free zone may be established for a special event if a problem with irresponsible drinking occurs only in relation to that particular event. Once established an alcohol free zone operates 24 hours a day for a maximum period of three years. The outer limits of the zone and the starting and finishing dates must be shown clearly on signs. There are minimum public consultation requirements when alcohol free zones are being established including a public notice in the newspaper circulating in the area allowing inspection of the proposed objections within 14 days. The council is also required to consult with the local police and the Anti-discrimination Board and in certain circumstances hotels and clubs within the proposed zone as well as local Aboriginal or ethnic groups. Alcohol free zones can only be enforced by police officers except where the Commissioner of Police has authorised particular council employees as enforcement officers for special events.

National competition policy

In April 1995 the Council of Australian Governments (**COAG**) signed agreements giving effect to a national competition policy. The competition principles contained in the agreement apply to all levels of government including local government and are designed to produce benefits to consumers of services in the community through improved service standards and reduced prices. Under the terms of the agreement each State cabinet must consult with local government to publish policy statements on how the principles apply to councils. Key issues of concern include the application of part IV of the Trade Practices Act, prices oversight of government business enterprises, competitive neutrality, legislative review and third party access of essential facilities.

Tree clearing policy

The Queensland government has endorsed a preliminary tree clearing policy for State lands which will assist in protecting Queensland's bio-diversity. This was to be implemented by proposed amendments to the *Land Act 1994* which were intended to be submitted to parliament in the latter half of this year. The policy has arisen out of an agreement forged between conservationists and the rural industry on the use of tree felling controls and will apply to 76% of Queensland that is leasehold and other State lands.

National Environmental Protection Council

The National Environmental Protection Council (**NEPC**) met for the first time in mid-December 1995. The council is a joint Federal and State and Territory government body which has power to develop environmental measures which will apply as law in every State or Territory. NEPC measures will ensure that people across the country will enjoy the benefit of equivalent environmental protection. The NEPC will deal with such matters as air, water and soil pollution, assessment of site contamination, the impact of hazardous waste, the use and recycling of used materials, noise abatement and motor vehicle emissions. The NEPC measures will be adopted by States and Territories thereby eliminating the necessity for variations in standards between States and Territories and the adoption and implementation of major environmental protection standards. It is intended that NEPC will be backed by legislation in all States and Territories and at the Commonwealth level.

Effluent management guidelines

The Australia and New Zealand Environment and Conservation Council (**ANZECC**) and the Agricultural Resource Management Council of Australia and New Zealand (**ARMCANZ**) are currently developing a strategy for water quality management with the aim of ensuring the sustainable use of Australia's water resources. As part of the national water quality management strategy the following draft guidelines are to be released early in 1996 for public comment and review:

- draft Effluent Management Guidelines for Intensive Piggeries;
- draft Effluent Management Guidelines for Tanning and Related Industries;
- draft Effluent Management Guidelines for Aqueous Wool Scouring and Carbonising; and
- draft Effluent Management Guidelines for Dairy Sheds and Dairy Processing Plants.

Draft Environmental Management Guidelines for Wineries and Distilleries were issued for public comment in November 1995. These guidelines have been issued with the object of ensuring a nationally consistent approach to effluent management for the various specified industries.

Recently released publications

ANZECC has produced a paper entitled "*Working Together to Reduce Impacts from Shipping Operations: ANZECC Strategy to Protect the Marine Environment*" for public comment. The second review report in respect of scheduled wastes entitled "*Appropriate Technologies for the Treatment of Scheduled Wastes*" is now available from the Environment Protection Agency. This revised report supersedes the initial report and provides information on four recent technological developments, updated information on the technologies reviewed in the initial report and a new section on issues affecting the scheduled waste treatment industry. The Environment Protection Agency has also released a publication entitled "*Environmental Risk Assessment: An Australian Perspective*". The publication is intended to inform persons about the techniques and applications of environmental risk assessment and to familiarise risk analysts with some of the issues that are relevant to environmental managers.

Gazettal of Environmental Regulations

On 7 December 1995 the Governor-in-Council made the *Nature Conservation Legislation Amendment Regulation 1995* under the *Nature Conservation Act 1992*. This regulation makes amendments to the *Nature Conservation Regulation 1994* in relation to matters of permits and licences, the *Nature Conservation (Wildlife) Regulation 1994* by adding additional animals to various categories of endangered species, and the *Nature Conservation (Protected Areas) Regulation 1994* by amending or adding national parks and conservation parks.

The *Nature Conservation Regulation 1994* was also amended by the *Nature Conservation Legislation Amendment Regulation (No. 2) 1995* in relation to matters such as wildlife harvesting, clearing and clearing permits. On 25 January 1996 the Governor-in-Council made a further regulation under the *Nature Conservation Act 1992*. Known as the *Nature Conservation (Protected Areas) Amendment Regulation (No. 1) 1996*, this regulation amends the description of the area of several national parks and inserts a new conservation park in the schedules to the original regulation. The *Nature Conservation (Protected Areas) Amendment Regulation (No. 2) 1996* adds new and amended national parks and conservation parks to the schedules of the *Nature Conservation Regulation 1994*.

The *Environmental Protection (Interim) Amendment Regulation (No. 1) 1996* introduced circumstances when applications and licence fees would be waived and amended the fee schedule of some sections of the *Environmental Protection Act 1994.* On 29 February 1996 the *Environmental Protection (Interim) Amendment Regulation (No. 2) 1996* was made. This regulation extended the due date for licences and approvals from 1 March 1996 to 30 June 1996. On 1 February 1996 the *Environmental Protection (Interim Waste) Regulation 1996* was made. The regulation amended the *Refuse Management Regulation 1993* and the *Sanitary Convenience and Night Soil Disposal Regulation 1976*.

Coastal management

The New South Wales Minister for Urban Affairs & Planning recently gazetted a notice which formally recognises the Coastline Management Manual prepared in 1990. The Minister has also issued a direction under section 117(2) of the Environmental Planning and Assessment Act which requires coastal councils in New South Wales to have regard to the manual when preparing local environmental plans in the coastal zone.

Management of native vegetation

The New South Wales Department of Urban Affairs and Planning has amended the State Environmental Policy No 46 – Protection and Management of Native Vegetation (SEPP 46). The principal aim of the policy is to regulate the clearing of native vegetation in New South Wales by making it subject to development consent. The policy requires the assessment of proposals to clear native vegetation for the purpose of ensuring that native vegetation is protected and managed in the environmental or social and economic interests of the State. The SEPP makes the Director-General of the Department of Land and Water Conservation a consent authority for proposals involving the clearing of native vegetation except for proposals in specifically excluded areas and proposals involving specified exemptions.

Outdoor advertising

The New South Wales Department of Urban Affairs and Planning has prepared a best practice guideline to assist councils in respect of formulating outdoor advertising controls. The guideline provides detailed advice on a range of issues and recommends an appropriate level of control over outdoor advertising. The guideline has been developed in consultation with local government and the outdoor advertising industry. It contains model local environmental planning clauses for outdoor advertising. The guideline sets out standards for business identification, public notices, real estate and temporary signs as well as other types of signs.

This paper was published as a Planning Law Update in the Queensland Planner 36:2, 10-12, June 1996.

PEDA: A good idea but will it work?

Ian Wright

This article discusses the introduction of PEDA and analyses its benefits and how it is to be implemented

September 1996

Introduction

I am certain that each of us today is dissatisfied in some respect with the regulation of development in this State. I am also certain that we differ as to the nature of the problem and how best it might be solved. Developers complain that the development approvals process is time and therefore cost consuming. Environmentalists complain that the complexity of the regulatory system precludes adequate public input. Government agencies complain about duplication and waste of public moneys. Consumers complain about increased housing costs which reduce home ownership and rental opportunities.

In response to these complaints, lawyers look for process solutions whilst planners look for content solutions. Environmentalists want to increase restrictions in the interests of saving the environment, whilst developers want to reduce restrictions to minimise delay and costs. Consumers, on the other hand, are more concerned that there is no impact on the price, location and supply of new housing.

Obviously each group sees the problem differently and prescribes different solutions. The regulator's proposed response to these problems is PEDA. This legislation should not be seen as a comprehensive and all-embracing panacea. In my opinion, regulatory reform through PEDA must be complemented by reforms in development planning and public decision making if we are to achieve the benefits which are said to be the outcome of PEDA.

Benefits of PEDA

The May 1995 exposure draft of PEDA stated that the bill would improve the efficiency and effectiveness of planning and development decision making. The quantifiable benefits were estimated at having a net present value of $636 million over 10 years, whilst the qualitative analysis estimated that government, business and the community would be better off as a result of PEDA.

Integrated Development Approval System (IDAS)

In my opinion PEDA will improve the efficiency of the development approvals process if the one procedure permitting system known as IDAS or Integrated Development Approval System is implemented. In general terms, IDAS is intended to allow a developer to commence the development approvals process at one time and at one entry point of government and by following one avenue, ultimately to reach a single exit point with all required decisions in hand (assuming that the project passes muster on all counts).

IDAS would provide the following benefits:

- First, it is normally easier and less costly (but not necessarily shorter in time) for an applicant to follow one path through government process rather than many.
- Second, if the applicant chooses to appeal, the merits of the appeal are heard by one review body under one uniform standard.
- Third, a single procedure rather than multiple procedures should reduce the total outlay of public funds.
- Finally, a one stop decision making process effectively brings government decision makers together, hopefully resulting in better governmental decisions.

In the absence of IDAS, PEDA in my opinion will do little to reduce the rising costs of development attributed to government regulation. Accordingly, the absence of IDAS would seriously call into question the need to repeal the existing Local Government (Planning and Environment) Act.

Infrastructure codes

It is also important to note that the benefits attributable to IDAS are also necessary to offset the increased costs of development that will result from a shift in terms of who pays for infrastructure. By making provision for infrastructure codes, PEDA will enable State and local governments to shift the cost of infrastructure from taxpayers (being present users) to future users (being the purchasers of new development). Allocating costs to new development keeps tax pressure off existing development and makes more feasible the potential improvement and maintenance of already developed areas. This will have the effect of making new developments expensive and placing greater strain on developers' margins.

Notwithstanding the impact on the cost of development, the cost shifts that will be brought about through PEDA will grow rather than diminish and accordingly, the reforms of the regulatory process through IDAS are essential to offset these costs.

Integrated planning system

Whilst IDAS will result in a more efficient development approvals system it will not of itself ensure that PEDA achieves its objective of managing land use, development and their effects in a way that provides sustainable land use and development and the economic, social and physical well-being of people.

The achievements of PEDA's objective will depend on the implementation of the integrated planning scheme envisaged by PEDA. This, in turn, will depend upon the quality of development planning and public decision making.

In general terms, the planning system envisaged by PEDA is similar to the current system under the Local Government (Planning and Environment) Act in that local governments are empowered to prepare planning schemes and policies whilst the State government is empowered to prepare State planning policies. Whilst planning schemes are required to address certain specified matters, PEDA is less restrictive than the current Act in that it does not specify whether zoning or some other device should be used to control development.

Implementation of PEDA

However, it would be unwise to believe that the improved flexibility provided by PEDA in relation to the planning system will result in PEDA being more effective than the current Act. Indeed, the implementation of the planning system under the current Act has suffered from a variety of problems which PEDA does nothing to solve. In my opinion, the effectiveness of PEDA will depend upon the ability of State and local governments to re-orientate development planning and their own pubic decision making processes. I would therefore like to take the remainder of this presentation to set out how State and local governments can refocus the development planning and public decision making process so as to address the needs of the general community and, in particular, the development industry.

Scope of planning instruments

Both the current Act and PEDA assume that planning instruments provide a comprehensive framework within which the impact of any single development may be evaluated. Unfortunately, in practice this is rarely the case.

Planning instruments must be comprehensive so that everyone involved knows that if the developer complies with the rules the project will be approved and, if not, it will not be approved. This requires that all the rules be stated up front. Unfortunately, the concerns of the community are applied to development projects regardless of whether they are set out in the planning instrument. Where an unwritten rule is applied against the developer, the developer feels ambushed. When the rule is applied against the public they feel betrayed. All unwritten rules should be written down and adopted.

Therefore, in order to implement PEDA it will be necessary to increase the scope of planning instruments. For example:

- Air quality, water quality, noise, water, flooding and other environmental management policies will have to be incorporated into planning instruments.
- Planning instruments will also have to be prepared at a scale fine enough to catch the details of specified development impacts - this will result in the proliferation of local area plans, development control plans and other types of special area planning instruments.
- Sets of standards which can be applied to individual developments (such as childcare centres, service stations and cluster housing) should also be incorporated into planning instruments.
- State government policies in respect of urbanisation and the provision of urban services should also be clearly articulated in planning instruments to reduce the level of uncertainty – this will require State government agencies to undertake greater up front planning than they have done in the past and to clearly set out the results of that planning in local government planning instruments.

Drafting of planning instruments

One of the largest and most fundamental problems associated with development planning in this State is the drafting of planning instruments. There is no reason why planning instruments should not be easy to read and understandable. Delay caused by misunderstanding is unacceptable. Far too many planning schemes are written by planners playing lawyer and far too many lawyers change perfectly understandable English to legalese.

Furthermore, planning instruments for a local government should be consolidated in one publication with an index for easy access. It should also contain tabular material with illustrations that clarify and explain the planning instrument and should be regularly updated.

The drafting of the development control standards to be incorporated into the planning instrument should also be given particular attention. In recent years, the rigid development standards that have contributed to the homogeneity of post-war development have been replaced by performance-based development standards. This trend has been reinforced by the perceived need to address environmental concerns regarding the degradation or destruction of natural resources.

This has had the effect of shifting the process of land use allocation from the time of preparation of the planning instrument to the time when the application for development comes before the decision maker. This shift to a discretionary case by case review process has added additional costs to the land development process. This is the case for several reasons:

- Firstly, decision makers are left with wide latitude in passing judgment on development proposals which introduces uncertainty into the development approvals system.
- Secondly, it imposes substantial information requirements on both the developer and the decision maker.
- Thirdly, it increases the time for obtaining development approvals.

If we are to achieve PEDA's objective, development standards will have to be redrafted to articulate the community's values and what result or impact the community wants from a development. The technique or method of achieving that result should be left to the ingenuity or creativity of the developer. For example, a 6 metre setback should not be specified as a legal requirement, but merely presumptive evidence that the development will be located a safe and comfortable distance from the street.

Submission of applications

As indicated earlier, the shift of the process of land use allocation from the plan preparation stage to the time when a development application comes before the decision maker has imposed substantial information requirements on developers. This problem has been exacerbated by a lack of specified application requirements. This in itself has led to continuing negotiations over the materials to be submitted with applications and in some cases, excessively detailed requests for information that have led to high costs and delay. Further, the lack of specified criteria have led to requests for additional information that in turn have been used to extend or restart the clock on allowable processing times established by planning legislation.

Apart from its impact on the development industry, the failure to specify universally identified criteria has meant that the data submitted with development applications cannot be easily integrated into a geographical information system or database which can be used as a basis for the preparation of future planning instruments.

It is therefore critical to the effective implementation of PEDA's IDAS and integrated planning systems that uniform application requirements be specified in PEDA and that the data that is submitted with development applications be captured in regional or State wide databases.

Administrative changes

Apart from changes to the preparation of planning instruments and development applications, the effectiveness of PEDA may well be improved by reforms in the public decision making process. For example:

- the introduction of compulsory pre-application conferences;
- in the case of local government, rationalising other statutory instruments such as local laws with planning instruments to establish a form of IDAS within local governments;
- the establishment of interdepartmental committees within State and local governments will provide an opportunity for simultaneous reviews and allow disagreements between departments to be aired out face to face rather than having the developer caught in the middle of opposing forces;
- the preparation of a single application form;
- the appointment of an ombudsman or permit expediter who keeps track of a particular application's location within the development approval system;
- the preparation of development manuals, application checklists or permit registers that explain the local regulatory process; and
- the delegation of decision making powers to officers within defined limits.

Decision makers may also expedite the regulatory process by increasing their knowledge of the economics of development. One of the complaints that is often heard from developers is that decision makers don't know enough about the economics of development. As a result, suggestions or proposals for changes are sometimes made and long debates take place concerning whether or not the changes are economically reasonable. More graduate planning programmes should contain a course in development economics. Such knowledge would not only give the developer a fair go, but would actually strengthen the negotiating position of the decision maker.

Conclusions

In closing, I would like to suggest that a narrow focus on the reform of the current Act through PEDA may be misdirected. If we wish to improve the community/developer relationship in the development process, it is as important to consider reform in development planning and public decision making as it is to address the form of the current Act. There is great inertia in existing local and State government agencies which works against even minor State level changes in enabling legislation. This is not an argument against change but it does suggest looking at legislation realistically. Furthermore, some of the adverse consequences of the current Act would not have occurred if adequate planning and development management were executed by State and local government agencies.

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Legal implications of bushfire management

Ian Wright | Vanessa Plumpton

This article discusses the legal implications of bushfire management by examining the legislative provisions surrounding fire, the common law principles with respect to fire or fire hazards and the legal liability of owners, occupiers and public authorities in relation to fires

September 1996

Introduction

Bushfire management is primarily concerned with the prevention, control, detection and extinguishment of bush, grass or other rural fires.

The Queensland Fire Service is the main bushfire response agency. Other agencies with a significant role in bushfire management are the Department of Primary Industries Forest Service, the National Parks and Wildlife Service, the Rail and Road Divisions of the Department of Transport, the Federal Airports Corporation and some private corporations such as mining companies and sugar mills. These agencies will assist to combat major fire situations beyond their immediate areas of responsibility.

With so many agencies and various levels of government involved in bushfire management, it can be difficult to determine the responsibilities of each agency and how the roles of these different agencies are co-ordinated. An analysis of the legislation that deals with bushfire management would indicate the following roles:

- Property owners are primarily responsible for ensuring their property is as safe as possible from fire threats.
- Local government is to support property owners by assisting local fire brigades and having adequate planning and building regulations.
- State government is to ensure the appropriate mechanisms are in place to support the local government and residents in their fire management activities.

The purpose of this paper is to:

- outline the legislative provisions in place with respect to fire;
- outline the common law principles that may come into play with respect to fire or fire hazards; and
- examine the potential legal liability of owners, occupiers and public authorities in relation to fires.

Relevant legislation

There is no single piece of legislation dealing with bushfire management. Rather, bushfire management is the subject of a patchwork quilt of legislation. It is appropriate to consider some of the more important legislative provisions.

The Building Act

In Queensland the erection of buildings is regulated by the *Building Act 1975* (Qld) and the Standard Building Law. These regulations require new residential buildings in designated bushfire-prone areas be protected as outlined in *Australian Standard 3959-1991: Construction of Buildings in Bushfire-Prone Areas*. Designated bushfire-prone areas are those areas determined by the relevant local government through its local laws including its Planning Scheme.

The Local Government Act

The *Local Government Act 1993* (Qld) empowers local governments to make local laws for the good rule and government of its local government area. In accordance with this power a number of local governments have introduced local laws in relation to bushfire management. For example, some local laws require landowners to obtain permits from the local government prior to hazard reducing an area. Another example is Model Local Law No 18 — Control of Nuisances, which may be adopted by local government. It imposes an obligation on occupiers to keep land free from fire hazards which may include:

- live embers or hot ash not contained in an approved receptacle;
- a substantial accumulation of grass clippings liable to spontaneous combustion;
- dry vegetation that could be easily ignited; or
- other flammable materials.

The Fire Services Act

Apart from the Building Act and the Standard Building Law the other significant piece of legislation in respect of bushfire management is the *Fire and Emergency Services Act 1990* (Qld). This Act imposes a number of obligations on landholders including compliance with a permitting system, hazard reduction, and notification and extinguishment.

Permit to Burn System

The Fire Services Act establishes a "*Permit to Burn*" System.[5] In accordance with the Act, a landholder wanting to light a fire greater than 2 metres wide or high must apply either orally or in writing to their local fire warden. The following details are required pursuant to the *Lighting of Fires Regulations 1991* (Qld):

- name and address of the applicant;
- a description of the land on which the proposed fire is to be lit;
- the name of every occupier of adjoining land where known to the applicant;
- the steps taken to notify every occupier of adjoining land of the making of the application; and
- whether any occupier of adjoining land has objected to the lighting of the fire, and if so, what reasons (if any) were given for the objection.

The permit is free and generally comes with a set of conditions for burning. It is an offence to provide false or misleading information when applying for a permit or to alter a particular in a permit without consent.[6] Where a permit has been obtained, the conditions have been complied with and the applicant has not acted maliciously or recklessly, then despite the fact that damage may have been caused, the property owner will not be liable.[7] It should be noted that where a state of fire emergency has been declared, any authority to light a fire ceases unless it is approved in the declaration or is given once the declaration is in place.[8]

The penalty prescribed for the unauthorised lighting of fires (ie where a permit has not been obtained or is nullified by a state of emergency) is a maximum $3,750 fine and/or 6 months imprisonment.[9]

Hazard reduction

It is the responsibility of individual landowners to take measures to remove or abate a fire hazard. Where a property owner fails to take appropriate action, the Fire Services Act empowers fire officers to require the occupiers of premises to take measures for the purpose of reducing the risk of a fire, or in the event of a fire, the danger to persons, property or the environment.[10] These measures may include the maintenance or making of fire breaks, the removal of vegetation, the obtaining of firefighting equipment, the provision of an adequate water supply, the maintenance of fire escapes, or the suspension of operations.

If an occupier of premises fails to comply with an instruction to clear a hazard, fire officers may implement the instructions and recover any of the expenses incurred from the occupier.[11]

Advice about hazard reduction can be obtained from the local fire warden and Rural Fire Brigade. The local Rural Fire Brigade may also be prepared to assist with any burning off that the owner requires in return for a modest donation towards Brigade funds.

Community service obligations

The Fire Services Act also imposes what can be called community service obligations on landowners. For example, immediately an occupier of land knows of fire they must take all reasonable steps to extinguish or control the fire and report its existence and location.[12]

Furthermore, it is an offence to leave unattended or fail to take reasonable steps to stop fire when it is likely to cause danger to persons, property or the environment.[13]

Where an occupier believes on reasonable grounds that an unauthorised or out of control grass fire within 1.6 kilometres of their land constitutes a fire risk, they have the power to enter land and take all reasonable measures to extinguish or control fire but only after contacting a fire officer if it is practicable to do so.[14]

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5 *Fire and Emergency Services Act 1990* (Qld), s65.

6 Ibid., s72.

7 Ibid., s74.

8 Ibid., s90.

9 Ibid., ss62 and 149.

10 Ibid., s69.

11 Ibid.

12 Ibid., s67.

13 Ibid., s72.

14 Ibid., s68.

Charges for service

Where a service involves attending a fire occurring on or endangering property, the owner of the property will be liable for any charge for service in rural areas where an unauthorised fire is lit by them or their agent.[15] Payment of the charge will not prevent the person being punished for lighting the fire.

The Forestry Act

The *Forestry Act 1959* (Qld) is concerned with fires in State Forests. A permit to burn is not required for fires lit by authorised personnel (ie forestry officers) in the State Forests.[16]

A person with a lease, licence, permit etc over relevant areas has a duty to make all reasonable provision for preventing, controlling, detecting, and extinguishing bush, grass or other rural fires in the area.[17] When aware of fire on or near the area they must promptly do everything reasonable to extinguish the fire and notify a Forest Officer.[18]

A Minister may forfeit a lease, licence etc if an infringement of the Fire Services Act or Forestry Act indicates that its continuation is prejudicial to the objects of the Forestry Act and detrimental to the public interest.[19]

However, it is possible to light small fires where there are provided places (eg at camping sites), a space of ground greater than 2 metres around the fire site is cleared, and the fire is completely extinguished.

If a Forest Officer discovers burning within three kilometres of State Forest and thinks it is likely to spread that person may enter land and extinguish the fire.[20] Forest Officers may also co-operate in burnings authorised under the Fire Services Act with occupiers whose boundaries are within three kilometres of State Forest.[21]

Common Law

Principles

The common law provides a number of causes of action in tort to persons who have suffered loss or damage as a result of bushfire. Until recently the common law recognised six torts: negligence, nuisance, trespass, breach of statutory duty, the rule in *Rylands v Fletcher*[22] and *ignis suus* (the rule of one's own fire).

In *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520[23] the High Court recognised that it was difficult to envisage a situation giving rise to liability under the rule of *Rylands v Fletcher* which would not also constitute an actionable negligence, nuisance or trespass. Accordingly it was held that the rule in *Rylands v Fletcher* had been absorbed into the principles of negligence.

In the same case the High Court also held that *ignis suus* no longer exists as part of the Australian common law. The court pointed out that:

> *Though fire is an exceptional hazard in Australia, contemporary conditions in this country have no real similarity to urban conditions in medieval England where the escape of domestic fire rivalled plague and war as a cause of general catastrophe.*

Liability

The common law claims most likely to arise in the context of a bushfire are negligence and nuisance.

Negligence

Owners or occupiers of land, whether they are public authorities or private individuals, are responsible for preventing the escape of fire from their land. Most public authorities are responsible for preventing damage on the lands under their control.

Therefore, before lighting other than a small fire a request to do so must be directed to a fire warden. Failure to do this will not only mean a penalty can be imposed but a finding of negligence is possible. Neighbours have the right of common law action with respect to any damage the fire may have caused. After Burnie Port Authority it can be stated that a person who takes advantage of his or her control of property to introduce a dangerous substance (eg fire) owes a duty of care to avoid a reasonably foreseeable risk of injury or damage to the person or property of another.

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15 Ibid., s144.

16 *Forestry Act 1959* (Qld), s62.

17 Ibid., s63.

18 Ibid.

19 Ibid., s68.

20 Ibid., s65.

21 Ibid., s68.

22 [1861-731] AII ER 1.

23 (1994) 179 CLR 520.

Nuisance

Some examples of nuisance in the context of a fire are:

- allowing the build-up of flammable material; and
- smoke.

Where a person is responsible for a nuisance, either by creating or allowing it, they will be liable if no steps (or inadequate steps) were taken to avoid or minimise the interference.

Case examples

The application of the principles of negligence and nuisance is best illustrated by way of decided case law.

Lightning strike

In the case of *Goldman v Hargrave* (1966) 115 CLR 458,[24] a lightning strike caused a tall red gum about 100 feet in height to catch alight. It was impossible to deal with the blaze while the tree was standing so the occupier called the district fire officer and asked for a tree feller to be sent, cleared combustible material from around the tree and sprayed the area with water. The tree was cut down and continued to burn fiercely. The occupier then left the tree to burn itself out rather than extinguishing it. Unfortunately, the weather conditions changed which revived the fire and it spread to neighbouring properties.

The court found it was the occupier's actions in not extinguishing the fire which constituted negligence. The court went on to say the duty of care arises on knowledge of the hazard, the ability to foresee the consequence of not checking or removing it, and the ability to remove it. Whether the occupier has fulfilled the duty must be determined in the light of what it is reasonable to expect in the individual circumstances. Here, it was quite reasonable for the occupier to have taken the step to extinguish the fire and therefore he was liable.

Grass fire

In *Gill v Muller and Hendy* [1957] QWN 32,[25] green grass was lit on a front of close to 100 metres within 1 metre of a public highway. The dense smoke clouds generated contributed to a two car collision. The person lighting the fire took no steps to guard against the consequences to travellers driving in the smoke. The court found the fire lighter negligent in that he created a hazardous nuisance and failed to take action to protect persons normally using the road.

Fire at council tip

Following the Ash Wednesday fires in Victoria and South Australia a number of cases were commenced against a local government in respect of the escape of fire from a council tip (*Casley-Smith v F S Evans & Sons Pty Ltd* (1988) 49 SASR 339;[26] *Delaney v F S Evans Sons Pty Ltd* (1985) 124 LSJS 170).[27]

Even though the operator of the tip was not the council but a contractor, the council was still held liable in negligence because it retained powers of supervision and control. There was held to be a duty to exercise that power of control over conduct of the tipping operation in such a way that it did not impose an unreasonable risk of injury by fire upon its neighbours. A sufficient relationship of proximity was established even to people living over five kilometres away as, in the reasonable contemplation of the local government, carelessness on its part might be likely to cause damage to those people.

Planning and bushfire management

Lack of integration

Planning guidelines which aid local governments in mapping fire hazard ratings for the area have been compiled in New South Wales and Victoria. Despite the approaches utilised in other States, Queensland does not yet have any formal statutory requirements or provisions relating to minimising fire risk in planning subdivisions.

Within Queensland, matters relating to the planning system and land use management are largely addressed under the *Local Government (Planning and Environment) Act 1990* (Qld). However as discussed earlier, fire management is addressed by a plethora of legislation including the Fire Services Act, the Building Act, the Local Government Act and local laws, and the Forestry Act. At present, the legislation dealing with fire management operates largely in isolation and there is no legislative requirement for the integration of fire management considerations into the planning process. The advisory publication "*Fire Hazard Planning in Queensland*" provides guidance to local governments on, amongst other things, the matters for inclusion in Strategic Plans. At this stage, these are recommendations only and there is no legal requirement for them to be included in Planning Schemes.

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[24] 91963) 110 CLR 40.

[25] [1957] QWN 32.

[26] (1988) 67 LGRA 108.

[27] (1986) 58 LGRA 395.

Recent experience in New South Wales indicates that there is a clear need to address fire hazard reduction through the planning process owing to the potential of bushfires to impinge on or detract from the achievement of broad planning objectives such as the need to safeguard quality of life, public health, convenience, and most importantly promote safety.

Rural residential development

One of the major potential problems is the increase in rural residential living. Rural residential developments are generally characterised by:

- a mixture of rural/urban environment (ie retention of considerable areas of vegetation close to housing);
- a lack of proximity to services (eg fire brigades, reticulated water);
- subdivision designs which incorporate cul-de-sacs, unsealed roads and dwellings on heavily treed slopes; and
- proximity to linked vegetation corridors or intact bushland and State forests.

Whilst the risk of bushfires impacting on rural residential developments is generally recognised by land developers and by people who wish to live in such natural bushland settings, their perception of the risk is masked by their individual desires and considerations. Accordingly local government has been forced into the unenviable position of having to determine the risk to any proposed development and, as the approving authority, to accept a responsibility commensurate with the risk potential if the development is approved and subsequently damaged by fire. This has focused attention on the effectiveness of local government planning instruments.

Deficient planning instruments

To date planning instruments have neglected to address the relationship between rural residential style developments and bushfire risks and hazards. Currently planning instruments are deficient in terms of the strategic planning and development control.

At a strategic planning level, the identification of preferred rural residential areas in local government strategic plans has failed to give due regard to fire hazard considerations. Very few local government strategic plans have designated preferred rural residential localities after considerable assessment of the potential bushfire risk of those areas. The identification of high risk fire areas would enable fire risk areas to be classified as a planning constraint (Casey 1995).

At a development approval level, very little consideration is given to high fire risk areas, to the location and site design of subdivisions, and the siting of the dwellings on allotments in these areas. Further, conditions placed on the approval of development applications for rural residential developments do not stipulate requirements associated with the design layout and management of the site in reducing bushfire risk (Casey 1995).

Conclusions

The legislative regime in relation to bushfire management is ad hoc with regulatory controls divided amongst a number of agencies.

Furthermore, the lack of integration of bushfire management into land use planning has meant that local governments have had to determine the risk of fire on a development by development basis without adequate statutory controls to prevent such development. As the land use approval authority, a local government is faced with the risk of being held liable for any damage that has been suffered.

Therefore to assist local governments with bushfire management and to ensure the council's duty of care is met, a number of actions need to be adopted (Casey 1995):

- Local governments should exercise their powers under the Building Act to designate bushfire prone areas so as to activate the provisions of the Standard Building Law in relation to residential housing (see AS1359-1991).
- Local governments should be required to consider bushfire risks and hazards when preparing and/or reviewing strategic plans.
- Local governments should be encouraged to undertake research and collate data from bushfire prone areas in addition to the preparation of fire hazard maps for utilisation in all planning assessment and review.
- Local governments should be encouraged to amend their planning schemes to include provisions for consideration of fire hazards and fire reduction measures when assessing rural residential development applications.
- Local governments should be encouraged to enforce the bushfire hazard provisions of planning schemes and the conditions placed on rural residential developments.
- The designation or zoning of rural residential land should be kept at an appropriate distance from national parks, State forests and other areas of environmental significance.

- Where tree preservation local laws are in place, relevant provisions should be included in exempting rural residential areas from retaining vegetation which may potentially hinder the suppression of an imminent fire.
- Provisions should be incorporated in planning schemes requiring the submission of an Environmental Impact Statement with applications for large rural residential developments in fire prone areas.
- Fire hazards should be considered by local government when reviewing subdivision designs, and when imposing conditions on the width of roads, the clearance around the perimeter of homes and minimum water tank sizes in areas not serviced with reticulated water.
- The location and service capacity of the local Rural Fire Brigades should be considered when designating rural residential land as part of a Strategic Plan review, and in the assessment of large or incremental areas of rural residential development.
- Local government should undertake a more defined responsibility in the location of house sites on a rural residential allotment giving due regard to siting, aspect and vegetation matters.
- Local government should levy charges on rural residential residents to provide Rural Fire Brigades with a constant financial resource.
- A comprehensive and accessible public education program should be undertaken to educate private property owners of the responsibility to provide fire protection for their property and assets, and on how to use fire reduction measures such as fire breaks.
- Qualified fire management officers should be employed in each local government area to undertake the necessary research and prepare fire management plans for inclusion in all planning documents.

If these measures are implemented, then the disastrous consequences for residential development arising from the Ash Wednesday bushfires in South Australia and Victoria and the recent bushfires in New South Wales are unlikely to be repeated in Queensland.

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Review of DCP implementation mechanisms

Ian Wright

This article discusses the review of DCP implementation mechanisms

November 1996

Review of DCP implementation mechanisms

Options	Planning Vision	Development Control Processes	Infrastructure Agreement	Comment
1. Typical Qld DCP	Strategic Plan (Regional) and DCP (District)	Table of development is included in planning scheme provisions	This is entered into as a condition of development approval	• Vision is implemented through development approvals process – involves multiple planning applications, third party involvement, delay and cost. • Vision in strategic plan and DCP can be overridden if planning grounds. • Conditions of development approval must be reasonable and relevant. • Infrastructure agreement can fetter council's power but terms must be reasonable and relevant by virtue of the fact that it is required as a condition of development approval.
2. DCP adopted by BCC – Fitzgibbon Forest Lake	Strategic Plan (Regional) and DCP (District)	Table of development is included in planning scheme provisions which refers to a supplementary table of development in a DCP	Same as above	• Same as above. The only difference in the approach is that uses are not allocated to a column within the table of development in the planning scheme provisions but rather, in a supplementary table of development in a DCP.
3. Kawana Waters DCP	Strategic plan (Regional) and DCP (District)	Table of development in planning scheme provisions refers to a supplementary table of development contained in a plan prepared as part of the master planning process that is specified in the DCP	This was entered into prior to gazettal of DCP	• Vision is implemented through master planning process specified in DCP – greater certainty and fewer applications, and less delay, cost and third party involvement.

Options	Planning Vision	Development Control Processes	Infrastructure Agreement	Comment
				• Existing uses and previous as of right uses preserved but all other potential uses prohibited until master planning process completed. • Conditions of approval of master plans and development applications must be consistent with DCP, infrastructure agreement and higher order plan. • Infrastructure agreement sets out matters that would otherwise not be reasonable or relevant on the basis that council cannot seek further contributions.
4. Kawana proposal – Sippy Downs	Strategic plan (Regional) and DCP (District)	Table of development in planning scheme provisions refers to: • Table of development under old planning scheme; and • Supplementary table of development contained in a plan to be prepared as part of the master planning process that is specified in the DCP.	This is to be entered into as a condition of approval of plan containing supplementary table of development (ie Development Area Plan)	• Vision is implemented through master planning process specified in DCP – see 3 above for benefits. • Existing uses and all use rights (including consent and prohibited uses) under old scheme retained until the land is subject to master planning. • Conditions of approval of master plans and development applications must be reasonable and relevant. • Infrastructure agreement can fetter council's power but terms must be reasonable and relevant by virtue of the fact that it is required as a condition of approval of Development Area Plan.

Options	Planning Vision	Development Control Processes	Infrastructure Agreement	Comment
5. Hybrid 3 & 4	Strategic plan (Regional) and DCP (District)	Table of development in planning scheme provisions refers to: • Existing uses and as of right uses under old planning scheme; and • Supplementary table of development contained in a plan to be prepared as part of the master planning process that is specified in the DCP where an infrastructure agreement has been executed in respect of the land.	This is entered into prior to approval of the Development Area Plan which grants the higher order use rights. Under the DCP an application could not be made for approval of the Development Area Plan until an infrastructure agreement has been prepared in respect of the land.	• Vision is implemented through master planning process specified in DCP – see 3 above for benefits. • Existing uses and as of right uses from old scheme preserved as permitted development but all other uses (consent and prohibited) under old scheme prohibited. • Conditions of approval of master plan and development applications must be consistent with DCP, infrastructure agreement and higher order plans. • Infrastructure agreement set out matters that would otherwise not be reasonable or relevant on the basis that council cannot seek further contributions.

This paper was presented to the Caloundra City Council and Maroochy Shire Council, November 1996.

Review of updated planning legislation and policies across New South Wales and Queensland

Ian Wright

This article discusses the relevant updates of planning legislation and policies across New South Wales and Queensland

December 1996

Departmental agreement on water quality monitoring

The Chief Executive Officers of the Department of Natural Resources and the Department of Environment have recently signed an inter-departmental agreement on water quality monitoring and reporting. It is proposed that a brochure outlining these agreed roles and responsibilities will be prepared for public release. In essence, the Department of Natural Resources is specifically responsible for the management of all non-tidal surface waters and all groundwaters including the monitoring of the quality parameters of these waters. The agreement allows the Department of Environment to undertake some water quality monitoring of non-tidal waters under certain circumstances. The Department of Environment is also to be responsible at an operational level for the monitoring and management of tidal waters. The agreement is to be monitored by an interdepartmental working group.

Reclaimed wastewater guidelines

The Department of Natural Resources recently published interim guidelines for re-use or disposal of reclaimed wastewater. The interim guidelines encourage the acceptance of reclaimed wastewater as a potential resource available for utilisation rather than discharge to receiving waters. They are intended to apply to the planning, design and management of reclaimed wastewater from the treatment of municipal sewerage.

Land management manual

The Queensland Landcare Council has launched a new land management field manual titled "*Understanding and Managing Soils in the Murilla, Tara and Chinchilla Shires*". The manual presents the best information to date on general land resource and land management information for the Western Downs and has been compiled by a range of producers and extension staff across the region.

Multi unit housing

The New South Wales Department of Urban Affairs and Planning has released a code entitled "*A Draft Guide to Performance Codes for Multi Unit Housing*". The guide presents a draft model code which will help planners and designers in achieving high quality multi unit housing. The model code is based on AMCORD and can be adapted and used by councils to prepare their own development control plans. The guide adopts a performance base to development. The code focuses on the end result and the issues that need to be considered to achieve that result and as such is more flexible as it allows the designer to produce various design solutions to gain the desired outcome. For example, rigid standards may require designers to locate a dwelling one metre from a side boundary with no exceptions or justification. A performance code requires designers to consider the bulk and scale, solar access and privacy of the dwelling to achieve the appropriate setback for the site. This may allow building on the boundary if there are no overshading or privacy problems or indeed a greater setback of more than one metre in certain cases.

The model code is intended to apply to the development of multi unit housing under 10 metres in height and, as such, covers all forms of low to medium rise housing including dual occupancy terrace houses, villas, townhouses, cluster housing, integrated housing and low rise residential flat buildings. The model contains aims and provisions in respect of site analysis and design. Site analysis is the first step in the design process and involves identifying the key features of the site and its immediate surroundings so that it is possible to see how future dwellings will relate to each other and to their locality. The second stage of the process involves identifying the significant design elements such as streetscape, energy efficiency, bulk and scale, privacy and security, site access and circulation, water management, open space and landscaping and site facilities. The guide then specifies objectives, performance criteria and design suggestions for each of the design elements.

Local Area Plans

Local Area Plans for Bulimba, Moorooka and Kuraby have been released for public comment by the Brisbane City Council. The LAPs consist of an action plan and town plan recommendations. The action plan sets out the strategies and actions for implementation by the community, the council and government agencies to realise the vision for each district. Themes of the action plans include mobility, accessibility, green space, recreation, environmental quality and community development. The town plan recommendations set out the strategies and actions in relation to land use and development and deal primarily with the character of housing and residential development. Recommendations are also provided to guide the application of heritage and character building controls and to assist in the allocation of zones.

NSW Environmental Planning and Assessment Act

The *New South Wales Environmental Planning and Assessment Act 1979* has been amended. The amendments fall into three categories. The first relates to streamlining the operation of the Act, the second relates to the clarification of a number of provisions of the Act following a number of court decisions and the third involves statute law revisions. The streamlining amendments provide for the following:

- the joint exhibition of a development application and draft amendment of an environmental planning instrument;
- non-discretionary development standards for developments (also referred to as deemed to comply development standards);
- commissions of enquiry of specified scope;
- the joint preparation and notification of environmental studies and draft regional development plans;
- the removal of the requirement for the Minister's consent to certain proceedings for offences against the Act; and
- power for the regulation to the Act to incorporate by reference publications in force from time to time.

The Act has also been amended to allow for the consideration of draft local and regional environmental planning instruments, the modification of certain approvals under Part 5 of the Act and to overcome an inconsistency between different kinds of environmental planning instruments.

Planning control of brothels

On 12 July 1996 the New South Wales Minister for Urban Affairs and Planning announced that councils would be provided with the option of limiting brothels to those areas zoned for industrial purposes. By letter dated 29 December 1995 the Department had previously advised that brothels would generally come under the definition of commercial premises and would be most suitably located in commercial and industrial areas that are not adjacent to schools or facilities frequently used by children. Councils now have more scope in nominating which areas are suitable for the location of brothels. The Minister advised that the government would not object if brothels are restricted to industrial areas if that is appropriate to the local circumstances. The decision of the Minister was in response to community concerns about the possibility of brothels being located in shopping centres. Therefore, in New South Wales councils can restrict brothels to industrial areas that are not adjacent to schools or facilities frequently used by children. The Minister also advised that the Department does not support the blanket prohibition of brothels throughout a local government area as this would be contrary to the intention of the recent legislative changes.

Commercial development of national parks

The Queensland National Parks Association has announced that it is alarmed that the Environment Minister has reached agreement with two companies to explore private enterprise developments in two national parks. The Association is opposed to concessions being granted within national parks. Its view is that national parks are a special part of the country which have been protected to allow future generations to appreciate the way the original Australian landscape looked in its pristine condition. It argues that to grant development concessions in the parks is contrary to the cardinal principles of preserving areas within the national park in their natural state. It is also argued that the infrastructure needed for resort development must necessarily be destructive to park values.

Integrated regional transport plan

The State government has released an integrated regional transport plan for South-East Queensland to respond to the following trends that will occur in the period from 1992 to 2011:

- the number of trips made each working day will increase by 70%;
- the number of vehicle trips will increase by about 3,000,000;

- the total number of motorised travel in vehicle kilometres will nearly double to about 93,000,000km each day;
- the average length of trips would increase from 12.5km to 15km; and
- the proportion of trips on public transportation would decline from 7% of all trips to just 6.3%.

The IRTT has set the following targets to be achieved by the year 2011:

- the proportion of trips by public transport is to be increased by 50% to 10.5% of all trips;
- the proportion of all trips made by non-motorised mode is to be increased from 15% to 20%;
- a big increase in daily public transport usage of over 751,000 trips;
- increased average vehicle occupancy from 1.3 to 1.4 persons; and
- the total vehicle trips reduced from 7.2 million under trend to 5.5 million or 19% less than trend.

The key elements of the IRTPR include:

- an Integrated Public Transport system which is so good that people will no longer have to rely on car for central travel like the journey to work;
- a regional system of bus-ways and priority lanes;
- rail operated expansions including higher service frequencies and increased peak period capacity;
- flexible cross town maxi taxi and taxi bus services;
- higher occupancy vehicle lanes and ride sharing to destinations to reduce the need to continually increase peak period road capacity;
- programmes to encourage businesses and households to reduce unnecessary trips;
- actions to support freight needs to ensure goods can get to market with minimum impact on communities and the environment;
- the provision of road capacity to meet moderated levels of vehicle demand;
- the provision of advice on how new urban development can be designed in a way that encourages public transport usage, walking and cycling.

Local Government and Environmental Management Systems

The Australian Local Government Association and the Institute of Municipal Management have embarked upon a project to develop a model approach to Environmental Management Systems (**EMS**) for local governments. The objective behind the development of a model is to encourage senior managers and elected members to consider national strategies and international obligations in local government planning, management and operations and to adopt practices which address local regional priorities. It is intended that an EMS would help local governments to meet emerging national and international standards mirroring private sector practice. In 1996 there are at least 20 local governments in Australia who are actually implementing components of an EMS. At least five of them (Redland, Wyong, Newcastle, Brisbane and Gold Coast) intend to seek external certification in the future. Local governments are developing an EMS for the following reasons:

- There has been heightened awareness about an environmental duty of care under existing or emerging legislation and an increased understanding of the scope and scale of environmental risks falling within local government responsibilities.
- Local governments are beginning to appreciate the economic benefits to be gained through the ability to plan and implement environmental policy over time, versus the ad hoc preparation and potential shelving of plans and strategies.
- There has been an increased adoption of management systems by local governments generally.
- There is a need to respond to the demands of the community for a systematic response to local environmental issues.

This paper was published as a Planning Law Update in the Queensland Planner 36:4, 25-27, December 1996.

Review of updated planning legislation focusing on heritage matters, the sale of water assets and the BCA

Ian Wright

This article discusses the various updates to planning legislation where it particularly focuses on heritage matters, the sale of water assets and the BCA

March 1997

Victorian Heritage controls

New State heritage controls have been approved by the Victorian Minister for Planning and Local Government. The new controls are intended to replace all existing local controls for the conservation of places of natural and cultural significance. The key features of the State heritage controls are as follows:

- The controls are intended to apply to places of natural or cultural heritage significance (ie buildings, structures, archaeological sites, trees, areas, geological formations, fossil sites and other important places).
- A planning permit is required for demolition or removal, external alterations, subdivision, new buildings and works and signage which affect places of natural and cultural significance.
- Places included on the State heritage register will be listed in local planning schemes.
- A planning permit under local planning schemes will not be required where a permit has been granted under the Heritage Act. However, a planning permit still may be required because of zoning or other planning requirements.
- Matters which are unlikely to raise major heritage impacts such as demolition or construction of outbuildings and fences or external paintings are exempted from the notification requirements of the Planning and Environment Act. However, these matters still require planning permission and a council must have regard to the heritage effects on the proposal.

Miscellaneous Heritage matters

The Sydney Opera House has been nominated for inclusion on the World Heritage List. The New South Wales government has also prepared a heritage manual. The Australian Heritage Commission has produced an introductory guide to heritage conservation for local governments. The Australian Heritage Commission is also in the process of producing guidelines on the development of historic town centres and is developing a policy on protecting vacant heritage sites.

In the Northern Territory the Northern Territory State Minister has sought the co-operation of local Councils to establish rate relief for listed heritage places. It is proposed that rate relief of 25% of the struck rate for residential properties and 75% of the struck rate for commercial properties will be provided. Additional incentives are to include free conservation architect advice, availability of restoration grants and issuing of Ministerial consent at the time of listing for maintenance, minor repairs and approved development works on listed places.

Review of Federal Environment Portfolio

The Federal Environment Minister, Robert Hill, has announced changes to the environment portfolio in response to the independent report prepared by Coopers and Lybrand entitled Review of the Environment Portfolio.

The Coopers and Lybrand report found that there were major structural issues affecting the portfolio including:

- lack of clear accountability for outcomes due to overlapping functional responsibilities between the Department and other portfolio environment agencies;
- the setting of individual agendas by each portfolio environmental agency;
- the lack of a systematic process by which the portfolio conducts its business and the absence of established arrangements for co-ordinating input from several areas and for reaching a portfolio view quickly; and
- lack of expertise in the area of economic analysis has limited the portfolio's capacity to argue its case against other portfolios with priorities in economic and industry development.

As a result, an environment executive will be established to replace the environment policy co-ordination committee. The executive will meet weekly and its duties will include determining the environment priorities for the portfolio as a whole. The environment portfolio itself will be restructured into four major functional groupings:

- *National and world heritage* – bringing together national and international heritage functions which are currently carried out by the Environment Strategies Directorate (**ESD**) and the Australian Heritage Commission (**AHC**).
- *Biodiversity* – bringing together several major components including sustainable land and water use, biodiversity conservation and reserve and wildlife management which are currently carried out by the Australian Nature Conservation Agency, ESD, the Environmental Protection Agency and the Australian Heritage Commission.
- *Environment protection* – consolidating the existing environment protection functions with new priorities and focus including locating the climate change and greenhouse activities currently in the ESD in this group.
- *Marine* – to reflect the government's priorities in this area, develop an overall marine policy for the Commonwealth and co-ordinate coasts and clean seas programmes.

The environment executive will be complemented by an environmental priorities group in respect of international, economic and environment information matters. Whilst the Australian Heritage Commission and the Australian Nature Conservation agencies will be retained as statutory bodies, the restructuring is intended to ensure closer integration with the Environment Department.

Heritage discussion paper

The Australian Heritage Commission has issued a discussion paper on proposed new national approaches to heritage protection entitled "*A National Future for Australia's Heritage*". The discussion paper has been issued in the context of the Commonwealth government's recently announced review of Commonwealth environment legislation and the Commonwealth government's desire to review the roles of State and Federal governments in relation to environmental issues.

The discussion paper identifies a number of significant problems and issues with national policies and processes regarding heritage protection. These can be summarised as follows:

- At present there is no national policy that unites Commonwealth, State and Territory governments in an agreed heritage protection regime thereby leading to significant gaps and duplications.
- Commonwealth responsibility for cultural and natural heritage policies is spread between a range of Commonwealth government portfolios and laws with the effect that there is no overarching policy framework or mechanisms for communication between relevant agencies.
- The State heritage bodies have developed and are working on comprehensive lists of cultural heritage places and implementing heritage protection regimes which are not necessarily consistent. For instance, States do not have statutory registers covering all three heritage environments – natural, indigenous and historic. As a result there are many omissions and overlaps in the assessment listing and management of heritage places.
- There is a wide disparity in heritage administrative structures, methodologies, funding bases and public consultation processes between States whilst at the national level cultural heritage issues have a low profile compared with national heritage matters.
- The register of the national estate maintained by the Australian Heritage Commission is the most comprehensive list of places in Australia and whilst it constrains actions by the Commonwealth government, it does not in reality provide any protection for places where no Commonwealth action is involved;
- In reality, the management of many Commonwealth owned heritage places falls far below the best practice management of States and Territories such as that exhibited in respect of Kakadu, Uluru, old Parliament House and the War Memorial.
- Certainty of results and the fact that obligations imposed on Commonwealth, State and primary decision makers differ in accordance with relevant legislation. For instance, the boundaries of relevant national estate places, world heritage places and national parks may vary for a single place. A classic example of this is the Great Barrier Reef.
- There is no provision in the Australian Heritage Commission Act to avoid repeated referrals of essentially identical actions to the Commission. For example, a proposal to offer export licences in an area where an environmental impact statement has been completed can be referred repeatedly even where there are no changes in environmentally significant conditions.
- The lack of an overarching national heritage places policy results in a process that tends to be place based rather than holistic.

In response to these concerns, the Australian Heritage Commission is suggesting a new integrated approach which includes the following aspects for discussion:

- The development of a list of places of outstanding national value or of nationwide importance.
- The maintenance of a register of the national estate as a comprehensive national database of all heritage places whether natural, indigenous or historic which is accessible to all decision makers.
- Heritage identification and conservation standards should be adopted to meet the objectives of the Australian Heritage Commission Act such that entry of places on States' registers will automatically be entered into the register of the national estate without further assessment.
- The establishment of heritage identification and conservation standards will enable the commission to selectively delegate to the States its powers to provide conservation advice to Commonwealth Ministers, agencies and the States and Territories.
- The Australian Heritage Commission should identify nationally significant wilderness areas for possible inclusion in the national reserve system.
- The Commonwealth needs to identify heritage properties and develop a best practice framework for their management.

Prohibited canal estate development

The New South Wales Department of Urban Affairs and Planning has released draft State environmental planning Policy No 50 – Canal Estate Development (SEPP 50). The State environmental planning policy has been prepared under the *Environmental Planning and Assessment Act 1979* and is intended to implement the government's policy of prohibiting canal estate developments. This policy was developed based on advice provided by the New South Wales Department of Land and Water Conservation and State Fisheries that existing canals of 50-70 metres wide were having impacts on local amenity, ecology and water quality and concerns about severe flooding, high winds and the structural stability of developments.

The SEPP is intended to prohibit the traditional or conventional canal estate developments. These are defined in the SEPP as canal estate developments involving residential development, the construction of a canal or canals if a canal is less than 100 metres wide along more than half the total canal length, and requiring the use of fill material to raise the level of part of the land within the development.

The SEPP is not intended to prohibit marinas, boat harbours or other water based developments falling outside the definition parameters of SEPP as these types of developments are subject to environmental safeguards and other controls and as such must be assessed on individual merits and regulated under planning and other relevant legislation. The SEPP is intended to make clear the government's position on canal developments so as to avoid the unproductive allocation of resources by developers, authorities and the general community in the preparation and consideration of these developments.

Sale of water assets

The Queensland Commissioner of Water has proposed historic reforms for Queensland's water management assets including privatisation of these assets. The Commissioner of Water has identified that $2.5 billion spending on water over the next 10 years will be required and that the planning and policy for this water provision is not adequate. The report identifies the need for the following reforms:

- State wide strategic process for future water infrastructure;
- further investment to meet water demand growth;
- management changes proposed for Queensland water;
- economic and financial performance monitoring;
- data collection of operating costs and capital costs on a scheme by scheme basis;
- financial performance of urban water providers to be monitored and targets enforced;
- institutional separation of strategic planning and regulatory functions from service delivery;
- specific government units to address resource allocation, regional infrastructure planning, industry obligations, subsidies and investment of State equity to government (including facilitation of infrastructure investment);
- a commercially focused approach to water infrastructure development management service delivery; and
- separation of retail activities and aggregation of wholesale activities.

Performance based BCA

The Australian Building Codes Board has released a performance based Building Code of Australia. The performance based BCA substantially includes the existing BCA 90 technical requirements together with a performance hierarchy. The following levels exist within the hierarchy:

- *Objectives* – these set out an interpretation of what the community expects from buildings and are expressed in general terms and usually refer to objectives such as safeguarding people and protecting adjoining buildings or property.
- *Functional statements* – these set out how a building could be expected to satisfy the community's objectives.
- *Performance requirements* – these outline a suitable level of performance which must be met by building materials, components, design factors and construction methods in order for the building to meet the relevant functional statements and in turn, the relevant objectives.
- *Building solutions* – these set out the means of achieving compliance with the performance requirements. This can be achieved in two ways. Firstly, by deemed to satisfy provisions which set out examples of materials, components, design factors and construction methods which, if used, will result in compliance with the performance requirements of the BCA 96 and are in fact the existing prescriptive provisions of the BCA 90. Secondly, an approval authority may issue an approval if a particular material component design factor or construction method can be demonstrated to comply with the relevant performance requirements. In coming to this determination, the approval authority is required to take into account a variety of factors including certificates from professional engineers, reports of registered testing authorities, compliance with Australian standards or the provision of calculations.

This paper was published as a Planning Law Update in the Queensland Planner 37:1, 15-18, March 1997.

Redundant sites and buildings: A legal perspective

Ian Wright

This article discusses the impacts of the Intergovernmental Agreement on the Environment, particularly concerning the effects of the principle of sustainable development being embodied in the *Queensland Heritage Act 1992*

May 1997

Introduction

The Intergovernmental Agreement on the Environment was signed on 25 February 1992 between all Commonwealth, State and Territory governments and the Australian Local Government Association on behalf of all local governments. The Agreement provides that sustainable development should form the basis of future policy approaches to environmental management. In accordance with the Agreement the principle of sustainable development has been embodied in the objectives of the *Queensland Heritage Act 1992* and will no doubt be incorporated in heritage legislation in other States as it is reviewed.

Sustainable development is defined in the Agreement as development which meets the needs of the current generation without compromising the ability of future generations to meet their own needs. The principle of sustainable development requires that heritage places continue to be used in order to conserve their heritage value. The redundancy of a heritage place will inhibit the conservation of its heritage value and is therefore contrary to the principle of sustainable development.

Since all levels of government have committed themselves to the principle of sustainable development in the Intergovernmental Agreement on the Environment it is incumbent on all governments to ensure that heritage places are not left redundant. There are a number of broad strategies available to governments to address the problem of redundancy. Generally speaking these strategies focus on:

- the protection of heritage places from damage;
- the reform of development and conservation approvals processes;
- integrated planning of heritage places; and
- financial assistance.

These strategies are intended to avoid redundancy and to facilitate the reuse of redundant heritage places. This paper examines the various policy options that are available to governments to implement these strategies and, where necessary, recommends appropriate legislative and administrative changes.

Protection of heritage places

In order to avoid redundancy or to facilitate the reuse of redundant heritage places it is imperative that heritage places be protected from damage. To ensure the protection of heritage places, heritage legislation must contain at least three elements:

- a prohibition against damage to heritage places;
- significant penalties in the event of damage to heritage places; and
- an obligation to maintain heritage places.

Damage to heritage places

Most heritage legislation in Australia prohibits heritage places from being developed, demolished, damaged or altered without approval. Additionally, heritage legislation in some States restricts the power of heritage authorities to approve proposals which would adversely affect the cultural heritage significance of a place. For instance, the *Queensland Heritage Act 1992* provides that the Queensland Heritage Council can only approve a proposed development which would destroy or substantially reduce the cultural heritage significance of a heritage place if there is no prudent or feasible alternative to carrying out the development.

In cases involving the adaptation of redundant heritage places for new uses, it is important, at least in Queensland, to determine whether there is any prudent and feasible alternative to the new use. The phrase "*prudent and feasible*" has been taken from United States transport legislation. The meaning of this phrase has been considered by United States Courts which have held that "*feasible*" means capable of being built on or being made to work with available technology whilst an alternative is said to be prudent if it does not present unique problems. It is considered that the tests enunciated in the United States cases are likely to be applied in Queensland.

Penalties for damage

Furthermore, most heritage legislation provides substantial penalties where a heritage place is damaged without approval. For instance, monetary penalties of up to $1 million are provided for in the *Queensland Heritage Act 1992*. Heritage authorities in Queensland and New South Wales are also empowered to require offenders to restore the damaged heritage place or to forbid development of the land for a period of up to 10 years.

Maintenance of heritage places

Unfortunately, heritage legislation does not require the owner to keep a heritage place in good condition or to restore the heritage place if it has been degraded. Generally speaking, owners are only required to comply with the public safety standards which apply to all buildings. However, these obligations have been extended in New South Wales and Victoria where owners are prohibited from deliberately allowing a heritage place to deteriorate with the intention of allowing demolition or redevelopment to occur. Where a heritage place has been wilfully neglected the heritage authority may prosecute the owner and order the undertaking of repairs to prevent further deterioration. If the repairs are not carried out the heritage authority can compulsorily acquire the land or forbid the development of the land for up to 10 years.

Unfortunately, there are evidential difficulties associated with proving that the owner wilfully (ie deliberately) neglected the heritage place. The relevant test is subjective rather than objective requiring an examination of the individual owner's state of mind. It is recommended that these provisions be amended to empower the heritage authority to direct owners to undertake specified maintenance work or to carry out the necessary work at the expense of the owner.

Reform of approvals process

The approvals process applicable to the conservation and development of heritage places should also be reformed to minimise uncertainty, costs, delay and risk to the owners of heritage places. This involves a number of specific reforms.

Integrated approvals system

The approvals systems contained in heritage legislation should be integrated with the approvals system specified in land use planning, pollution control and natural resources legislation. At minimum this would require the inclusion of heritage protection as an objective and decision making consideration in all land use planning, pollution control and natural resources legislation. At maximum it would require the amalgamation of land use planning, pollution control and natural resources legislation into one Act. As such it would provide a comprehensive Act, clarification of responsibilities and an integrated system. However, the amalgamation of these Acts into one would require major legislative and administrative changes. Accordingly, it is recommended that other approvals systems should be amended to include heritage considerations.

Protection mechanism

The mechanism by which a heritage place is brought within the ambit of heritage legislation should also be reformed. Heritage legislation should provide for the establishment of a single publicly accessible register that indicates all heritage places whether owned by the Crown or private owners. The process by which places are included in the register should also be specified in the heritage legislation. This process should include public participation mechanisms. This system of registration has been adopted by most States with the notable exception of New South Wales which still retains the process of making conservation orders. It is recommended that a system of registration incorporating public participation mechanisms be implemented.

Assessment of economic values

The process of determining whether a place should be included within a heritage register requires an examination of both the conservation and development values of the place. Not only will this potentially reduce the conflict between owners and the heritage authority but it is also mandated by the concept of sustainable development. In New South Wales and Victoria, owners are entitled to object to the inclusion of a place within the ambit of the respective heritage legislation on a number of economic grounds including that:

- it is unnecessary to the conservation of the place;
- it would render the place incapable of reasonable or economic use;
- the conservation of the place could not be achieved without undue financial hardship to the owner; and
- the preservation of the place is not economically feasible.

In Queensland, however, owners are only entitled to object under the *Queensland Heritage Act 1992* to the inclusion of a place on the heritage register on the grounds that the place is not of the requisite conservation value. This right of objection is expanded by a further provision of the Act which provides that a place is not of the requisite conservation value if there is no prospect of the conservation value of the place being conserved. The meaning and rationale of this provision is not clear from the Act and was not properly articulated in the second and third reading speeches of the Minister.

Despite the uncertainty associated with the provision, it may be possible to argue that a place does not have the requisite conservation value if the owner does not have the financial capacity to maintain the place in a manner necessary to conserve its conservation value. It is uncertain whether such an argument would succeed before a court. What is certain is that if economic matters are to be considered in the process of determining whether a place should be included in the heritage register then they should be expressly articulated. However, if it is the case, as I suspect it is, that economic matters are not intended to be considered in the registration process at least in Queensland, then it would appear that the *Queensland Heritage Act 1992* is inconsistent with the principle of sustainable development and will promote conflict between owners and the heritage authority.

Assessment of construction values

Heritage legislation should also ensure that the conservation of a place is properly assessed before its inclusion on a heritage register. This should include an assessment of the cultural significance of the place in terms of both the nature of the significance and the degree of significance. This is the case under the *Queensland Heritage Act 1992* where a place is required to be of cultural heritage significance and to satisfy one of eight criteria before it is entered on the heritage register. Legislation in most other States focuses only on the nature of the significance of the place. Accordingly, in these jurisdictions the only requirement for inclusion in the register is if the place is of cultural significance. It is recommended that heritage legislation require an assessment of both the nature of the significance and the degree of significance of a place before its inclusion on the heritage register.

Heritage legislation should also define in more particularity the nature of the significance and the degree of significance that is required for a place to be included on the heritage register. In most jurisdictions the nature of the cultural significance that is required for registration is defined in accordance with the Burra Charter to mean a place of aesthetic, historic, scientific or social value for past, present or future generations. This definition is very wide as are the criteria that are adopted in Queensland and Western Australia to define the degree of significance that is required for registration of a place. Not only has this resulted in uncertainty for owners but the courts, recognising the significant constraints imposed on the property rights of owners by heritage legislation, have interpreted these provisions strictly. This is illustrated in the recent case of *Advance Bank Australia Limited v Queensland Heritage Council* (Unreported 19 November 1993). In that case the Queensland Planning and Environment Court held that the reference in the definition of cultural heritage significance to:

- **The present community and future generations** means the whole of Queensland and not a limited area of Queensland.
- **Historic** means an event of particular significance as distinct from the word historical which refers to an event that occurred in history and is part of the historical process.
- **Aesthetic** means pertaining to the sense of the beautiful or having a sense of beauty and does not include architectural values such as style or utility.
- **Social** means a relationship to people or human society being the people of Queensland and not the residents of a particular part of Queensland.

On the basis of this interpretation the court held that the place in question, Ascot Chambers, was not of heritage significance and should not be entered on the register. The decision calls into question the legality of other places included on the register on the basis of a more expansive interpretation of the concept of cultural heritage significance.

The decision is also of significance to other jurisdictions which have adopted the definition of cultural significance contained in the Burra Charter. Accordingly, it may be necessary for heritage authorities to review heritage places included on their respective registers to ensure that they satisfy the definition of cultural heritage significance as interpreted by the Queensland Planning and Environment Court. It is therefore recommended that the concept of cultural heritage significance and the relevant criteria for determining the degree of significance of a place be defined with as much care and precision as possible and that guidelines be developed to assist in the interpretation of those provisions.

Development approvals process

Heritage legislation should provide for a development approvals process in respect of heritage places which is simple and minimises delay and costs. To achieve these aims the existing development approvals process should be reformed in a number of respects:

- Development approval should not be required from a heritage authority where the proposed development complies with certain performance standards specified in respect of the heritage place.
- Development approval should not be required from a heritage authority in relation to certain specified works such as maintenance, minor repairs, gardening maintenance or agricultural activities which are consistent with the preservation of the conservation value of the place.
- Heritage authorities should delegate their power in respect of specified categories of minor applications to officers or, where possible, local authorities.
- Guidelines similar to those in New South Wales should be prepared to assist owners in the preparation of conservation studies and plans and the preparation of development applications in respect of heritage places.

Integrated planning of heritage places

The reform of the conservation and development approvals process contained in heritage legislation should be complemented by an integrated planning strategy for heritage places. This strategy should be prepared and implemented by heritage authorities and should include the following components:

- The protection of heritage areas to ensure the integrity of individual heritage places is not affected by a decline in the fabric of surrounding places.
- The presentation of awards to owners who have taken steps to avoid the redundancy of heritage places or to facilitate their reuse.
- The revitalisation of town centres with funds from the Commonwealth's main streets programme or other appropriate programmes.
- The provision of advice and technical assistance to owners in respect of the conservation and development of heritage places.
- The relaxation of existing building requirements which, if implemented, would adversely affect the fabric of the heritage place or its significance.
- The implementation of development incentives designed to avoid redundancy or to facilitate reuse. These generally involve an increase in the development potential of a heritage place or related land and generally take the form of increases in plot ratio or gross floor area, the relaxation of development standards such as car parking requirements or transferable development rights. Development incentive systems have been implemented by city councils in Adelaide, Melbourne and Brisbane.

To date heritage authorities have avoided the use of other planning incentives involving increases in the range of purposes for which heritage places may be developed under planning legislation or for that matter under heritage legislation. This can probably be related to problems associated with determining which uses are compatible with the cultural heritage significance of the heritage place. As was recently illustrated by the proposal to use the Treasury Building in Brisbane for a casino, views particularly amongst heritage experts may vary greatly as to what is a compatible use.

However, if the objective is to avoid redundant places or to facilitate the reuse of redundant places, heritage legislation should allow maximum flexibility to adapt redundant buildings to new economically viable uses. In this context, heritage authorities and their consultants will be increasingly required to make difficult choices between redundancy and the gradual degradation of the fabric of a heritage place on the one hand and on the other hand a new commercially viable use which will facilitate the conservation of the fabric but which will adversely affect the cultural heritage significance of the place.

Heritage agreements between owners and heritage authorities are generally provided for in most legislation. Unfortunately their effectiveness is limited by the fact that heritage authorities are not in a position to offer any real benefits to an owner to enter into such an agreement. In the absence of direct financial assistance the only benefits may be the remissions in rates and land tax brought about by a reduction in the value of land. However, as discussed later in this paper, it is likely that an owner would in any event be entitled to seek a reduction in the valuation of the heritage place in accordance with general valuation principles.

Financial assistance

Unfortunately, the strategies discussed in this paper will not be effective in preventing the redundancy of heritage places or facilitating the reuse of redundant places unless they are supplemented by other financial assistance schemes.

It is necessary that all levels of government implement incentive programmes aimed at assisting in capital investment in and maintenance of heritage places. A number of options are available to government.

The Commonwealth *Income Tax Assessment Act 1936* should be amended to provide tax concessions and credits, rebates for conservation and restoration work, accelerated depreciation allowances for capital works on renovation and deductibility for donations towards heritage conservation works. The Act should also be amended to alleviate the capital gains tax payable upon a transfer of development rights.

Despite the rigidities of the current tax system, this year's Federal budget provided that approved work on heritage places is eligible for income tax deductions. Under the scheme to be capped at $1.9 million per year, owners of heritage places will be able to apply through a competitive selection process for income tax rebates of 20 cents in the dollar. Conservation works must be valued at more than $10,000 and must relate to heritage places that are visible or are accessible to the community. The scheme is expected to generate approximately $9.5 million in heritage conservation works each year.

Grants may be made directly by heritage authorities to finance conservation works. In this regard it is recommended that the National Estate Grants Programme, administered by the Australian Heritage Commission, be extended to private owners.

State governments have also provided interest free loans and low interest free loans to owners as well as subsidies to mortgagees to encourage conservation works on heritage places.

Heritage authorities are usually empowered to purchase property or compulsorily acquire property in certain circumstances. Interestingly, the *Queensland Heritage Act 1992* does not empower the Queensland Heritage Council to acquire property.

Heritage legislation sometimes provides for revaluation of heritage places. For instance, in the *Queensland Heritage Act 1992* the Valuer General is required to consider the restrictions on use contained in a heritage agreement when assessing the unimproved value of a heritage place. However, where heritage legislation does not provide for the revaluation of a heritage place regard must be had to general valuation principles.

The valuation principles applicable to heritage places have recently been enunciated in a series of cases involving heritage places in Queensland. These cases are *The Valuer General v Queensland Club* (1991) 13 QLCR 207, *Robert W Mathers* and *Robert F Gibson v The Valuer General* (1992) (unreported) and *Ballow Chambers Limited v The Valuer General* (1992-93) 14 QLCR 422. In having regard to the development restrictions contained in the *Queensland Heritage Act 1992* the court held that in circumstances where the owner is clearly obliged to sell the heritage place subject to statutory constraints preventing or significantly impeding the demolition of the building and development of the site that heritage place should be valued on the basis of its actual use rather than its highest and best use. It is likely that these principles would be applicable to the valuation of heritage places in other jurisdictions.

Owners may also be granted remissions in rates and land tax to assist in the construction of the heritage place. These may occur either through direct discounts or by a reduction in the valuation of the heritage place in accordance with the principles previously discussed.

Conclusion

The continuing use of heritage places is essential to the conservation of the heritage value of these places. It is therefore imperative that governments adopt strategies which avoid redundancy or facilitate the reuse of heritage places. It is essential however that government initiatives should be as flexible as possible so that legal and policy options may be tailored to satisfy the requirements of individual heritage places and their owners. Finally it should never be forgotten that our heritage places will be in jeopardy if it is not economically feasible to maintain them and that it is in this context that appropriate policy and legal options should be implemented.

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Review of planning law updates concerning State and Commonwealth legislation

Ian Wright

This article discusses the various planning law updates concerning State and Commonwealth legislation

June 1997

Wastewater re-use

The Queensland Minister for Natural Resources has advised that the Queensland budget would reflect the Queensland government's commitment to reclaim water and water conservation projects. The Minister stated:

> *If re-use of stormwater proved viable it would provide a boost to economic development and would put Queensland at the forefront of innovative water conservation practices. Water is essential for the economic and social development of this State and stormwater re-use is certainly an area that government, industry and the community are actively studying.*

The Minister stated that the potential of stormwater and sewerage effluent re-use for industry and community benefit had featured in the submissions lodged with the government's water infrastructure taskforce. The Minister stated that:

> *Stormwater management involves a complex range of issues including community health, drainage and flooding, resource use, catchment management, the environment and, of course, the ultimate cost to taxpayers. These issues are presently providing the biggest obstacle in the development of this important concept from an idea to the application stage. People reasonably expect clean waterways and protection from flooding and disease that result from poor stormwater practices.*

Sale of water resources

The Queensland State government will commence the commercialisation of water resources by introducing private ownership and management of infrastructure. The Minister recently advised that he would be taking a paper to Cabinet to spell out the future of regional management of water schemes throughout the State. The regional approach would be modelled on the current joint study between the Department of Natural Resources and the South East Queensland Regional Organisation of Councils which was investigating possible bulk water supply options. The Minister also advised that Queensland was moving away from State-run schemes and more towards local management aimed at making both primary and secondary industries stronger partners in water management. He also advised that water pricing policy would be focused on achieving individual scheme viability so that there were no ongoing costs to taxpayers.

National pollutant database

The National Environmental Protection Agency, a body comprising Federal, State and territory governments, has agreed to establish a national pollutant inventory designed to inform the community of pollutants being discharged to the environment. The inventory will be developed into a National Environmental Protection Measure (**NEPM**) to ensure uniform environmental standards and protection. When implemented, the inventory will detail industry and domestic emissions to land, water and air and be available to the public. It is intended to encourage and enable companies to improve their environmental performance and assist governments to set environmental priorities and monitor their environmental programs.

Cinema developments

The recent edition of the American Planning Association Zoning News discusses recent developments in the United States in respect of large cinema complexes. The article notes that the number of screens which constitute a multiplex theatre differs between countries. In the United States the minimum is 16 screens, whilst in Japan it is 13. The article notes that cinema operators in the United States will not be building multiplex theatre complexes unless they have at least 24 screens. It is noted that the developers of such complexes want the audience to experience an entertainment event. Accordingly, the seating that is provided is luxurious and the sight and sound systems are as technologically up to date as possible. These facilities also provide video games, coffee shops and the usual popcorn and candy.

The article also notes that developers usually pick one or two types of locations. One involves stand-alone structures in existing or newly developing shopping centres. The other type involves a redevelopment of an existing entertainment complex as part of a strategy to revitalise a dying town. In either case the theatre developers seek to provide a holistic entertainment experience by trying to locate their theatres near coffee shops, restaurants and retail, interactive video parlours or sports facilities. In all such cases the same planning issues arise, namely traffic conditions, the need for additional parking, noise and security.

Communities in the United States have dealt with the parking issues associated with multiplex complexes by requiring developers to conform to their existing parking standards for movie theatres. These standards use a ratio of parking spaces to either seats or square metreage. In suburban shopping malls or office parks, the developer usually buys enough land to provide extra parking. However, in some cases parking standards may be reduced on the understanding that there will be informal shared parking with other existing uses.

Commonwealth owned heritage properties

The Commonwealth government has recently released a report by the Committee of Review into Commonwealth owned heritage properties. The report identifies that Commonwealth entities do not share a common approach to the conservation of heritage properties in their control. Accordingly, the Commonwealth has no way of guaranteeing good outcomes in the use and re-use of its heritage assets. The report identifies the following problems affecting the management of Commonwealth owned heritage properties:

- the lack of directives to Commonwealth agencies to conserve heritage properties as a core management responsibility;
- the lack of consistent legislation and agreed procedures between the Commonwealth, States and territories leading to some confusion and an operational difficulty;
- the lack of comprehensive identification of heritage properties and current Commonwealth property portfolios;
- the lack of integrated strategic planning and budgeting for maintenance, repairs and replacement of property components;
- the lack of economic incentives available to encourage property managers to conserve their heritage property and/or seek adaptive uses;
- the lack of public awareness of the operational and technological changes affecting many Commonwealth agencies; and
- the lack of effective consultation with those agencies, stakeholders and communities in which Commonwealth heritage properties are located.

The major problem identified by the Committee is that Commonwealth agencies, with few exceptions, are inadvertently mismanaging the heritage values of their properties. This is a direct result of the lack of explicit government direction to observe heritage conservation objectives. Without such direction, agencies that do not attempt to meet government objectives may be in conflict with other directions of the government regarding their performance. The solution to such a problem as suggested by the Committee does not require massive funding but rather overarching, consistent policies and guidelines within which agencies can pursue their specific functions as well as fulfilling the expectations of the community in regard to these properties.

The Committee therefore recommends that the Commonwealth implement a cohesive strategy for the future management of heritage properties under Commonwealth control. The key objectives of the strategy are that by 2001 the Commonwealth government will have:

- provided its agencies with an explicit direction and policies in regard to the conservation of Commonwealth heritage assets;
- established a comprehensive, publicly accessible inventory of these national heritage assets:
- implemented practices and processes into its agencies to ensure the conservation of these properties;
- adopted a partnership approach in caring for these properties with other levels of government, the public and private sectors and the community;
- substantially added to its record of adaptive re-use and restoration projects which are exemplars in their field;
- instilled within its organisations a greater understanding of and commitment to the conservation of heritage values;
- provided the Australian community with greater opportunities to be involved in decisions relating to the long-term future of properties which are important parts of their lives; and
- resourced its energies to achieve best practice and heritage conservation.

The Committee has also set out various principles and implementation matters to be addressed in relation to legislative review. The Committee recommended that:

- consideration of key aspects of its report be incorporated in the Commonwealth government review of environmental legislation including the *Australian Heritage Commission Act 1975*;
- until at least equal protection of Commonwealth owned heritage properties can be guaranteed under all State and Territory legislation entities should remain subject to Commonwealth and, where applicable, State and Territory legislation;
- Commonwealth heritage property managing entities and their tenants have full regard to State and Territory heritage and planning regulations where practicable; and
- the Australian Heritage Commission develop bi-lateral agreements with State and Territory Heritage agencies in relation to the delegational processes under section 30 of the *Australian Heritage Commission Act 1975*.

Local law review process

The Queensland government became a signatory to the National Competition Policy Agreements in 1995. One of the agreements, the Competition Principles Agreement, requires all existing and proposed legislation to be reviewed with a view to reforming any competitive provisions where no net public benefit can be demonstrated. This agreement extends to include local laws. Local governments have until January 1998 to identify any competitive provisions in their local laws although the larger urban local governments have only until July 1997 to finalise the review. The *Local Government Act 1993* also requires local governments to review their local laws by 30 June 1999 to identify and remove redundant provisions.

Telecommunications deregulation

The Commonwealth government has agreed to deregulate telecommunications such that the regulation of telecommunications will be made a State and local government responsibility. The current exemption of licensed telecommunication carriers being Telstra, Optus and Vodafone from the State and local government laws will lapse on 1 July 1997. This means that from 1 July 1997 telecommunications carriers will have to comply with State and local government regulations regarding their activities. Accordingly, it will be necessary for local governments to review their planning schemes and local laws to take account of these changes.

New South Wales Planning legislation

The New South Wales government has released a White Paper on Integrated Development Assessment and an exposure draft of the proposed *Environmental Planning and Assessment Amendment Bill 1997*. The White Paper follows on from an earlier Green Paper entitled "*Towards an Integrated Land Use Planning and Natural Resource Approvals Policy in New South Wales*".

Currently all subdivision, building and development applications are considered under separate legislation and often sequentially. Development applications are assessed under the Environmental Planning and Assessment Act whilst building applications are assessed under the *Local Government Act 1993*, while subdivision applications are controlled under the *Local Government Act 1919*. In addition, various licences, permits and approvals are required from other State government agencies including the New South Wales Environmental Protection Authority.

Similar to Queensland's IDAS proposals and the proposed Integrated Planning Act, the proposed *Environmental Planning and Assessment Amendment Bill 1997* proposes a one-stop shop where development and building consents with all necessary environmental and other licensing conditions will be satisfied by one application to an integrated approvals process. The Bill involves the following:

- combining development approvals required under the Environmental Planning and Assessment Act with licences, permits and approvals required under other legislation;
- creating integrated approvals which consolidate all conditions of all regulators relevant to the application into one document agreement;
- projects of State significance that are to be covered by integrating approvals agreements;
- accredited private sector professionals being empowered to issue certificates for compliance functions usually performed by consent authorities such as local councils; and
- empowering local councils to issue enforcement orders under the Environmental Planning and Assessment Act.

This paper was published as a Planning Law Update in the Queensland Planner 37:2, 21-22, June 1997.

Review of various planning legislation concerning State and Commonwealth legislation

Ian Wright

This article discusses the various planning law updates concerning both State and Commonwealth legislation

September 1997

Provision for people with disabilities

The Human Rights & Equal Opportunity Commission (**HREOC**) has issued a revised Advisory Note on Access to Premises. This release coincides with proposed new amendments to the *Building Code of Australia 1996* (**BCA96**). These documents will enable owners, designers, builders, managers and local governments to make more informed decisions about the kind of facilities that should be provided in premises in order to avoid complaints under the *Disability Discrimination Act 1992*. Regulation Document (RD97/01) provides for the modification of the BCA96 to present "t*he minimum requirements needed to meet the Disability Discrimination Act 1992 in most applications*". RD97/01 which is expected to be incorporated in the BCA96 in 1998 amends existing requirements in respect of:

- places of refuge to achieve fire resistant construction;
- the requirement to provide the reasonable, safe, equitable and dignified access for people to the services and facilities within buildings and external features such as car parks;
- smoke hazard management;
- lift installations;
- emergency lighting systems;
- sanitary and other facilities; and
- theatres and public halls.

The State government has also authorised the preparation of amendments to the Building Act which are scheduled to commence operation from 1 September 1997. The amendments will introduce private certification of building approvals as an alternative to the current local government approvals process. Under the proposed process, private certifiers will operate in competition with local governments to approve building applications and to carry out required inspections during construction. Certifiers are required to have appropriate qualifications and experience. The amendments will also introduce mandatory building application and other forms to be adopted by every local government in Queensland. Amendments to the Act will also provide for streamlining of the procedures for deciding objections under the Building Act. Associated with these amendments is an increase in the maximum number of expert members on the building tribunal. The amendments will also provide a process whereby neighbours who cannot agree over access required for the construction and maintenance of walls erected on or near the boundary may proceed to the Magistrates Court for an order.

New Queensland Competition Authority

Parliament passed the *Queensland Competition Authority Act 1997* on 9 May. The Act establishes the Queensland Competition Authority which is intended to be an independent authority responsible for monitoring the pricing practice of government owned businesses, regulating competition between government owned businesses and the private sector and ensuring that the competitors of government owned businesses receive equal access to infrastructure. The Act also prohibits the owner of natural monopoly, which is defined to include water, harbour, railway and airport facilities, from charging competitors excessive prices for services that are essential to their businesses. It is intended that the Act will apply to all types of infrastructure facilities except for pipelines and other types of infrastructure facilities exempted by way of regulation.

The Act applies to both private sector providers of infrastructure services as well as government business enterprises. For example if a local government acquires new plant and equipment that is unique in a location other local governments and contractors can apply to the QCA to have the service made a declared service. The local government as owner of that service would then be required to make that equipment available to other local governments or contractors on an equal basis. Where an access agreement cannot be negotiated between the owner of the service and the person seeking the service either party can notify the QCA that a dispute exists. The QCA will then conduct an arbitration of the dispute. The arbitration is to be conducted by two or more members of the QCA with decisions being made on a majority basis. The arbitration is to be conducted on an informal basis and the arbitrators are not bound by rules of procedure or technical rules of evidence. The QCA may require the owner of a facility to provide access to the service on certain prescribed terms and conditions.

Recent government strategy documents

The following significant strategies are currently under development by the State government:

- *South-East Queensland Economic Development Strategy* – this is being co-ordinated by the Department of Economic Development and Trade and will involve specific actions in respect of industry development, infrastructure provisions, skills development, export development and investment attraction.
- *Integrated Regional Transport Plan* – this was adopted and endorsed by Cabinet on 28 May 1997 and involves over 140 actions aimed at improving the transport system of South-East Queensland.
- *Interim Water Quality Management Strategy and the Brisbane River Management Plan* – these are being coordinated by the Brisbane River and Moreton Bay Waste Water Management Study and the Brisbane River Management Group respectively.
- *Regional Coastal Management Plan for South-East Queensland* – this is being co-ordinated by the Department of Environment and will provide guidelines for managing coastal areas in South-East Queensland and will cover matters such as land use, development works, recreation and conservation.
- *Regional Open Space Section of the Regional Framework for Growth Management* – this is being revised by an open space planning committee involving representatives of various local government and stakeholder interest groups.

Application of Native Title to the Sea

In late April 1997 the Federal Court began hearing evidence in *Mary Yarmirr & Ors v The Northern Territory of Australia & Ors* [1997] FCA 274. This case is expected to be the first decision by the courts on the application of the *Native Title Act 1994* to the sea. The case concerns an application for determination of Native Title rights in respect of the Croker Island area. Croker Island and the smaller surrounding islands together with the mainland abutting these islands being the northern edge of Arnhem Land are already held by Aboriginal land trusts having been granted under the Aboriginal Land Rights (Northern Territory) Act. The area covered by the application includes waters within the tidal zone, the territorial jurisdiction of the Northern Territory (that is within three nautical miles of the coast) and the Commonwealth Territorial waters beyond that. In addition to a recognition of their traditional fishing and hunting rights in the area the Aboriginal applicants have sought a determination that they have the right to exclusive possession of the sea, the sea bed, the subsoil beneath it and the air space above it. As a result of this, Aboriginal groups have sought the right to control access to these areas as well as the right to speak for and make decisions regarding its use. The implications for commercial fishermen, recreational fishermen and offshore mining are obvious.

The High Court in the Mabo case was not required to determine the application of Native Title rights to the adjacent areas of the sea as that aspect of the claim had been abandoned at an earlier stage. Accordingly the Native Title Act was drafted in expectation of the Mabo principle being able to be applied to the sea. The question whether the Commonwealth of Australia will recognise the existence of Native Title to the sea remains unresolved. It should be noted that the Prime Minister's response to the Wik Decision seeks to deal with the management of water resources and air space. Item 8 of the Amended Wik 10 Point Plan provides as follows:

> *The ability of Governments to regulate and manage surface and subsurface water, offshore resources and airspace and the rights of those with interests under any such regulatory or management regime would be put beyond doubt.*

The waters within the Croker Island area are the subject of both Commonwealth and Northern Territory Fisheries Management Plans and rights to fish in these waters under such plans would appear to fall within the category of rights the Prime Minister intends to put beyond doubt. However in the absence of further detail as to how such rights are to be protected predictions as to the full extent of the protection offered by the Prime Minister's plans are almost impossible. In whatever form the proposed amendments of the Native Title Act are passed it is clear that total extinguishment is unlikely to occur. As a result the decision in the Croker Island case is likely to provide valuable answers to those who are concerned with future planning of resources in and under the sea.

Environmental control of airports

The Federal government has resolved to privatise airports by leasing them to airport lessee companies. A new Act known as the *Airports Act 1996* and accompanying Regulations and Transitional Act have been introduced. Section 136(2) of the Airports Act allows for the making of regulations which can exclude the operation of State environmental laws to the leased airports. The Commonwealth government has introduced the *Airports (Environment Protection) Regulation 1997*. The Act requires lessees to prepare an environmental strategy to be approved by the Minister within 12 months or longer with Minister approval after the granting of a lease. Regulation 4.01(1) requires lessees to prevent pollution from the undertaking or if prevention is not reasonable or practical to minimise the generation of pollution from the undertakings. The lessee is also under a duty to preserve environmentally sensitive areas. The lessee is also under an obligation to give notice of an object, species or ecological value which indicates that the site of an undertaking is a site of a previously unrecognised significance. Failure to give such notice is an offence. The lessee is also under a duty to prevent offensive noise generated at airport sites other than generated by aircraft in flight. This general duty is complemented by specified national pollution and noise standards which are set out in the schedules to the regulations. However, power is

given under the regulations for lessees to apply to the minister to have the standards varied in relation to a particular airport.

Enforcement of the obligations will be undertaken by way of a new entity known as an Environmental Officer who will be employed by the Transport Department. This officer is to hold a stake of up to 5% in the lessee company. An Environmental Officer is empowered to issue Environmental Protection Orders when he or she is satisfied of certain factors such as when there is pollution which is harmful or offensive. However, having regard to the fact that the terms harmful and offensive are not defined and that the Environmental Officer has a stake in the company and also a discretion would mean that the Environmental Officer has a conflict of interest which could result in limited enforcement. The Environmental Officer also is empowered to issue infringement notices which allow the offender to pay a penalty rather than having them be able to be dealt with by way of a court. The penalty is limited to one-fifth of the maximum fine which can be imposed by the court for the offence. Penalties range from $25,000 to $250,000 for a company and $5,000 to $50,000 for an individual depending upon whether the offence involves environmental harm, material environmental harm or environmental nuisance.

National Pollutant Inventory

The Draft National Pollutant Inventory requires all companies and government enterprises involved in the manufacture, processing or handling of listed chemical substances to report annually on their emissions. This obligation will apply to all industries covered by the Australian & New Zealand Standard Industry Codes although some threshold levels will be specified to avoid small businesses having to report their emissions. The emissions from smaller enterprises will be estimated by the Environment Protection Agencies in each State. Companies which fail to report will be named for their non-reporting action and this is expected to lead to community pressure being put on them to comply. The National Pollutant Inventory is intended to provide an overview of air, land and water pollution sources, identify a specific source of pollution and provide background information about polluting sources and their potential effects. It is intended that the NPI will be accessible through local libraries and local council offices and updated yearly. Australian Territory governments will be responsible for collecting NPI data by 31 August of each year. The data collection process is estimated to cost $4 million. The collected information will be provided in the form of a report from each facility.

NCP review of local laws

The *Local Government Legislation Amendment Act 1997* came into force on 22 May 1997. The Act requires all local governments to review their local laws and local law policies for anti-competitive provisions. There are two defined stages to the review process. The first involves identification of potentially anti-competitive provisions. The second involves the assessment of costs and benefits of the anti-competitive provisions. The second stage of the process is referred to as the public interest assessment.

These local governments carrying out Type 1 or Type 2 business activities being Brisbane, Caboolture, Cairns, Caloundra, Gold Coast, Hervey Bay, Ipswich, Logan, Mackay, Maroochydore, Noosa, Pine Rivers, Redland, Rockhampton. Toowoomba and Townsville are required to undertake a preliminary review of their existing local laws and local policies by 31 July 1997 in order to identify any anti-competitive provisions. This must then be refined by 31 December 1997 to remove any provision the council believes after more detailed consideration is not an anti-competitive provision. All other local governments are required to undertake the first stage of the analysis by 31 December 1997. Each local government must then carry out a public interest test and have a report prepared as to whether the provision should be retained, repealed or omitted. Anti-competitive provisions can be retained if they are determined to be in the public interest. The public interest assessment must be completed by 30 June 1999.

NSW review of environmental protection laws

The New South Wales government has prepared the *Protection of the Environment Operations Bill 1996* which is intended to consolidate into one Act the *Clean Air Act 1961*, the *Clean Waters Act 1970*, the *Pollution Control Act 1970*, the *Noise Control Act 1975* and the *Environmental Offences and Penalties Act 1989* as well as major provisions of the *Waste Minimisation and Management Act 1995*. The *Protection of the Environment Operations Bill 1996* provides for:

- an integrated environmental protection licensing system;
- the making of environmental protection policies;
- the enhancement of public participation and decision making process;
- the inclusion of a greater range of sentencing options;
- the introduction of voluntary mandatory audits; and
- the ability to use economic instruments to achieve cost effective environmental protection.

Commonwealth Wetlands Policy

The Federal government has released the Wetlands Policy of the Commonwealth Government of Australia. The policy outlines how the Commonwealth government intends to ensure that the conservation and ecologically sustainable use of wetlands will be protected as a result of its activities. The policy comprises six broad strategies which provide for the conservation, repair and wise use of wetlands. The strategies are intended to implement the policy objectives which are stated to be:

- to conserve Australia's wetlands;
- to manage wetlands in an ecologically sustainable way;
- to achieve community and private sector participation in the management of wetlands;
- to raise awareness of the values and range of wetlands;
- to develop a shared vision between the State, Commonwealth and local governments;
- to ensure a sound scientific basis for the conservation and repair of wetlands; and
- to meet Australia's commitments to relevant international treaties.

An Environmental Protection Policy

The South Australian government has released a discussion paper on a Proposed Environment Protection (Water Quality) Policy. The EPP on water quality represents the first major policy to be developed under the new *Environmental Protection Act* and will replace the *Environment Protection (Marine) Policy 1994*. The discussion paper proposes that new offences be created whereby breach of a mandatory EPP provision could result in a fine of $250,000 for a company and $120,000 for individuals or the imposition of a jail term of 2 years if the contravention is deemed to be reckless or intentional. The policy provides that no waste discharge will be permitted to water bodies or watercourses. This requirement is intended to apply not only to the direct discharge of waste into the State's water bodies, but also to any incorrect discharge such as water infiltration to the soil and thereby into the ground water. The policy also requires that before an authorisation is granted the South Australian Environment Protection Agency must be satisfied that a waste management hierarchy involving the elimination, minimisation, re-use, recycling and treatment of waste water has or will be introduced.

State of the Environment Reports

The Tasmanian government has released a draft State of the Environment Report consisting of two separate volumes. Volume 1 focuses on environmental conditions and trends whilst Volume 2 deals with findings and recommendations. Volume 1 surveys the state of the environment ranging from the health of the land and oceans to cities and towns and assesses the resource management issues facing Tasmania's key economic sectors and relationships with the environment. Volume 2 outlines key areas of environmental achievements and challenges and proposes a series of actions for improvement. Importantly, the report provides over 100 recommendations including significant reforms for various pieces of State legislation.

The New South Wales government has also released a discussion paper titled "*Reform of the State of the Environment Reporting Provisions of the Local Government Act 1994*". The discussion paper criticises New South Wales local governments for treating their State of the Environment Reports as a data gathering exercise rather than integrating them within their management processes. The discussion paper recommends detailed changes to the content and structure of the State of the Environment Reports with the objective of ensuring that a more active use is made of such reports in the council's management planning process. The discussion paper flags significant changes to the Local Government Act including amendments that would require councils to consider the principles of ecologically sustainable development when exercising approval powers.

It is currently anticipated that Queensland's first State of the Environment Report as required under the Environmental Protection Act will be released in the first part of 1998. The Environmental Protection Act provides that a State of the Environment Report is to be prepared every four years. The State of the Environment Report will concentrate on seven key areas including atmosphere, inland waters, land and soils, coastal zones, biodiversity, human settlement and cultural heritage.

Model planning scheme provisions

The Western Australian Planning Commission has released a bulletin advising of the progress in the review of the Model Scheme Text. As is the case in Queensland, town planning schemes in Western Australia are the central instrument for planning at the local government level setting out the planning proposals and intentions for local governments and establishing the system for planning and development control.

Prior to 1986, the *Town Planning Regulations 1967* contained a model planning scheme text which provided for schemes to be prepared generally in conformity with the appropriate provisions of the model text. The Regulations were amended in 1986 to provide for greater flexibility in the formulation of schemes. The Model Scheme Text was deleted and greater discretion was introduced in relation to the structure of schemes. This has resulted in increasing variations in the form and structure of planning schemes which in turn has created certain difficulties:

- There are increasing inconsistencies between schemes so that different provisions apply to different parts of the State without any real justification.
- Schemes are becoming more difficult to understand and interpret.
- There is uncertainty and confusion for those who need to use them.
- There is in increasing risk of inappropriate provisions being included in schemes.
- Schemes are now taking a longer time to prepare and to complete the necessary statutory processes for approval.
- The cost to local governments of preparing schemes is increasing.
- An additional workload has been created for the Western Australian Planning Commission and the Minister for Planning in assessing schemes.
- In view of the considerable time and cost in preparing schemes, many schemes have become outdated and are continuing beyond the five yearly review period.

As a result, the Minister has directed the Western Australian Planning Commission to prepare a Model Scheme Text in order to achieve greater consistency in schemes. The Model Scheme text will incorporate:

- a local planning strategy to set out the broad vision of the council and the longer term directions for land use and development;
- special area controls to deal with planning issues which overlap zoning boundaries, for example airport environs, flood prone land and bushfire prone land;
- consistent land use definitions which can be incorporated into schemes by reference;
- greater consistency in the types of zones and reserves; and
- provisions to incorporate environmental conditions into schemes.

It is interesting to note that the proposed Queensland Integrated Planning Act is moving in completely the opposite direction to that prescribed in Western Australia. Only time will tell whether there is a lesson to be learned from the Western Australian experience.

Telecommunications infrastructure

As from 1 July 1997, the existing *Telecommunications Act 1991* and the *Telecommunications National Code 1996* will be replaced by the *Telecommunications Act 1997* and a new Telecommunications National Code. The major effect of the new Act will be that the installation of telecommunication facilities other than low impact facilities as defined in a Ministerial determination will have to comply with State planning and environmental legislation. As a result, the Commonwealth Minister responsible for the Telecommunications Act has not yet determined what will be low impact facilities under the National Code. However, it is already known that overhead cabling and mobile phone towers (other than those which are less than five metres high and attached to buildings) will not be low impact and will be subject to State planning and environmental legislation. Since telecommunication facilities have not previously been subject to State planning legislation, such uses are generally not recognised in town planning schemes. Accordingly, it will be necessary to review town planning schemes to take account of the changed circumstances.

Local governments, when considering applications for any telecommunication areas, should take into account the following matters:

- the social and economic benefits of affordable and convenient access to modern telecommunications base services for people and businesses throughout their local government area;
- continuity of supply of telecommunication services;
- protection of the environment;
- safeguarding visual amenity in streets;
- protection of heritage places;
- public safety; and
- co-ordination of other infrastructure services.

Australian National Heritage Charter

The purpose of the Charter is to assist everyone with an interest in the significance and conservation of national heritage to make soundly based decisions on the conservation of that heritage. As such, it is intended to provide a uniform approach to the conservation of places of natural significance in Australia that can be applied to publicly and privately owned places, to terrestrial, marine or fresh water areas, and to protected and unprotected areas. The Charter acknowledges the principles of intergenerational equity, the principle of existence, the principle of uncertainty and the precautionary principle.

This paper was published as a Planning Law Update in the Queensland Planner 37:3, 15-19, September 1997.

Various planning law changes within Australian legislation including changes to ACT planning laws and consideration of both water and noise policies under Queensland legislation

Ian Wright

This article discusses the various planning law changes within Australian legislation. It duly discusses changes to ACT planning laws by way of the amendment of the *Land (Planning and Environment) Act 1991* and further considers both water and noise policies which take effect under the *Environmental Protection Act 1994*

December 1997

Changes to ACT Planning Laws

The *Land (Planning and Environment) Act 1991* has been significantly amended. The amendments are intended to streamline approvals and reduce processing times for public notification requirements and third party appeal rights.

The application and approval process has been simplified by imposing an obligation to lodge only one application in respect of a proposal rather than having separate approvals processes for separate controlled activities such as the design and siting, heritage works, lease variations and subdivision. Furthermore a specified range of minor works such as pergolas no longer require approval. The changes however do not affect applications made under the Building Act which still require a separate application. Processing times have also been limited with most applications being required to be processed within 30 working days where there are no objections and 45 working days where there are objections. If the specified times are exceeded, an application is taken to be refused and the applicant has a right to seek review before the Administrative Appeals Tribunal (**AAT**).

Similar to the proposed Queensland Integrated Planning Act, the Minister has also been given powers to call in and decide any application. There are no rights of appeal by an applicant or objector to the AAT in respect of decisions made by the Minister in respect of called-in applications. There have also been general changes to appeal rights which are principally directed towards third party appeal rights. Some applications which are required to be given public notice do not necessarily attract third party appeal rights in respect of objectors. This is the case in respect of certain specified developments such as single residential dwellings.

Endangered Species Protection Act

The Commonwealth's Endangered Species Protection Act was enacted in April 1993. The Act provides for the listing of endangered species, endangered ecological communities and key threatening processes. Currently there are about 1,030 endangered or vulnerable species listed in the Act, most of them plant species. Whilst the Act has always contained provisions for the listing of endangered ecological communities, so far none have been listed. Key threatening processes which are listed include:

- predation by the European red fox;
- dieback caused by root rot fungus;
- predation by feral cats;
- competition and land degradation by feral rabbits;
- competition and land degradation by feral goats; and
- incidental catch of seabirds during oceanic longline fishing operations.

The Commonwealth Environment Minister has recently released guidelines to assist people interested in nominating endangered ecological communities for listing under the Act. The guidelines allow ecological communities which are likely to become extinct if threats to their wildlife are not addressed to be formally classified as endangered and listed under the Act. The provisions are intended to allow any conservation action by State and territory agencies, scientists and the community to focus more broadly on protecting entire communities of species and habitats, rather than one species at a time.

Heritage for Local Government Policy

The Chief Executives of NSW local governments have endorsed a Draft Heritage for Local Government Policy. The draft policy recognises the significant role of local government in the identification, assessment and management of local heritage items and establishes a framework for the development of a closer relationship between individual local governments and the NSW Heritage Office.

The Local Government (Springfield Zoning) Act

This Act is intended to facilitate the development of the Springfield Master Planned Community located in the eastern suburbs of Ipswich. A planning agreement has been entered into between the developer and the council for the provision of infrastructure. The development of the area is to be regulated by a Development Control Plan which was gazetted in January 1997. The Development Control Plan requires the land to be rezoned from the current Rural zone into the Particular Development zone under the Ipswich Planning Scheme. The need for the legislation arose from the fact that, although the council's Planning Scheme called up an approved Development Control Plan, those provisions were not specifically tied to the Springfield Estate. The inclusion of the land in the Particular Development zone will enable the land use and management provisions contained in the Development Control Plan to be implemented.

Contaminated land review

A Bill has been prepared to integrate the Contaminated Land Act with the Environmental Protection Act. Under the proposed changes the Contaminated Sites Register will be replaced by a Contaminated Land Directory detailing the risks associated with a specific piece of land. The current Register lists more than 28,000 sites but only a fraction of these have been assessed as to the actual degree of contamination. The Contaminated Sites Directory will list around 29 estimated sites including the degree of risk associated with each. Details of the other 28,000 or so will be transferred to an Environmental Management Directory which will contain details of sites which are potentially contaminated such as service stations and gas works for which no detailed assessment has been undertaken.

Ecologically Sustainable Development in New South Wales

The *Local Government Amendment (Ecologically Sustainable Development) Bill 1997* requires NSW Councils to consider the principles of ecologically sustainable development when exercising their approvals power. The Act amends the Local Government Act so that one of the purposes of the Act will be to require councils to have regard to ecologically sustainable development principles in carrying out their responsibilities. The Bill will make it mandatory for councils to properly manage, protect, restore, enhance and conserve the environment in a manner consistent with ecologically sustainable development principles.

Water EPP

The *Environmental Protection (Water) Policy 1997* (**Water EPP**) is the first Environmental Protection Policy to take effect under the *Environmental Protection Act 1994* (**EPA**).

The Water EPP became law on 5 June 1997. The Water EPPs will be taken into account as part of the "*Standard Criteria*" when an administering authority considers whether to grant a licence, approval, draft environmental management program or when deciding to issue an environmental protection order. The Water EPP defines environmental values for water in terms of protecting the "*qualities*" of water which render it suitable for different types of uses: recreational use; use as drinking water (with minimal treatment); agricultural use; industrial use. In addition to these uses, if the water is a pristine water body then the biological integrity of the water ecosystem is also protected. These "*qualities*" may be identified in different documents such as the Trinity Inlet Management Plan (for waters in the Trinity Inlet north of Cairns). These qualities (or values) are measured by reference to "*indicators*" which can be measured in a quantitative way (eg concentrations of chromium, pH values etc are commonly used indicators). Indicators for various water bodies may be found in: site specific documents (if any); the Australian Water Quality Guidelines; or documents published by a recognised entity.

"*Water quality guidelines*" are numerical concentration levels of indicators or statements for indicators that protect a quality or value. Again, in deciding what are appropriate guidelines for particular indicators regard is to be had to the above categories of documents. A recognised entity can be any one of a large number of organisations including ANZECC, the US EPA or an Australian university. In the event of any inconsistency between matters set out in the documents, they are to be applied in the order previously stated. Site specific documents are therefore of primary importance. These concepts are very much the language of the Australian Water Quality Guidelines and it is necessary to be familiar with those guidelines to fully understand these concepts as there will be few "*site specific*" documents currently in existence.

The Water EPP sets very high management goals for Queensland's water quality. These are stated in terms of water quality objectives. Water quality objectives from most Queensland waters are said to be the water quality guidelines for all indicators that will protect all environmental values for the water. These objectives do not apply however to "*discrete*" water bodies such as:

- water in a pond used for aquaculture;

- water within an initial mixing zone;
- wastewater in storage;
- water in a domestic water supply system.

The Chief Executive may develop a Plan to decide priorities for identifying environmental values and water quality objectives for Queensland waters. The Water EPP requires an administering authority to consider a range of issues when making environmental management decisions including: wastewater elimination treatment and recycling; and disposal of wastewater to sewer, surface or groundwater (if treatment or recycling cannot eliminate all wastewater). An administering authority, when considering releases of wastewater to land may require release to an artificial wetland to ensure the removal of nutrients from the water.

Other management criteria are also specified for releases to land, surface waters, ground waters or roadside gutters in the case of contaminated stormwater, for example: considering cumulative effects of the release; covering paving or roofing of contaminated areas; diverting upstream stormwater runoff away from contaminated areas. Many of these management measures already appear in Environmental Authorities issued under the EPA.

Administering authorities must also consider requiring waste reception facilities for ships when making management decisions concerning mooring, docking or berthing of ships. These measures can include sewage pump-out facilities, mobile barges and on-shore facilities. Where the administering authority permits releases of wastewater to land or waters, the Water EPP authorises it to impose monitoring requirements including impact monitoring. Specific offences are created with respect to releases of oil, noxious liquids and harmful substances and rubbish from ships into non-coastal waters. It is also an offence to discharge sewage into non-coastal waters from a ship fitted with a sewage holding tank. The depositing of various contaminants such as paints, thinners, oil or insecticides into roadside gutters or drains or placing them where they may be expected to be washed into a gutter or drain is an offence. Maximum penalties may range up to $3,000 for an individual and $15,000 for a company.

The Water EPP also places new obligations on local authorities to develop environmental plans with respect to operation of sewerage systems and urban stormwater systems. The purpose of these management plans is to reduce or avoid unintended infiltration and stormwater inflows to sewers and encourage investigation of alternatives such as domestic on-site wastewater treatment and recycling of wastewater. A local government that operates a water supply system must also develop and implement an environmental plan about water conservation that improves water use efficiency in the system. These plans must be developed within 5 years of the commencement of the Water EPP.

Noise EPP

The *Environmental Protection (Noise) Policy 1997* (the **Noise EPP**) is the second EPP to take effect under the EPA. It was gazetted on 17 October 1997 and will come into force on 1 December 1997 with product labelling requirements coming into force on 1 December 1998.

The environmental values to be enhanced or protected under the Noise EPP are the qualities of the acoustic environment conducive to: the wellbeing of the community including its social and economic amenity; and the wellbeing of an individual including the individual's opportunity to sleep, relax and converse without unreasonable interference from intrusive noise.

The Noise EPP nominates an ultimate "*acoustic quality objective*" of 55dB(A) (ambient level) for Queensland's residential areas. It is intended that this objective be achieved progressively over the long term. A concept of "*beneficial assets*" is introduced. These are defined to include airports, approved industrial estates, navigable waterways, public roads or railways. The Noise EPP recognises that, although the operation or use of beneficial assets may have adverse effects on environmental values, they are necessary for the community's environmental, social and economic wellbeing. It is intended that, so far as practicable, significantly adverse effects from the use or operation be progressively reduced.

A schedule to the Noise EPP specifies noise levels, called "*planning levels*", that may be used as a guide in deciding a reasonable noise level for a beneficial use.

The Noise EPP does not reproduce the approach previously taken in schedule 7 of the *Environmental Protection (Interim) Regulation 1995* to noise control. That approach required environmentally relevant activities to ensure they did not generate noise to certain levels above background levels at various hours of the day and night. Instead, the Noise EPP relies upon the concept of "*unreasonable noise*". Unreasonable noise is defined to mean: noise that causes unlawful environmental harm; and is unreasonable, having regard to its characteristics, its intrusiveness; the time at which it is made; where it can be heard; and other noises ordinarily present at the place where it can be heard. There is likely to be some inconsistency between the approach taken in the Noise EPP and existing environmental authorities which reflect the old approach taken in the Interim Regulations.

In making a decision about an environmental authority, the amendment of a licence or approval of a draft environmental management program concerning activities that may adversely affect environmental values, an administering authority must evaluate the activity in relation to various matters including: the acoustic quality objective; any relevant code of practice; whether the activity is the operation of a beneficial asset; the characteristics of the noise; the order in which the applicant and affected persons started to occupy land at or near the site; and the views of affected persons about noise from the activity.

In considering an application for an environmental authority, the administering authority may impose a condition requiring a noise management plan. A plan may provide for: measures to be taken to minimise noise; maximum, Leq and background levels for the relevant activity; monitoring; and processes for dispute resolution. Similar provisions apply to draft environmental management programs.

The Chief Executive of the Department of Environment is required to develop and implement co-ordinated programs to enhance or protect the environmental values identified in the Noise EPP. However, no timetable is set for these programs. The Noise EPP provides for a "*show cause*" and noise abatement notice procedure similar to that which exists under the Noise Abatement Act.

If a person believes noise is unreasonable noise, the person may make a written complaint to the administering authority. The authority is required to investigate the complaint as soon as practicable unless the authority believes the complaint is vexatious. If the authority considers there are reasonable grounds for believing an unreasonable noise is being made, it may issue a "show cause" notice to the person responsible for the noise. The notice must specify a time within which the person responsible can respond. That time must be at least 14 days after the notice is given. If the authority is satisfied the noise is an unreasonable noise, it may proceed directly to issue a noise abatement notice. However, it cannot do this if it has first issued a "*show cause*" notice. It must, in the circumstances, first consider any response made to the notice.

A noise abatement notice must describe the noise and state that within a specified time the person must either stop the noise or reduce the level of the noise or change its characteristics in another specified way so that it is no longer unreasonable noise. It is an offence not to comply with a noise abatement notice. Internal review and appeal rights apply to the issue of a noise abatement notice. The Noise EPP contains specific provisions about assessment of noise and what constitutes reasonable noise with respect to particular activities such as carrying out building works for some residential premises, the operation of power tools, blasting, activities at indoor venues including sporting, musical or entertainment venues, power boats and rowing activities on the Brisbane River.

This paper was published as a Planning Law Update in the Queensland Planner 37:4, 37-39, December 1997.

Summary of recent developments in planning and environment law within Australia

Ian Wright

This article discusses numerous updates to planning and environment law within Australia. It briefly summarises Western Australia's community design code, changes to Planning and Environment Court costs, dispute resolution, New South Wales State planning instruments, Queensland Moreton Bay zoning plan, updates to the Building Code of Australia and recent P&E and NSW Land and Environment Court decisions

March 1998

Liveable neighbourhoods

The Western Australian Planning Commission has released a document entitled Liveable Neighbourhoods – A Community Design Code. Liveable Neighbourhoods is available to developers as an alternative to current subdivision policies to trial and test the community design code. Proponents can elect to have their subdivision application assessed under liveable neighbourhoods. The Planning Commission will need to be satisfied that the principles of the community design code are incorporated otherwise the provisions of the current Commission policies will prevail.

Planning and Environment Court costs

In the recent decision of Re: Crouch and London's Bill of Costs White J. has determined that the District Court Scale of Costs is the relevant scale of costs for determining solicitor and own client costs for legal work undertaken in the Planning and Environment Court in Queensland. The court found that a proper construction of section 7.6 of the *Local Government (Planning and Environment) Act 1990* requires that the District Court scale be applied in all circumstances.

Resolving development disputes without litigation

The NSW Department of Urban Affairs and Planning has released a circular designed to encourage councils to resolve disputes without court action. The circular aims to encourage alternatives to litigation by suggesting some ways to prevent disputes, outlining some of the advantages or alternatives for dispute resolution and outlining some principles for effective dispute resolution. This circular provides some support to the alternative dispute resolution provisions which have been included in the Integrated Planning Act.

Canal estate development

The NSW Department of Urban Affairs and Planning has released State Environmental Planning Policy No 50 – Canal Estate Development. The object of the State Environmental Planning Policy is to prohibit canal estate developments. Canal estate development involves a wholly or partly constructed canal or other waterway or body with a residential component as defined in the State Environmental Planning Policy and the use of fill to raise the service level of the land to a suitable height for residential use. The State Environment Planning Policy does not prevent necessary works for drainage water supply or treatment. The SEPP also does not prevent the completion of development consistent with an existing approval or development for which a development application has been lodged and which is permitted by another environmental planning instrument immediately before the SEPP comes into effect, provided any outstanding approval is obtained.

Acid sulphate planning instruments

The NSW local government of Hastings has prepared a local environmental plan and a development control plan based on acid sulphate soils. The documents require development consent for work on land, particularly non-urban land, affected by acid sulphate soils even where they did not previously require approval.

Moreton Bay Marine Park

The Queensland government has released the Moreton Bay Marine Park zoning plan. This Plan covers that part of Moreton Bay from Caloundra to the Gold Coast Seaway and includes Pumicestone Passage and Bribie and Stradbroke Islands. Sections of the Park have been designated as conservation zones where dredging will not be permitted in order to conserve the zone's natural features as far as possible and ensure only ecologically sustainable uses. Under the Plan a Special Management Area has been introduced for the conservation of sea turtle and dugong populations to primarily reduce the incidence of injury and death caused by boats and other craft such as jet skis. The Plan also addresses conservation of shorebirds such as the Eastern Curlew and Little Tern with provisions designed to prevent undue disturbance of the birds and their habitat. Conflict with

recreational and commercial fishing interests is to be addressed through Management Advisory Committees established under the Fisheries Act. The Plan does not allow for trawling in the conservation zone. Those areas zoned Protection cannot be used for fishing, collecting and particularly for recreational lines and spear fishing.

Access for disabled persons

The *Building Code of Australia 1996* has been amended to significantly increase the obligations on designers and builders in relation to the provision of access for people with disabilities. The amendments apply to new buildings and classes 3, 5, 6, 7, 8, 9 and 10A.

As a general principle, access must be provided through the principal public entrance to premises. In residential buildings such as hotels and boarding houses, access must be provided to all public areas on the public entrance level, at least one of each type of public facility provided on each floor and every floor containing accommodation. Public areas include reception areas, TV rooms, common lounges, common kitchen and dining areas and common recreation areas. If the building contains sole occupancy units, one in every twenty units must provide disabled access. If the building does not contain sole occupancy units: if there are 49 beds or less in the building, two must have disabled access; if there are between 49 and 99 beds, four must have the required access; and if there are more than 99 beds in the building, six beds must have access for disabled persons.

In classes 5-8 buildings, access must be provided to and within the entrance floor. Access to class 9B buildings must be provided to and within every auditorium but not to every tier or platform, the main entrance to the auditorium and all other areas normally used by the occupants. Where fixed seating is provided, one wheelchair space is required for every 100 seats. Up to 200 seats with the additional space for every 200 seats thereafter. In schools, access must be provided to every floor to which vertical access is available by way of lift or ramp. In early childhood centres, access must be provided to all areas used by staff, visitors and children. Buildings that are within a school or early childhood centres with built-in amplifying systems must have a hearing augmentation listening system complying with AS1428.1.

Signs incorporating the international access symbol must identify each accessible entrance, lift and sanitary facility (in accordance with AS1428.1). All passenger lifts must now comply with the amended and more stringent requirements of clause E3.6 of the Code. If there are no lifts in the building of more than one storey, at least one stairway or ramp must have handrails complying with AS1428.1.

Environmental Protection Regulation 1998

The Queensland Department of Environment has released its Regulatory Impact Statement on the *Environmental Protection Regulation 1998* (**1998 Regulation**). The 1998 Regulation will replace the *Environmental Protection (Interim) Regulation 1995* (**1995 Regulation**) which expires on 1 March 1998. The 1995 Regulation as it currently stands, contains much of the regulatory detail under the *Environmental Protection Act 1994* (**EPA**) including a list of Environmentally Relevant Activities (**ERAs**) which require either a licence or approval under the EPA.

Recent EPA prosecutions

A Gold Coast man was recently convicted in the Southport Magistrates Court under the EPA for dumping tyres and 400 drums of paint waste. The defendant pleaded guilty to the charges of: placing a contaminant where environmental harm or nuisance may be caused; and failure to comply with an Environmental Protection Order. The defendant had been issued with an Environmental Protection Order in August 1996 to clean up and dispose of waste left on a property rented by the defendant. The defendant had been evicted from the property in June of 1996 and failed to comply with the terms of the Order.

In recording a conviction, the Magistrate imposed a fine of $10,000 or six months imprisonment on default of payment. The defendant was also ordered to pay $80,000 compensation to the Department of Environment. In assessing the penalty, the Magistrate took into account various issues. Firstly, the defendant had shown little or no remorse for his actions. Secondly, the defendant stood to profit by $30,000 in dumping the waste. The $10,000 fine was seen to be necessary to act as a deterrent in this case. In considering a penalty, the Magistrate was also referred to the prosecution of Golden Circle Limited in 1996 for the same offence of placing a contaminant where environmental harm or environmental nuisance may be caused. The Magistrate said that the Golden Circle case can be distinguished from the facts of this matter as Golden Circle had taken some steps in alleviating the problem. In this case the defendant had not taken steps to address the problem. The decision shows that the taking of positive steps towards rectifying or alleviating the impact an activity may have on the environment is given a significant degree of weight by the courts.

A similar prosecution was recently successful in the Rockhampton Magistrates Court. The defendant, Mr Wolfe, was convicted for failing to comply with an Environmental Protection Order (fined $5,000); operating an environmentally relevant activity without a licence; and causing unlawful environmental nuisance (fined $5,000). The offences related to the transport and storage of regulated waste. Mr Wolfe was also ordered to pay the costs of the Department of Environment amounting to nearly $16,000.

Polluter imprisoned

A caravan park owner who pumped millions of litres of sewage into a New South Wales river became the second person in Australia to be jailed for committing an environmental offence. The NSW Land and Environment Court imposed a 12 month jail term on the polluter. The court also imposed a maximum fine of $250,000 and ordered the defendant to pay the costs of the prosecution amounting to $170,000. The defendant was found to have wilfully disposed of waste in a manner likely to harm the environment between October 1993 and April 1996. Through an elaborate secret system of bypass pipes constructed by the defendant, an average of 128,710 litres of effluent a week was discharged into the Karuah River which contained oyster leases. The deliberate act was repeated a number of times a week for the 128 weeks of the offence period. The defendant's motive to pollute had been for financial gain. The defendant saved himself around $138,000 in effluent removal costs during the period he used the bypass pipes. The judge in this case said that the actions had the most serious consequences of environmental harm and likely environmental harm imaginable. It appears that the judge in this case gave considerable weight to the fact that the defendant was deliberately causing the pollution and did little to rectify the situation.

This paper was published as a Planning Law Update in the Queensland Planner 38:1, 18-21, March 1998.

Review of the impact of telecommunications and land contamination legislation and issues surrounding local government liability in negligence, anti-discrimination and negligence in town planning

Ian Wright

This article discusses recent updates to planning and environment law in Australia. It particularly focuses on the impact of the *Telecommunications Act 1997*. The article further considers issues surrounding land contamination and identifies the impacts of recent court decisions upon issues surrounding local government liability in negligence, anti-discrimination law and negligence in town planning

June 1998

Telecommunication facilities

Background

Since 1 July 1997 telecommunications carriers have been subject to State and local government planning processes for activities not covered by the *Telecommunications (Low-Impact Facilities) Determination 1997*.

The placement and location of telecommunications infrastructure is an issue which has gained momentum in the past 10 years. This decade has brought with it the popular use of mobile telephone networks, internet and email facilities and the advent of cable television to Australia, necessitating the installation of hardware required for its functioning: antenna towers; additional cabling, equipment shelters, payphones and antenna dishes. The phenomenon has been exacerbated by the partial deregulation of the telecommunications market to allow competitors into the marketplace, and hence, a duplication of equipment and infrastructure.

Telecommunications is within the jurisdiction of the Commonwealth, and therefore, in the past, State and territory governments, least of all local governments, have had little input in relation to the location of telecommunications infrastructure. The result of this lack of power of State and local governments has been many aesthetically displeasing, incongruous and on occasions unsafe sitings of equipment.

The Commonwealth has purported to give State and local authorities greater power by creating Codes of Practice requiring compliance by telecommunications carriers. These have not, in practice, substantially bettered the bargaining position of local governments in their relationships with carriers. The *Telecommunications Code of Practice 1997* and the *Telecommunications (Low Impact Facilities) Determination 1997* are the latest editions in this series of regulatory instruments. The new instruments were drafted following a public inquiry by AUSTEL (now the Australian Communications Authority) and a short period of public comment on exposure drafts by the Department of Communications and the Arts.

The Australian Local Government Association, together with State and territory Associations argued strongly for the introduction of a new telecommunications regime which balanced the need for national telecommunications systems with the need for community consultation in relation to the location and type of telecommunication facilities. The associations made some substantial progress in gaining amendments to the previous code in a number of areas.

The *Telecommunications Act 1997* provides that the Minister for Communications and Arts, may, by written instrument, make a Code of Practice setting out conditions that are to be complied with by carriers in relation to activities covered in the Act. The Act requires that a carrier comply with the Code of Practice. The Low Impact Determination defines those activities that are considered to be low impact. Low impact telecommunications facilities, as defined in the determination, will continue to be regulated by the Commonwealth. The Code of Practice prescribes the manner in which these activities will be carried out.

Low impact facilities – definition

Schedule 3 of the determination contains a list of facilities and the circumstances under which they are to be regarded as being "*low impact*". Some of these facilities include:

- panel and dish antenna, and equipment shelters if no larger than the specified dimensions, and if colour matched to its background or in a colour agreed in writing between the carrier and the relevant local authority;
- an extension to a tower if the height of the extension does not exceed five metres and there have been no previous extensions to the tower;

- underground cable if not more than 150mm in diameter and deployed in the fashion described in the schedule;
- public payphone cabinets or booths, if not designed for other uses (for example, as a vending machine), fitted with devices or facilities for other uses, and used to display commercial advertising other than advertising related to the supply of standard telephone services; and
- colocation of any other facilities.

Under subclauses 6(4), (5) and (7), certain facilities cannot be low-impact facilities:

- designated overhead lines;
- a tower that is not attached to a building;
- a tower attached to a building and more than 5 metres high;
- an extension to a tower that has previously been extended;
- an extension to a tower if the extension is more than five metres high.

Areas in which a defined facility constitutes a low-impact facility

A facility will be a low-impact facility only if it is installed in particular areas identified in the determination. The determination classifies and prioritises areas in which a facility will constitute a low-impact facility. The areas have an order of importance, based on zoning under State or territory laws, so that an area only has its "*highest*" possible zoning. The order of priority is:

- areas of environmental significance;
- residential areas;
- commercial areas;
- industrial areas;
- rural areas.

Subclause 3.1(2) notes that a facility is not considered low-impact if the area is also an area of environmental significance, in which case, the facility would have to be approved by the relevant State or local authority. Areas falling outside of the five listed areas are to be classified as either residential or rural, thereby influencing whether or not a proposed facility will be deemed low-impact. These areas may include special use zones such as schools, recreation and tourism zones, and significant public concern is likely to be occasioned if a telecommunications facility is located within them.

Implications for local government

The Telecommunication (Low Impact Facilities) Determination represents a major victory for local government as it acknowledges many of the concerns which had been expressed by councils and local communities, particularly with regard to expanding facilities already inappropriately located.

One issue which was not adequately addressed in the determination, however, was that of co-location. The determination looks at each facility in isolation and fails to recognise their cumulative impact on the environment. It is suggested that several facilities, built to the maximum specifications listed, could in no way be considered low-impact facilities, their cumulative impact being considerable.

The determination conveniently deems overhead and underground cabling with a diameter less than 150mm as being a low-impact facility and therefore outside the control of State and local authorities. This effectively ties the hands of local governments in the roll-out of cable television conduit.

All activities not deemed low-impact in the determination are to be dealt with through State approval processes unless delegated by the State to local government. The degree to which State governments have delegated this responsibility to local government has been variable. In Queensland the approval of telecommunications facilities has been delegated to local government.

Telecommunications Code of Practice 1997

The *Telecommunications Code of Practice 1997* replaces the *Telecommunications National Code 1996* and the *Land Access Code 1996*, which ceased on 30 June 1997. The Code applies to the carriers' conduct with respect to the inspection of land, subscriber connection, low impact facilities, temporary defence facilities, and maintenance of facilities. In addition to specific conduct requirements stipulated in each chapter, general conduct requirements in relation to all activities include:

- carriers are required to do as little damage as practicable and undertake restoration of the land;
- carriers are to comply with relevant industry standards and international agreements;
- carriers are to maintain records; and

- carriers must take all reasonable steps to co-locate and co-operate with other carriers and public utilities for installation activities.

The new Code includes sections dealing with height requirements for subscriber cabling and requirements for notification to relevant authorities.

The main features of the notification to landowner and occupier section are:

- the carrier must notify landowners and occupiers at least 10 business days before engaging in an activity (for low-impact facilities, managers of public land are treated as a landowner or occupier and must also be notified);
- the land owner or occupier has the opportunity to object to the activity and the carrier is required to resolve the objection by agreement;
- if there is an objection, it can be referred to the Telecommunications Industry Ombudsman; and
- where either the owner or occupier is unknown the code requires carriers to publish a copy of the notice in a local newspaper and attach a notice to a conspicuous part of the land. If neither the owner or occupier are able to be located the carrier may treat the land as unoccupied.

As a result of amendments to the Telecommunications Act subscriber cabling is able to cross streets. A minimum height requirement has been included to mitigate the safety risk to the public. These height standards are based on the current Austel Technical Standard TS009. Under the Code of Practice, notified owners and occupiers of land on which a carrier proposes to undertake an activity, including inspection, maintenance and the installation of low impact facilities, have the right to object to the actions of the carriers. The Code of Practice sets out a process and timeframes for such objections. If a satisfactory agreement cannot be reached between a carrier and the owner/occupier of the land the objection can be referred to the Telecommunications Industry Ombudsman for resolution.

Implications of code for local government

While the Telecommunications Code of Practice does strengthen the position of local governments, especially in relation to the height of cabling and some of the notification requirements, there are still significant shortfalls in the instrument in its dealing with local governments.

The Code expressly requires carriers to notify owners and occupiers of land prior to a prescribed activity taking place. For privately owned land, this will not include a requirement to notify a local government. For public land, the Department of Communications and the Arts (**DOCA**) has suggested that by virtue of certain provisions of the Code a local government will be required to be notified in respect of the installation of a low-impact facility but for other activities will only be required to be notified if the local government is a "*common law*" occupier of the public land — which requires something more than powers of control or management. We have examined the provisions which DOCA appear to rely on for this conclusion and do not agree that they have this effect. Further, there is substantial case law stating that powers of control and management do give rise to "*occupation*" in the ordinary sense of that term. The importance of notification is that under the Code only owners or occupiers who are notified of prescribed activities have a right to object to those activities. DOCA's view would preclude local governments from objecting to the majority of activities covered by the Code. The new Code places a significantly higher number of requirements on carriers and authorities, but many of the changes in the new Code under the guise of introducing a "*stricter regime*" are essentially cosmetic, and in some instances, offer the carrier an easier path provided they "*go through the motions*" set out in the Code.

Liability for contaminated land

Local governments face potential liability from purchasers of land who subsequently find their land is contaminated.

Common law responsibilities

Council liability under the common law for land contamination has been the focus of recent judicial decisions. In *Alec Finlayson Pty Limited v Armidale City Council* (1994) 84 LGERA 225, the Federal Court held that councils do "*owe a relevant duty of care*" for approvals that are granted in relation to lands which they know or ought to know are contaminated. Moreover, the court stated that "*the complexity of modem life continually places citizens in situations where, in a practical sense, they have to rely on the due performance of functions by authorities in circumstances in which lack of care may create or permit hidden hazards*".

In *North Shore Gas Company v North Sydney Municipal Council* (1991) the court was asked to decide whether or not the containment of contaminated material on land subject to re-development was safe for residential, commercial and recreational use. The question for determination focused on the degree of certainty to which councils must adhere before determining. what is "*safe*". The court suggested that a relevant test would be "*barring the more unforeseen circumstances, can the council be confident that people who are to live in the residential buildings will not be adversely affected by any activities previously undertaken on the site*". In *Two Gables v Blacktown City Council* (1995) the council escaped liability because it obtained a (qualified) clearance from the Environmental Protection Authority prior to the final consent being granted and engaged in an independent assessment of the remediation work. This decision suggests that councils are not placed in a

position where they have to predict what might well be uncertain and unpredictable environmental consequences. Instead, councils will escape liability where they follow due process and due diligence guidelines. That principle is proposed to be included in amendments to the Environmental Protection Act.

Practical problems

There are a number of practical problems facing councils in relation to contamination sites. Financial constraints on councils are a critical issue. Investigation of possible contaminated sites is an expensive exercise and pragmatic discretion must obviously be exercised when deciding which sites should be investigated and to what extent those sites should be studied. As many environmental issues involve complex chemistry, physics, engineering and mathematical questions, it is no surprise that many councils do not have the expertise to undertake such investigations. These problems are exacerbated when councils are given added environmental compliance functions under statutes such as the *Environmental Protection Act 1994* with little additional resourcing. The devolution of functions is placing increasing pressure on council rate bases and giving rise to a fiscal imbalance which needs to be addressed as part of any national discussion of tax reform.

Land contamination in Western Australia

Background

Over the past decade there has been an increasing recognition of the problems associated with contaminated sites. The problem is of special importance in Western Australia because of a great reliance on ground water and the threat posed by land contamination to ground water quality. The number of contaminated sites in Western Australia is difficult to estimate. In many instances adequate information on former land use activities was not recorded, has not been retained or is not readily available. Contamination sites are managed through some sections of the *Environmental Protection Act 1986* and through a variety of provisions in planning and public health legislation. No legislation currently exists which specifically focuses on identifying and managing contaminated land and ground water in the State. This has caused uncertainty for land transfers and the financial sector.

Public Position Paper 1995

In August 1995 the Department of Environmental Protection (**DEP**) released a public Discussion Paper on the "*Assessment and Management of Contaminated Land and Ground Water in Western Australia*". The paper outlined limitations in the current management system and proposed that it be replaced by a co-ordinated management framework. The DEP received 74 responses from companies, industry bodies, government agencies and community groups. These responses were used to produce a second position paper which was released in May 1997.

Public Position Paper 1997

This position paper identified a number of deficiencies in the current legislation:

- a lack of legislation to require the identification, referral and investigation of contaminated and potentially contaminated sites;
- a lack of legislation to require the effective remediation of contaminated sites;
- no clear rules on liability relating to the management of contaminated sites;
- a lack of co-ordination among government agencies with no single agency having prime responsibility;
- a lack of incentives that encourage self-initiated investigations and remediation of contaminated sites;
- a lack of arrangements that ensure the availability and transfer of information;
- no means of ensuring available funding for the management of contaminated sites where no party can be identified or located, held responsible, or made to pay.

Public Position Paper proposals

In response to these deficiencies, the Western Australian government put forward a number of proposals. These include:

1 A new framework

The new framework will provide clear rules, procedures and standards. To be introduced by major amendments to the *Environmental Protection Act 1986*, the new legislative framework will incorporate the following principles:

- the prevention of contamination, or continuing contamination;
- the polluter pays principle;
- an onus on innocent land owners and occupiers to disclose the extent of contamination to escape liability;
- effectiveness, equity, efficiency and accountability.

2 Identification of contamination sites

The DEP will administer a system whereby contaminated sites are collated into a register from a number of sources:

- from contamination disclosure statements from land owners and occupiers;
- reports of known or suspected contaminated sites by regulatory agencies, polluters, landowners, occupiers and accredited auditors.

This register will be made available to the public and a memorial placed on the title of land where contamination has been confirmed.

3 Classification of selected sites

Sites are to be classified according to the degree of contamination. These include "*report not substantiated*", "*possibly contaminated – investigation required*", "*unrestricted use*", "*contaminated – remediation required*", "*contaminated – restricted use*" and "*decontaminated*".

4 Groundwater contamination issues

The Waters and Rivers Commission will establish a groundwater database to supply information on contaminated bores and notification of bores near contaminated sites. This database will form part of an integrated information system with the DEP contaminated sites register.

5 Access to information on contaminated sites

It is proposed that the DEP will establish a database which will list information regarding sites which have been classified under the proposed classification system. Access to this information will vary according to the classification given to the site. Information on "*contaminated*" sites will be publicly available, while information on sites classified as "*report not substantiated*" and "*possibly contaminated – investigation required*" will be restricted.

6 Investigation of contaminated sites

Site investigations will take two forms:

- *Voluntary investigations* — initiated by the land owner or developer to meet their land use or commercial objectives (such as assessments undertaken as part of land use development requirements or as part of disclosure provisions associated with land transfers).
- *Regulatory investigations* — as required by the DEP in circumstances where a site is suspected to be contaminated.

7 Remediation of contaminated sites

Where a site is contaminated, the DEP will issue a notice requiring the land owner or occupier to prepare a site remediation management plan and implement the approved plan. The preferred approach to remediation for decontamination of soil is that it:

- be treated on site and the contaminants reduced to acceptable levels; or
- be treated off site and returned to re-use after the contaminants have been reduced to acceptable, levels.

Disposal of contaminated soil off site or capping will only be considered where the preferred approaches are not viable or practical.

8 Responsibility and Liability for Contaminated Sites

The polluter is to be primarily liable for contamination caused by it. In the absence of an identified polluter, or if the polluter is insolvent, the land owner or the occupier of the land where the contamination exists will be held responsible. The government will assume responsibility for a site if it has been abandoned.

9 Exemptions from Liability

Innocent land owners can avoid being held responsible for contamination caused by past polluting activities by providing a disclosure statement which outlines the characteristics and extent of contamination on their site. Protection from liability will only extend as far as the extent of the information contained in the disclosure statement. In addition, exemptions will be available where the contamination occurred as a direct result of an instruction given by a government agency, and when a party can demonstrate that contamination on their site was caused by a past activity which did not contravene legislation which applied at the time.

10 Administration

The Position Paper sets out the roles of various government departments and agencies whose responsibilities include land management issues or whose activities impact on the environment.

Implications for local government

As occupiers, local government authorities will be subject to the same liability rules as apply to any other party. With regard to the management of landfills, it is proposed that a Western Australian government agency or local government authority be liable for contamination caused by past polluting activities arising from a landfill for which they had responsibility, when they contravened legislation that existed or applied at the time. It has not yet been decided whether local government authorities will be able to provide disclosure statements for landfills located in their jurisdiction and thereby avoid liability. As regulatory bodies local governments will play a key role in the implementation of measures which will form the basis of the new legislation. Therefore it will be important that local governments are adequately equipped with additional resources, training and efficient procedures in light of the new regime. Local government authorities will be responsible for ensuring that site contamination issues are considered during land use planning and development processes and will be responsible for ensuring that relevant information on site contamination is provided to the DEP. This may leave local governments liable if they do not demonstrate due diligence in performing their responsibilities. Local government authorities who have contributed to, or exacerbated, contamination through not exercising due diligence or an adequate standard of care in performing their operational and decision making functions could be liable on the basis of negligence under common law.

The contaminated sites legislation is still in its formative stages. The information collated by the DEP is currently being drafted into Bill form. The DEP hopes to have the Bill ready for the autumn opening of parliament. Following the timetable, the legislation will not come into force until the second half of 1998.

Negligence of local governments

Background

On 23 January 1998 the High Court, constituted by Chief Justice Brennan and Justices Toohey, McHugh, Gummow and Kirby, handed down its decision in the cases of *Pyrenees Shire Council v Day; Eskimo Amber Pty Ltd v Pyrenees Shire* (1998) 192 CLR 330, signalling a significant change in direction as to the circumstances in which local governments and other statutory bodies will be liable in negligence in the exercise of their statutory powers.

In brief, the case began with a small fire in a chimney in the Victorian country town of Beaufort, in a building used partly as a shop and partly as a residence. An inspector from the Pyrenees Shire Council subsequently inspected the chimney and found defects in its construction. The council warned the then tenant of the property (**First Tenant**) and the owners of the property (**Owners**) not to light any fires in the fireplace but did nothing further, notwithstanding that the Shire had substantial powers to ensure the defects were remedied under the then *Local Government Act 1958* (Vic). The First Tenant later transferred the lease of the property to Eskimo Amber Pty Ltd, the family company of the Stamatopoulos family (**Second Tenants**), but said nothing about the defective chimney. The Second Tenants later lit a fire in the fireplace, which burned down the property and a neighbouring property owned by Mr and Mrs Day (**Neighbours**). In the legal proceedings which followed the Shire was found liable in negligence to the Neighbours but not to either the Owners or the Second Tenants. The Second Tenants appealed against the decision in favour of the Shire and the Shire appealed against the decision in favour of the Neighbours.

"General Reliance"

The basis of the initial findings that the Shire was liable in negligence to the Neighbours, but not to the Second Tenants, was the concept of "*general reliance*". This concept, first suggested by Justice Mason in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 in 1985, was said to give rise to a duty of care on the part of the Shire to the Neighbours on the basis that the mere existence of the Shire's statutory powers in this case led to a general reliance or expectation by the Neighbours that those powers would be exercised, notwithstanding that the Neighbours in fact did not rely on the Shire at all and did not even know the powers existed. The Shire was held not to owe a duty of care to the Owners or the Second Tenants because each of these had the ability to have inspected the chimney and protected themselves against any risk either by not lighting a fire or by remedying the defects in the chimney. This was said to preclude any "*general reliance*" by the Owners or the Second Tenants that the Shire would exercise its powers.

The High Court's decision

The concept of general reliance has faced criticism since it was first suggested and was the subject of sustained argument in this case. Justice Kirby summed up the position by saying that these appeals provided the court "*with an opportunity to reconsider its decision in Sutherland Shire Council v Heyman*" and "*an opportunity to afford a more principled approach (to the liability of a local government or statutory body for failure to exercise its powers) which is at once more realistic about the law's objectives and operations, more straightforward in application and, to the extent possible, more predictable in outcomes*."

A 3:2 majority of the High Court (Chief Justice Brennan, Justices Gummow and Kirby) rejected the concept of general reliance as a basis for imposing a duty of care. Chief Justice Brennan emphasised that the court was dealing with a statutory power and stated that "*if community expectation that a statutory power will be exercised were to be adopted as a criterion of a duty to exercise that power it would displace the criterion of legislative intention*". Justices Gummow and Kirby simply acknowledged that the concept was merely a "*legal fiction*", in that the plaintiff need not have actually relied on the power at all, or even known that it existed.

Thus the majority rejected the creation of a "*fictional*" reliance in order to give rise to a duty of care where no reliance in fact exists, but that finding did not signal a win for the Shire. Rather, the majority found that reliance was not necessary at all in order to give rise to a duty of care. As a result, the majority found that the Shire remained liable in negligence to the Neighbours and, of even more importance for local governments and statutory bodies, that the Shire also owed a duty of care and was liable in negligence to the Second Tenants.

The majority decisions took somewhat different approaches to the formulation of a duty of care and liability in the absence of general reliance (or any reliance at all), but each applied those approaches in the same way. Chief Justice Brennan held that a duty of care to exercise the statutory power in question arose quite simply on existing general principles from the particular circumstances of the case, including the purpose for which the power was conferred, the extent of the risk if the power was not exercised, and the reasons given for not exercising the power. Justice Gummow also found a duty of care arising simply from the circumstances of the case but emphasised that the statutory powers of the Shire gave rise to a "*measure of control of the situation, including its knowledge, not shared by the Second Tenants or the Neighbours, that if the situation was not remedied, the possibility of fire was great and damage to the whole row of shops might ensue*". Justice Kirby was the only judge to reach his conclusion based on a restatement or fine-tuning of the general principles of negligence. Even his judgment, however, is in the end based on a finding that it was reasonably foreseeable by the Shire that its failure to exercise its statutory powers to ensure the defects of the chimney were remedied would be likely to cause harm to the Neighbours and the Second Tenants. Justice Kirby found that "*given the undoubted statutory powers of the Shire, the high risk to which it had found the offending fireplace and chimney exposed the shops and dwellings and those who owned and occupied them, it is not at all unreasonable to suggest that prima facie more should have been done than to write the rather inconsequential letter which the Shire considered to be the discharge to its responsibilities*".

As set out above, each of the majority judges applied these principles to find the Shire liable not just to the Neighbours but also the Second Tenants, notwithstanding that the Second Tenants could have inspected the fireplace and chimney themselves and discovered the defects. The court found that this did not sufficiently distinguish the position of the Second Tenants from the position of the Neighbours.

Implications for local government and other statutory bodies

The High Court's decision will apply to local governments and any other body exercising statutory powers. Those bodies may now be found liable for failures to exercise their statutory powers in circumstances where previously they may not have been liable. The High Court rejected the concept of "*general reliance*", but rather than insisting on some form of actual reliance and narrowing the potential liability of local governments and statutory bodies, instead found that an obligation to exercise statutory powers may arise notwithstanding an acknowledgment that there is no reliance at all on the local government or statutory body exercising that power.

Once a local government or statutory body has knowledge of a situation which may cause damage or injury and it commences to exercise statutory powers to effect a remedy of the situation, the High Court's decision is such that it almost certainly will come under a duty of care to ensure that its powers are exercised to the fullest extent necessary in order to remedy the situation. That duty will be owed to anyone who might foreseeably suffer damage from the situation, whether or not they rely on the local government or statutory body to act, or even know of the existence of the statutory power to act.

Nor is it necessarily the case that a local government or statutory body can avoid the implications of the High Court's decision by not acting at all. Apart from the fact that "*not acting*" will often be inconceivable for responsible local governments and statutory bodies, if a local government or statutory body had knowledge of a situation likely to cause damage or injury and has statutory powers which enable it to effect a remedy, then it is but a short step from the High Court's statements above to find a positive duty to exercise those statutory powers.

It remains to be seen what limits or control mechanisms the Courts will place on this new duty of care. The nature of the statutory power will still be relevant and some distinction between operational and policy decisions appears to still apply, but the High Court's statements will apply to many, and possibly the majority, of significant statutory powers. For local government in Queensland the scope of statutory powers to which the High Court's statements will apply is likely to be even more indeterminate following the replacement of the previous specific powers in the *Local Government Act 1936* by the general powers set out in the *Local Government Act 1993*.

Finally, practically speaking, local governments and statutory bodies should realise that, not having the benefits of hindsight they may often infringe this new duty of care. It will not be practicable or possible for local governments or statutory bodies to fully exercise their statutory powers, including (in the case of local governments) notices, prosecution, or even the undertaking of works by the local government, in every situation which might now give rise to liability. Local governments and statutory bodies should however look closely at their practices and policies as to how, when and to what extent they exercise their statutory powers and seek legal advice to refine those practices in light of the High Court's decision.

Anti-discrimination law and the development process

A recent decision of the High Court of Australia in *IW v The City of Perth* [1997] 191 CLR 1 (**Perth case**) has the effect of significantly exposing local government to claims for compensation under the *Anti-Discrimination Act 1991* (Qld) (**ADA**) for discrimination. The case represents an extension of the liability of councils for discrimination discussed in the decision of the Anti-Discrimination Tribunal (**Tribunal**) in the matter of *Secrana Pty Ltd and Beaudesert Shire Council* (**Secrana case**) delivered in August 1995.

Setting the scene – the Secrana case

In the Secrana case (although the process leading to the case was totally different from the Perth case) the Tribunal was concerned with a rezoning approval of the council to a Special Facilities (Mature Age Leisure Village) zone which had a condition that no person under the age of 50 years could be resident in the leisure village. The relevant provision was section 101 of the ADA which provides a person (which includes a local government) who performs any function or exercises any power under a State law (which includes the *Local Government (Planning and Environment) Act 1990*) must not discriminate in the performance of the function or the exercise of the power. Discrimination can be in relation to sex; marital status; parental status; pregnancy; age; race; impairment; religion; political belief or activity; trade union activity; lawful sexual activity; and other bases as well.

The Tribunal found that, on its face, the condition was discriminatory. However, the council sought an exemption under section 104 of the ADA which provides that if the council could prove its condition was imposed to benefit members of a group (for whose welfare ADA was designed) the council would not have committed discrimination. The Tribunal considered that section 104 of ADA could be relied upon by the council because the purpose of the condition was to ensure that those most in need (ie those 50 years of age or over) were provided with appropriate accommodation in the form of the leisure village.

Put in its context, the Secrana decision was dealing with a resolution of council imposing the condition with the rezoning approval. This is to be contrasted with a situation where council may refuse a town planning application on certain grounds, and some of those grounds might be considered to be discriminatory. This is what the Perth case was concerned with.

Extension of Secrana – Courts now look at Councillors [not council resolutions]

In the *Perth* case (leaving technicalities aside) the People Living with AIDS (WA) Inc (**PLWA**) sought approval from the City of Perth for town planning approval to use premises as a daytime drop-in centre for persons who were HIV affected. The application (by a majority vote) was refused. Of the majority of councillors who voted, some of those councillors cited reasons for refusal which could be considered discriminatory (eg that the congregation of HIV infected persons should not be encouraged).

The PLWA lodged a complaint with the Commissioner of Equal Opportunity under the *Equal Opportunity Act 1984* (WA) (**EOA**) alleging that the City had, in the course of providing the service of assessing planning applications, discriminated against it. Whilst the appeal by PLWA to the High Court was lost on other technical grounds, the minority justices made some significant observations about the liability of the City (and its councillors personally) for discrimination in the decision-making process.

The liability of council

Justice Toohey found that, even if only one councillor demonstrates discriminatory ground, then the City (as opposed to the councillors) will have discriminated within the meaning of the Act. Justice Gummow came to the same conclusion. Justice Kirby also agreed with Justice Toohey and added that it was not necessary to show that discrimination was the dominant or substantial reason for making the decision, but only a "*real*" reason. However, the reason must not be trivial or insubstantial.

The personal liability of councillors

Section 680 of the *Local Government Act 1960* (WA) (the equivalent of section 188 of the *Local Government Act 1993* (Qld)) states that a councillor is not liable for an act or omission done honestly and without negligence under the Local Government Act.

Justices Toohey and Kirby found that it was arguable that this section provided immunity to councillors personally even though, by their actions, they have discriminated within the meaning of the EOA.

Effect of the Perth case

Whilst the decisions of Justices Toohey, Gummow and Kirby are minority decisions, they are the strongest indication yet by the most superior court in Australia that discriminatory behaviour by a single councillor (in the context of deciding a planning application or otherwise performing some other statutory function) will amount to discrimination of the part of the council. The decisions are likely to be followed by all inferior courts in Australia. This places a council at risk of defending a complaint for discrimination. The Anti-Discrimination Tribunal (established under ADA) has the power, if a complaint is made, to order a council to pay compensation for damages (for embarrassment, humiliation, intimidation or for any other loss sustained) by virtue of that discrimination. The amount of compensation that may be ordered is unlimited. This is particularly significant if a large development application has been refused and the applicant has suffered a loss as a result.

Conclusion

Councillors should, when making a decision in relation to any matter within council's statutory functions or powers that may affect another person (whether with respect to a town planning application or otherwise), ensure they exclude as part of their decision-making process reasons that might be considered to be discriminatory.

Negligence in town planning decision making

On 19 December 1997, the Queensland Court of Appeal delivered a decision in the case of *Albert Shire Council v Bamford* [1997] QCA 462. The case was concerned with the way council dealt with a subdivision application for land intended to be used for residential purposes. The evidence in the case showed that a visual on-site inspection by a suitably qualified geotechnical expert would have revealed the existence of land slips in the area. Indeed, aerial photographs taken not long before the subdivision application was assessed would have revealed the existence of land slips also. Whilst a visual inspection of the land from the road has been undertaken by the Shire Engineer when assessing the subdivision application, an on-site inspection had not been undertaken.

Damaged residence

Some 10 years later, the Bamfords purchased a lot of the subdivided land for the purposes of constructing a home. After the home was constructed, the land slip moved causing damage to the home. The Bamfords sued the council for damages for negligence claiming the council had breached its duty in the way the council dealt with the subdivision application by failing to consider if the land was suitable for residential use under section 34(12)(g) of the now superseded *Local Government Act 1936*. This section has now been superseded by (in this context) section 5.1(3)(b) of the *Local Government (Planning and Environment) Act 1990* which requires councils to assess whether any of the proposed allotments, the subject of the subdivision, would be unsuitable for use because of existing or possible subsidence or slip. The Bamfords' lawyers relied upon the High Court of Australia decision in *Sutherland Shire Council v Heyman* which held that councils owe a duty of care to subsequent owners of land in relation to the way they inspect and assess the construction of buildings under the building legislation.

Council's defence

In its defence, the council argued that it was not obliged to take steps actively to investigate the land's suitability for the residential purpose. The council argued that it was obliged to do no more in considering the suitability of the land for residential subdivision than to collect and consider information on that suitability as was within its own knowledge and to consider the documents presented to it by the applicant for the subdivision against the background of its own knowledge. Even though it was conceded by the council that a proper investigation by an adequately qualified person would have discovered the unsuitability of the land, the council argued it had no obligation to engage such a person.

Argument not accepted

The Court of Appeal did not accept any of these arguments and found that the council was under a duty to satisfy itself that the land was indeed suitable for the purposes of residential development.

Advancing IPA's purpose

In the context of the *Local Government (Planning and Environment) Act 1990* (**PEA**), Councils may legally, insist that subsidence and land slip information be provided with the subdivision application as "*prescribed information*". This requirement comes from the combined effect of section 5.1(2)(b) of the PEA and regulation 10(2)(g) of the *Local Government (Planning and Environment) Regulations 1991*.

In the context of the *Integrated Planning Act 1997* (**IPA**) (which came into force on Monday 30 March 1998) there is no specific requirement within the IPA to take into account subsidence and land slip issues. Instead, section 1.2.2 casts upon a council a statutory duty to perform its function or exercise its power in a way that advances IPA's purpose. Advancing IPA's purpose includes, ensuring decision making processes are accountable and includes applying standards of safety in the built environment that are cost effective and for the public benefit. In our opinion, this broader duty cast upon councils would seem to maintain the effect of the Bamford decision.

Conclusion

In conclusion, councils, in relation to subdivision applications (and indeed other types of applications), should ensure subsidence and land slip issues are properly taken into account when assessing the application. This duty extends so far as to require councils to obtain further information from an applicant or their own technical information from suitably qualified experts. The wider implications for councils flowing from the Bamford decision are that litigants (who claim they have suffered loss flowing from a perceived breach of a council's duty to perform its functions and powers in a way that advances IPA's purpose) will commence actions for negligence in the Courts.

This paper was published as a Planning Law Update in the Queensland Planner 38:2, 17-23, June 1998.

Wastewater use, reuse and the law in Queensland

Ian Wright | Matthew Austin | Sam Hawthorne

This article discusses wastewater management in response to ecologically sustainable development

August 1998

Introduction

Community wastewater systems

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

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

Ecologically sustainable development

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

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

An approach to wastewater management based on ecologically sustainable development may include the following elements (Niemczyhowicz 1992):

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

Wastewater reuse

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

- the recycling of greywater for toilet flushing and garden lawn watering;
- the recycling of industrial wastewater for dust suppression, wash water and cooling water;
- the recycling of stormwater;
- the reuse of effluent for agroforestry, recreational facilities, groundwater recharge, non potable uses and to prevent salt water intrusion;
- the reuse of biosolids (digested sludge) for landfall, mine reclamation, bricks and as compost for gardens, golf courses and agroforestry; and
- the reuse of biogas for energy.

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

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

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

Public health risks associated with the reuse of wastewater include:

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

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

The purpose of this paper is three-fold:

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

Legal instruments

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

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

The common law

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

The common law recognises four torts being negligence, nuisance, trespass and breach of statutory duty.

Negligence

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

First, the plaintiff must prove that the defendant owed the plaintiff a duty of care. To establish this the plaintiff must prove that the relationship between the plaintiff and the defendant was sufficiently close for the defendant to have reasonably contemplated that the negligent act would lead to the plaintiff's damage, and, that it was reasonably foreseeable that damage was likely to occur to the plaintiff or a class of persons to which the plaintiff belongs. These are respectively known as the tests of proximity and reasonable foreseeability.

On 23 January 1998, the High Court. handed down the decision of *Pyrenees Shire Council v Day* [1998] HCA 3 which indicated that the test of proximity is not definitively settled. The effect of the decision is that local governments and statutory authorities may now be found liable in for failures to exercise their statutory duties in circumstances where previously they may not have been liable. For instance, once a local government or

statutory authority has knowledge of a situation which may cause damage or injury and exercises statutory powers to remedy the situation, they are now required to ensure that those powers are exercised to the fullest extent necessary to remedy the situation. Such a duty is owed to any person who may foreseeably suffer damage from the situation irrespective of whether that person relied on (or was aware) the local government or statutory authority to act.

Secondly, the plaintiff must prove that the defendant has breached the duty of care owed to the plaintiff. To establish this, the plaintiff must prove that the defendant failed to observe the standard of care that would have been observed by a reasonable person. In determining what a reasonable person would have done in the situation regard should be had to the magnitude of the risk, the degree of probability of the occurrence, the expense, difficulty and inconvenience of alleviating action and any other conflicting responsibility which the defendant may have had.

Thirdly, the plaintiff must prove that it has suffered damage. To establish this the plaintiff must prove that it has suffered actual damage and that the damage was reasonably foreseeable as a consequence of the breach of the duty of care.

Finally, the plaintiff must prove that the damage was caused by a breach of the duty of care. Where the damage is caused by the interaction of several independent wrongful acts, the defendant or defendants will be answerable for the whole of the damage although the plaintiff can only recover once. Where each of the defendants only caused part of the total damage and it is practical to split up the loss and attribute identifiable parts to each of the defendants, liability will be apportioned according to responsibility.

Nuisance

This action arises where the use of land causes an unreasonable and substantial interference with a person's use or enjoyment of the land (private nuisance) or the right of the public at large to health, safety, property and quality of the environment (public nuisance). To succeed in a nuisance claim a plaintiff must prove on the balance of probabilities that the defendant's interference or proposed interference caused or will cause damage and that the interference is substantial and unreasonable.

In relation to a public nuisance action, the plaintiff must demonstrate that they have suffered special or particular damage over and above that suffered by the public as a whole. If such damage has not been suffered, they may bring proceedings if the Attorney General consents to the taking of the action. It is a defence to both private and public nuisance actions if the nuisance was an inevitable consequence of the exercise of a statutory duty (*Allan v Gulf Oil Refinery Ltd* (1981) AC 100). However, this defence does not apply where a public authority is merely exercising a statutory power (*Department of Transport v The North-West Water Authority* (1983) 2 WLR 707).

Trespass

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

Breach of statutory duty

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

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

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

Toxic torts

Another form of tort is the toxic tort. Toxic tort disputes involve the release of toxic chemicals into the environment.

As can be seen from above, the common law is very much concerned with the maintenance of private property or interests. Apart from the doctrine of public nuisance, the common law does not take into account the wider public interest in fostering principles such as ecologically sustainable development. In this respect, the application of the common law doctrine to toxic. tort disputes is also limited. The distinctive characteristics of a "toxic tort" distinguish it, and limit it, more than for other traditional "tortious" forms of injury. For example, toxic torts exhibit the following characteristics:

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

As a result of these characteristics it is difficult, although not impossible, for the common law to protect against toxic torts. Accordingly, governments have found it necessary to be pro-active and formulate policies and programs to encourage the responsible conduct of wastewater programs. Such policies and guidelines have been given effect through various pieces of legislation.

Contract

The law of Contract is relevant to agreements entered into between suppliers of recycled wastewater and users of this water. Contracts may contain both express and implied terms. The sources, or reasons for, implied terms are as follows:

- making the contract effective;
- the nature of the contract;
- statute.

For example, if people have contracted to receive a service, or product, for a specific purpose, and that product or service fails to satisfy the particular purpose for which it was purchased, there may be an argument that there is a breach of contract. The breach may arise as a result of an implication that the quality of goods and fitness for purpose for which they are provided, are satisfactory. Terms implied by statute include those in Part V and VA under the *Trade Practices Act 1974* which will be discussed later.

The recent Sydney Water dispute, which is discussed later, raises the issue of potential contractual liability and class actions in relation to wastewater reuse schemes.

Legislation

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

Commonwealth

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

- *Antarctic Treaty (Environmental Protection) Act 1980* and the *Antarctic Marine Living Resources Conservation Act 1981* which control the disposal and removal of wastes within Australian and Antarctic territory;
- *Environment Protection (Sea Dumping) Act 1981* which controls marine pollution from dumping and incineration;
- *Great Barrier Reef Marine Park Act 1975* which controls the discharge of all wastes into the Great Barrier Reef Maxine Park area;
- *Hazardous Waste (Regulation of Exports and Imports) Act 1989* which controls the transport, storage, export and import of hazardous substances as outlined in the Basel Convention of Hazardous Wastes;
- *Heard Island and MacDonald Islands Act 1953* which controls the removal and storage of wastes from these islands;

- *Industrial Chemicals (Notification and Assessment) Act 1989* which controls the importation, storage, use, transportation and handling of chemical substances;
- *Murray Darling Basin Act 1983* which controls the pollution of rivers and other waterways in the Murray Darling River catchment area in accordance with the terms of the Inter-Governmental Agreement between the Commonwealth and various States;
- *National Parks and Wildlife Conservation Act 1975* which controls the disposal of waste in a park or reserve declared under the Act;
- *Navigation Act 1912* which controls the discharge of sewage into the sea; and
- *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* which controls the discharge of sewage from ships into the sea.

State

At the State level, legislation exists which imposes regulations in respect of the establishment and operation of wastewater reuse schemes. This legislation can be divided into the following categories:

- *Development* – This category encompasses the *Integrated Planning Act 1997* (**IPA**), the various planning instruments (such as State Planning Policies which control development) and the *Sewerage and Water Supply Act 1949*. Prior to the commencement of the IPA, the *Building Act 1975* was considered separately, however the provisions of the *Building Act 1975* which relate to development assessment have been transferred across to the IPA.
- *Environmental Quality and Pollution* – This category encompasses the *Environmental Protection Act 1994* (**EPA**) and any relevant environmental protection policy such as the *Environmental Protection (Water) Policy 1997*. Following the commencement of the IPA, all conditions of an environmental nature for a new development will be imposed on the development approval. Both the EPA and any relevant Environmental Protection Policy will be considered when imposing these conditions on a development approval. The holder of a development approval will also be required to hold an Environmental Licence which will now largely fill the role of a personal licence. The EPA also now regulates issues relating to contaminated land following the repeal of the Contaminated Land Act on 6 July 1998.
- *Public Health* – This category encompasses the *Food Act 1981* which controls the sale and preparation of food, the *Chemical Usage (Agricultural and Veterinary) Control Act 1988* which controls chemical residues/disease in plants under cultivation, the *Stock Act 1915* which controls chemical residues in stock and the *Health Act 1937* which controls the public health risks associated with sewage.

Local government

Laws adopted by local governments are of greatest practical significance as they are generally applicable to all developments, including development for the reuse of wastewater. Relevant local authority laws include:

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

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

Policies

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

Commonwealth

The National Water Quality Management Strategy is a document which contains various guidelines for wastewater reuse. In 1987 various guidelines were .released and in 1996 these guidelines were placed under review. On 28 August 1998 the period for public consultation on the guidelines closed. The following guidelines are relevant:

- Australian Drinking Water Guidelines, Agriculture and Resource Management Council of Australia and New Zealand, National Health and Medical Research Council, 1996.
- Australian Water Quality Guidelines for Fresh and Marine Waters, Australian and New Zealand Environment and Conservation Council, 1992.

- Guidelines for Sewerage Systems – Acceptance of Trade (Industrial Waste), Australian and New Zealand Environment and Conservation Council, Agriculture and Resource Management Council of Australia and New Zealand, 1994.
- Draft Guidelines for Sewerage Systems – Reclaimed Water, Australian and New Zealand Environment and Conservation Council, Agriculture and Resource Management Council of Australia and New Zealand, National Health and Medical Research Council, 1998.
- Draft Guidelines for Sewerage Systems – Sewerage System Overflows, Australian and New Zealand Environment and Conservation Council, Australian and New Zealand Environment and Conservation Council, 1998.
- Guidelines for the reuse of Reclaimed Water in Australia, National Health and Medical Research Council, 1996.
- Australian Guidelines for Recreational Use of Water, National Health and Medical Research Council, 1989.

Some work has also been done towards the development of a National Environmental Protection Measure (**NEPM**) concerning wastewater. However, to date no document has been prepared for public comment. Should a formal NEPM commence under national scheme laws the NEPM is to have legislative force. In Queensland however, the NEPM will not have legislative force in Queensland until it is approved pursuant to section 34 of the EPA. Once a NEPM is approved in Queensland, it is taken to be an Environmental Protection Policy.

Queensland

In 1996 the Department of Natural Resources released Interim Guidelines for the Re-use of Reclaimed Water. These guidelines aim to assist local governments, business and individuals in selecting the most safe and effective method of using, and disposing of, wastewater. Wastewater that conforms with the Interim Guidelines is suitable fox the following uses:

- urban non-potable uses (gardening, watering, irrigation);
- agriculture;
- aquaculture;
- forest plantations and natural forests;
- recreational;
- industrial;
- mine rehabilitation.

The Department of Natural Resources have recently commissioned a series of background studies into different aspects of wastewater reuse. They are due to be released around November 1998 and will explain in detail the various guidelines which will apply to each form of reuse.

Other States

Guidelines have also been prepared in other Australian States and include:

Guidelines for Wastewater Reuse, Environmental Protection Authority, Victoria, 1996;

Draft Guidelines for the Utilisation of Treated Effluent by Irrigation, Environmental Protection Authority, New South Wales, 1995;

Draft Water Quality Guidelines for Fresh and Marine Waters, Environmental Protection Authority, Western Australia, 1993.

Many industry specific guidelines have also been developed by the individual States.

In general, the above guidelines are most important in terms of the licensing of wastewater reuse schemes by State government bodies. At the local government level however, the various policies and codes of practice which support each local government's planning scheme and other local laws are of greater relevance. Matters such as land contamination and sewage disposal maybe the subject of such local laws and policies.

Approvals process

As indicated earlier, the establishment and operation of wastewater reuse schemes is not regulated by one piece of legislation. Rather, the approvals process involves the application of a number of statutes and decision making bodies. In simple terms, a wastewater reuse scheme may require the approval of the relevant local government, Department of Environment and Heritage, Department of Health, Department of Primary Industries and the Division of Workplace Health and Safety of the Department of Employment, Training and Industrial Relations.

Local government

Development approval will be required to establish a wastewater reuse scheme. Approvals may be required in the following ways:

- development permit for a "material change of use" must be obtained pursuant to the IPA;
- development permit for "building works" must be obtained pursuant to the IPA;
- sewerage and water supply works to be approved pursuant to the *Sewerage and Water Supply Act 1949* (eventually a development permit for plumbing and drainage works will be required pursuant to the IPA);
- development permit may be required for "operational works" pursuant to the IPA; and
- a licence may also have to be obtained under an applicable local law.

An application for a development permit for a material change of use (for the purpose of establishing a wastewater reuse scheme) is "assessable development" under the IPA. In order to obtain the development permit referral agency coordination will be required. Section 6.1.35C of the IPA provides that a designated development under the *Local Government (Planning and Environment) Regulations 1991* will require referral coordination.

A designated development includes a refuse transfer station, sewerage treatment plant, waste disposal facility, waste landfill or waste treatment plant for burying, crushing, disposing of, incinerating, processing, recovering, storing or transferring hospital wastes or chemical, liquid, oil, petroleum or solid wastes. Referral coordination involves the assessment manager's coordination of information requests on behalf of all referral agencies. Typical referral agencies may include the Department of Environment and Heritage, Queensland Health and Department of Primary Industries. These bodies may have the opportunity to impose conditions in a development approval.

Department of Environment and Heritage

The Department of Environment and Heritage may be a referral agency in the assessment of a development application lodged under the IPA. The referral agency will refer the provisions of the EPA and any relevant Environmental Protection Policies, ie Air and Water, when considering the application. The grant of development approval will contain relevant environmental conditions as part of development approval.

A wastewater reuse scheme forming part of a sewerage treatment operation is a level 1 "environmentally relevant activity" (ERA 15) and will therefore require an environmental authority to be obtained from the Department of Environment and Heritage. However, as conditions of an environmental nature will be imposed in a development permit, the environmental authority will be a "personal licence" and may only contain conditions relating to financial assurances and an Integrated Environmental Management System.

Queensland Health

Queensland Health may be a referral agency for the assessment of a development application lodged under the IPA. Consideration will need to be given to the provisions of the following Acts:

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

Department of Primary Industries

The Department of Primary Industries may be a referral agency for the assessment of a development application lodged under the IPA. Consideration would therefore need to be given to the provisions of the following Acts:

- where stock are to be grazed on land the subject of wastewater reuse, the *Stock Act 1915* empowers the Minister to restrict or absolutely prohibit the grazing on residue affected land by stock; and
- where plants are being cultivated on land the subject of wastewater reuse, the Chemical Usage (Agricultural and Veterinary) Control Act 1988 empowers the Minister to prohibit the cultivation where it would be likely to result in the concentration of a chemical residue in the plants, and, to order the disposal of any plant containing residues beyond the prescribed levels.

Division of Workplace, Health and Safety

Although no specific approval would be required to establish a wastewater reuse scheme, certain minimum standards for wastewater would need to be observed in order to comply with the *Workplace Health and Safety Act 1995* and *Workplace Health and Safety Regulations 1997*. This legislation requires employers to maintain as far as reasonably practical the place of work in a condition which is safe and without risk to health. There is also a more general duty on employers to protect the health and safety of the general public who may be affected by work activities.

Legal liability

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

Legislation

The operation of a wastewater reuse scheme raises issues which are regulated by legislation. These issues include:

- environmental harm;
- land contamination;
- water pollution;
- air quality/odour;
- chemical residue build up in plants and animals;
- public health matters associated with pathogens;
- the breach of approvals and licence conditions; and
- consumer protection.

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

Environmental harm

A general environmental duty exists in section 36 of the EPA and provides that:

> *a person must not carry out any activity that causes, or is likely to cause environmental harm unless the person takes all reasonable and practicable measure to prevent or minimise the harm.*

It is not an offence to breach the general environmental duty.

Environmental harm is defined broadly by section 14 of the EPA as being any adverse effect or potential adverse effect on any environmental value, and includes environmental nuisance. (Environmental values to be enhanced or protected are these values specified in Environmental Protection Policies).

- *Environmental nuisance* – unreasonable interference with enjoyment of the area.
- *Material environmental harm* – harm that is not trivial or negligible in nature or extent and causes actual or potential loss or damage or remediation costs between $5,000 and $50,000.
- *Serious environmental harm* – harm that causes harm to environmental values that is irreversible, widespread and harms an area of high conservation value or results in remediation costs of greater than $50,000.

It is an offence to wilfully (ie deliberately) and unlawfully (ie contrary to an environmental protection policy environmental management program, environmental protection order, environmental authority, condition of development approval or direction) cause environmental harm. Under the EPA, a corporation may be liable for fines ranging from $313,125 for causing environmental nuisance, $624,375 for causing material environmental harm or $1.56M for causing serious environmental harm.

The EPA also includes executive officer liability provisions. Conduct engaged in for a corporation by an executive officer of the corporation is taken to have been engaged in by the corporation unless the corporation establishes it took reasonable precautions and exercised proper diligence to avoid the conduct. Executive officers will be guilty of the offence of failing to ensure a corporation complies with the EPA unless they can show that the offence occurred without their knowledge or consent and they took all reasonable steps to ensure the company complied with the Act. This is generally referred to as the due diligence defence.

Water pollution

Apart from land degradation, wastewater reuse schemes may also result in contamination of waters by various contaminants including nutrients. In particular, groundwater may be contaminated by nitrogen while surface waters may be contaminated by phosphorous run-off.

The *Environmental Protection (Water) Policy 1997* (**Water EPP**) emphasises conserving water, reducing the quantity of wastewater discharged to the environment and improving the quality of wastewater. The Water EPP is relevant when a decision is made by an administering authority (environmental management decision) concerning an environmental authority, Environmental Management Plan or Environmental Protection Order. The Water EPP requires the administering authority to consider certain things when making an environmental management decision about wastewater recycling, wastewater releases to land and surface water, stormwater management issue and the release of water to groundwaters.

The Water EPP also provides for the management of certain sources of contamination, such as on-site domestic waste water treatment systems in development applications.

Air quality/odour

Much like the Water EPP, the *Environmental Protection (Air) Policy 1997* (**Air EPP**) requires the administering authority to consider certain things when making an environmental management decision.

Wastewater reuse schemes may give rise to undesirable odours or other air quality problems, particularly in relation to the disposal of treated effluent and sludge. The Air EPP sets air quality indicators and goals which indicate the extent to which environmental values have been enhanced or protected.

The Air EPP includes a procedure for investigating complaints concerning air quality. The administering authority may issue a show cause notice and then an abatement notice to a person who causes an "unreasonable release" of a contaminant. Failure to comply with the abatement notice attracts a penalty of $15,000.

Undesirable odour problems may also give rise to a breach of the statutory public nuisance provisions under the *Health Act 1937*.

Land contamination

On 6 July 1998 the *Contaminated Land Act 1991* was repealed and contaminated land issues were incorporated into Part 9B of the EPA.

Central to the amendments incorporating contaminated land into the EPA is a greater focus on the risk an activity poses to the environment and to human health. The amendments recognise that contaminated land may be adequately managed rather than totally remediated. Contaminated land means land contaminated by hazardous contaminant. Hazardous contaminant means a contaminant that, if improperly treated, stored, disposed of or otherwise managed, is likely to cause serious or material environmental harm because of:

- its quantity, concentration, acute or chronic toxic effects, carcinogencity, teratogenicity, mutagenicity, corrosiveness, explosiveness, radioactivity or flammability; or
- its physical, chemical or infectious characteristics.

Section 118E of the EPA obliges an owner or occupier of land to notify the administering authority if it becomes aware of either:

- a "notifiable activity" that is being carried out on the land; or
- land has been or is being contaminated by a hazardous contaminant.

In both cases the owner or occupier of the land must, within 30 days after becoming aware of the "notifiable activity" being carried out or of the contamination to the land, give notice to the administering authority in approved form. Failure to notify the administering authority of a "notifiable activity" carries a maximum penalty of $18,750 for a corporation. Failure of an owner or occupier of land to notify the administering authority of land that is contaminated carries a maximum penalty of $37,500 for a corporation.

In relation to land considered to be contaminated, the Department of Environment may require that a site investigation report be compiled (s 118K), may require remediation of the site (s 118Y) or may require the preparation of a site management plan (s 118ZM). The issue of any such notice must be given to the person considered responsible for the contamination. This accords with the polluter pays principle. Failure to comply with a notice to remediate may attract a maximum penalty of $375,000. Failure to comply with the conditions of a site management plan may attract penalties up to $625,000.

The amendment of the definition of owner has been expanded to include a person who has freehold title to the land, and a person who holds a Crown lease, licence or permit in relation to that land. Further, owner refers to mortgagees where the mortgagee is in possession of the land and have exclusive management and control over the lands.

Residues

The reuse of wastewater may result in the introduction of undesirable residues into the food chain. The *Food Standards (Adoption of Food Standards Code and General) Regulation 1987* made under the *Food Act 1989* prescribes maximum pesticide residue limits at the point of sale. The *Chemical Usage (Agricultural and Veterinary) Control Act 1988* also specifies maximum residue limits in respect of agricultural produce or manufactured stock food. Both Acts empower the relevant Ministers to make orders spelling out how the foodstuffs should be dealt with, including its destruction. Where chemical residues are detected in the body tissues of stock, the Department of Primary Industries may issue an order pursuant to the *Stock Act 1915* preventing the movement of affected stock indefinitely.

Pathogens

The major public health concern associated with wastewater reuse is the risk of the spread of human disease by micro-organisms from human excreta in treated sludge or effluent. Wastewater may contain traces of viruses, bacteria, protozoans as well as human round worms, tape worms and liver flukes. The spread of pathogens from these sources are regulated by the *Health Act 1937* which imposes various offences and penalties and enables the Minister to make wide-ranging orders.

Breach of licence conditions

It is possible that breaches of the abovementioned legal obligations may also constitute a breach of the various land use planning, pollution control and public health conditions that attach to development approvals (and licences) which authorise the operation of the wastewater reuse scheme. Such breaches may not only constitute an offence punishable by penalty, but may also result in the revocation of relevant approvals (and licences).

Consumer protection

There are possible *Trade Practices Act 1974* implications for the operation of a wastewater reuse scheme.

Part VA of the *Trade Practices Act 1974* contains the defective goods provisions which provide statutory rights against a manufacturer of a defective product which has caused loss or injury to a person. Part V of the *Trade Practices Act 1974* relates to undertakings as to quality or fitness of goods supplied. These provisions are often implied into contracts for the sale of goods.

Contravention of the provisions of Part VA requires the corporation in breach to pay compensation to the person. Alternatively, section 79 of the *Trade Practices Act 1974* provides that a person who contravenes a provision in Part V of the Act is guilty of a criminal offence and maybe fined up to $200,000.

Common law

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

Negligence

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

Further if a wastewater reuse scheme is considered to have operated contrary to legislation, licence conditions or guidelines, then it is likely that a court would hold that there has been a breach of the duty of care. However, if there has been compliance with relevant standards and requirements specified in the legislation, licence conditions and guidelines, it is likely that a court would hold that the duty of care has not been breached.

If a breach of duty of care can be established there still may be substantial evidential issues to overcome with proving that the breach actually caused damage unless the impacts on health are immediate and obvious.

Trespass

Like negligence actions, the application of trespass and nuisance actions to a toxic chemical case is restricted by evidential and procedural problems. First, there are the problems of causation highlighted in respect of negligence actions. Second, the proof of direct interference with the plaintiff's personal property is often difficult where ecological systems are complex and interrelated. Third, the proof that the interference was intentional involves an examination of the subjective intent of the defendant. Finally, trespass is designed to protect a person's personal interest or their property and is of little use in considering protection of the environment.

Nuisance

The applicability of private and public nuisance actions in toxic chemical cases is also restricted. First, there are the problems concerning causation. Second, proof of whether an interference with the use and enjoyment of land is substantial and unreasonable is determined by an objective standard rather than a subjective standard. Accordingly, the interference must be unreasonable to the ordinary person rather than unreasonable to the plaintiff who may have a particular sensitivity to chemicals. Third, in order to bring an action for public nuisance in respect of an interference with public health or the environment generally, the plaintiff must prove special or particular damage. This is often difficult or impossible in the case of pollution of areas used by the general public such as public parks or waterways.

Breach of statutory duty

The common law action of breach of statutory duty is also limited in its application in respect of toxic chemical cases. To succeed in such an action, it must be proven that the duties imposed on public authorities or individuals by statute are intended to be owed to citizens as individuals.

However, most environmental legislation is intended to benefit the public as a whole such that the duties are owed to the public generally. Accordingly, no private action for breach of statutory duty would arise under the EPA.

Contract

The recent Sydney Water dispute provides a good example of potential liability for breach of contract.

Case Study – Sydney Water Dispute

Quite recently a public health crisis left millions of Sydney residents in 152 suburbs without safe drinking water. Sydney residents were told that the water was unfit for consumption and that the water must be boiled for a minute before use. The microorganisms *giardia* and *cryptosporidium* were detected in water at the Prospect and Palm Beach Filtration Plants on 24 July 1998. The symptoms of the illness associated with these bacteria are weakness, bloating, abdominal cramps, nausea and diarrohea.

It was not until 4 August 1998 that the water was declared safe for the entire city of Sydney. The very next day on 5 August 1998, a class action for breach of "customer contract" was lodged in the High Court.

The argument being run is that there is a contract to supply a product for certain purposes, that is consumption, however the product in this case was not suitable for the purpose for which it was supplied. There is a public expectation that water from the tap will be drinkable and safe. Statements were made to the effect that:

> *If those who have a contract to supply a product for certain purposes and that product fails, then they are left open wide for damaged*
>
> (Sunday Telegraph 2/8/98 p8 "Deluge of Damages: 10000 Will Sue Over Tainted Water Predicts Lawyer").

No clause in the contract between Sydney Water and Australian Water Services (the private contractor) stated that water was to be tested for *giardia* or *cryptosporidium*. In fact, the testing that took place under the contract was in accordance with standards set by the National Health & Mutual Research Council and this list did not require the testing for these parasites. Nevertheless, it is suggested that the action is likely to succeed on the basis that irrespective of compliance with standards, the water supplier is bound by its contract with its customers, to supply safe and drinkable water. In other words, there is an implied term that the water will be fit for human consumption.

If this argument succeeds, a breach of contract exists and customers (parties to the action) will be entitled to damages to return them to the position they would have been in had the contract been observed. Damages would arguably cover the cost of buying water, any medical expenses incurred as a result of contamination related illness and loss of income by businesses which rely on water for the conduct of their operation.

There is precedent for such class action – cases where actions succeeded include:

- *Butler v Kraft Foods Limited* (Federal Court) – Action on behalf of people who became sick after eating peanut butter.
- *Ryan v Great Lakes Council* (Federal Court). Oysters farmed in Wallis Lake, New South Wales, were contaminated. A Hepatitis A outbreak was linked to oysters at Wallis Lake where hundreds of people became ill and one person died:

Conclusions

Wastewater reuse schemes are a necessary part of the response to ecologically sustainable development. However, the implementation and operation of these schemes raises a number of important legal issues that need to be considered before any general policy of wastewater reuse is embraced.

The introduction of the IPA and the Integrated Development Assessment System will create a more streamlined approached to granting approvals for wastewater reuse schemes. These provisions will ensure that the potential environmental impacts for such a scheme will be considered upfront at the development approval stage and appropriate conditions are imposed on the operation of the scheme. Integration of the approvals system may ultimately bring on the development of wastewater reuse schemes.

However, as evidenced by the recent incident involving Sydney Water, there still may be some scepticism in the public as to the viability of wastewater reuse schemes despite the obvious benefits associated with reusing a valuable resource.

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Consideration of major concepts of new urbanism, hazardous industry planning, subdivision of heritage buildings, dance parties code of practice and amendments to New Zealand, New South Wales, Queensland and Commonwealth planning and environment legislation

Ian Wright

This article discusses the recent developments in planning and environment law in Australia. The article particularly considers major concepts of new urbanism, hazardous industry planning, subdivision of heritage buildings, dance parties code of practice and amendments to New Zealand, New South Wales, Queensland and Commonwealth planning and environment legislation

December 1998

New urbanism and planning controls

The September 1998 edition of Zoning News produced by the American Planning Association makes some interesting comments about the new urbanism movement and its impact and implementation through planning controls in the United States.

New urbanism is the current buzz-word amongst planners. The potential design benefits of new urbanism have been touted at planning conferences in this country and in the planning literature. In its simplest terms, new urbanism involves a traditional neighbourhood development design concept which is usually characterised by a more compact, high density mixed design with a range of housing types and a pedestrian-friendly neighbourhood. It is argued that new urbanism has the potential to effect a major shift away from conventional low density sprawl.

However, the American Planning Association notes that a review undertaken in late 1997 and early 1998 of existing zoning and development codes in the United States indicates that many such codes still prohibit new urbanism development or strongly favour conventional low density development. Typically, zoning controls prevent a mix of housing types and neighbourhood retail uses and continue to require conventional forms of specialised and unintegrated pod and strip development. This should sound familiar to many Queensland planners.

However, there are some notable exceptions. For example, Fort Collins in Colorado has recently amended the comprehensive Plan and Zoning Code, not only to accommodate but to actually require new urbanism development within the city. New urbanism development is subject only to a site plan administrative approval under fixed but fairly flexible performance standards. A rezoning is not required for new urbanism development, and conventional low density development is no longer an available option. The Fort Collins Zoning Code contains mandatory urban design elements relating to block size, streets, sidewalks, build-to lines, and housing mix. It provides for neighbourhood centres and each quarter section of land promotes multi-mode or transportation opportunities and, unlike all other zoning codes, provides minimum density requirements for residential development. To promote compact, orderly and sequential development and to avoid the sprawl of leap frog development, the Development Code also requires that new development be contiguous to the existing development and that adequate public facilities exist (or be provided) contemporaneously with new development.

Major concepts of new urbanism that underpin the Fort Collins Zoning Code are summarised as follows:

- *Neighbourhoods* – These are seen as the building blocks of all communities and cover more land area than any other type of land use. They are more than single family houses and are not isolated from one another or from other parts of the city. They incorporate many land uses and are tied together by a complete transportation system.
- *Density* – Low density residential development is a significant cause of sprawl. As a result, the Fort Collins Zoning Code requires minimum densities higher than typical sprawl developments – about five dwelling units per acre in low density zones and 12 dwelling units per acre in medium density zones.
- *Building Design* – It is recognised in the Zoning Code that auto-domination tends to result in a "*garagescape*" within residential areas. Design standards have therefore been incorporated which require garages to be recessed from the front facade. They can be attached, detached, street accessed or approached from an alley. The home may also have a front porch that extends; however, the garage simply cannot protrude.

- *Multi-Family Design* – These housing types are critical to the mix and variety in the neighbourhood. The, design standards of these have been raised. For example, entries should face the street and blank walls should not. Residents must be able to use the sidewalk system without competing with cars. In low density areas, buildings are limited to six units.
- *Gated Entries* – Residential developments with gated entries are prohibited.
- *Blocks* – Block size has been limited to 12 acres in low density areas and to 4-7 acres in commercial areas blocks.
- *Streets* – Design guidelines have been imposed which requires account to be taken of street amenities (detached sidewalks, streets etc) as well as the effect that private development has on this public space.
- *Commercial Buildings* – The Zoning Code requires build-to lines, bringing the facade to the street, and mandates direct pedestrian connections from the sidewalk to building entry. Corporate architecture such as strip-down big blocks set behind acres of parking are unacceptable splits in the urban fabric.
- *Zoning* – All new districts are mixed use, allowing for various combinations of residential and non-residential development.

In other words, under the Fort Collins Zoning Code new urbanism development is the preferred "*vision"* and the Zoning Code itself establishes new urbanism development design as the city's basic urban fabric.

Hazardous industry planning

The Chemical Hazards and Emergency Management Unit "*Chem Unit*" of the Department of Emergency Services has issued an information paper on hazardous industry planning for Queensland local governments. The paper discusses the duties and responsibilities of local governments, encourages a comprehensive approach to hazardous industry planning for safety and discusses various tools and techniques (including hazard analysis and risk analysis) that can be used in hazardous industry planning.

Of greatest interest to planners will be the discussion of the use of the *Integrated Planning Act* 1997 in ensuring that safety is considered in the planning of hazardous industries. The paper makes the point that the need to identify desired environmental outcomes and to develop measures for achieving these desired environmental outcomes allows a performance based approach to be adopted to the location of hazardous industries. This approach will also lay the foundation for ensuring that other land uses in the vicinity of hazardous industries meet the desired environmental outcomes. The paper makes the point that desired environment outcomes should be defined in terms of the risk limits that could be imposed on certain land uses such as industrial, residential or more sensitive land users like schools or hospitals. It is accepted in the paper that if a proposed development complies with the general requirements of the zone, then, provided the proponents can demonstrate compliance with the defined risk criteria (as specified in the desired environment outcomes), there should be no restrictions placed on the development proceeding. That is, the probable risk criteria should be used to define the desired environment outcome in relation to public safety.

The paper also notes that the Chem Unit will continue its role as an advice agency under the *Integrated Planning Act* 1997. It is pointed out in the paper that the Chem Unit currently has no legislative requirements in relation to hazardous industry. However, the Chem Unit is currently drafting the Hazardous Materials Safety Management Bill which will be introduced into Parliament in July 1999. The major features of this Bill will include the adoption of two standards developed by the National Occupational Health and Safety Commission. The first standard – the National Standard for Control of Major Hazardous Facilities – seeks to prevent major accidents at facilities representing a significant risk to the community by ensuring safe management of the hazards. The second standard, which is currently in draft form, covers the storage and handling of dangerous goods. This standard seeks to protect the safety and health of persons and to prevent damage to property and the environment from the hazards arising from the storage and handling of dangerous goods and combustible liquids. However the paper makes the point that, even with the implementation of this new legislation, it is envisaged that the Chem Unit will remain as an advice agency and not a concurrence agency.

Subdivision of Heritage buildings

Heritage Victoria is currently developing policies to guide building owners in relation to the subdivision of heritage buildings. In particular, Heritage Victoria is concerned about how developers subdivide registered properties such as warehouse shells, and sell off the plan prior to gaining subdivision permits.

Heritage Victoria has set out the following guidelines in relation to the subdivision of buildings:

- Some buildings do not lend themselves to subdivision. Certain buildings – particularly those with interior spaces of particular significance or with single volumes such as a church or hall – will generally not be considered appropriate for subdivision.
- If a building has historically been divided into a number of smaller compartments, subdivision is more likely to be acceptable.

- Where a place or part of a place has historically been accessible to the public, any subdivision proposal should continue to provide for public accessibility. If this is not considered possible, the applicant should provide evidence of having thoroughly investigated this option.
- If subdivision is considered appropriate, the exterior shell of the building should remain in single ownership.
- In some cases certain interior spaces or suites of spaces should remain in single ownership – eg the foyer of a cinema in the cinema itself.
- Developers wishing to sell shells will be "*expected to complete all works to the exterior envelope of the building*". This includes roof works.
- In the case of the subdivision of buildings or complexes, a conservation plan will generally be required prior to the determination of the permit.
- Where a building or complex is in poor condition, repair work will be required to be completed as a condition of any permit.

Heritage Victoria has also made the following comments in relation to the subdivision of land:

- Where subdivision involves land, there is usually an expectation that the lots created will need to be separated by fences and buildings will be allowed. Design guidelines which describe future building envelopes, materials and fences should be provided with the application.

In some cases such as a remote property, the applicant may be required to maintain sufficient land with the main homestead to provide for its ongoing maintenance.

- The history of the property's boundaries will also be considered. If, for example, the original property was quite small and had increased in size over time, it may be appropriate to subdivide along original lines and return the property to its original size.
- If subdivision is seen as the only means of ensuring the long-term preservation of a property, evidence of having examined the feasibility of other alternatives should be submitted with the permit application.

Code of Practice for Dance Parties

The New South Wales government has prepared a Code of Practice for Dance Parties. The Code is intended for use by dance party promoters, organisers and venue providers in planning and running dance parties. The aim of the Code of Practice for Dance Parties is to support and encourage dance party promoters to hold responsibly-organised, legal and hassle-free dance parties in suitable locations which are safe for patrons and do not disturb neighbouring properties. The Code applies to public entertainment which is viewed as a youth cultural event celebrating dance. and music. Dance parties usually involve:

- an indoor/outdoor venue with an open space suitable for dancing;
- the performance of electronic music usually with disc jockeys;
- being called dance or rave parties;
- relatively large numbers of mostly young patrons; and
- a charge for admission.

The Code of Practice includes detailed guidelines. In relation to planning related matters, the guidelines indicate that the ideal location for a dance party is where:

- zoning allows a dance party to be held in the area;
- the venue does not adversely affect residential areas;
- the premises provide safe accommodation for patrons during the event;
- public transport is available;
- there is easy access to and from the venue for emergency service vehicles; and
- parking and noise will have limited impact on surrounding uses and the general public.

Amendments to the NZ Resource Management Act

The New Zealand government is currently preparing a proposal paper which will set out proposed changes to the Resource Management legislation. Some of the proposals to be included within the paper are of interest having regard to the policy position that has been adopted in relation to the *Integrated Planning Act 1997*. For example:

- *Definition of Environment* – It is proposed to limit the definition of environment on the grounds that it has generated uncertainty because it refers to social and economic matters and this has allowed trade competition arguments to be raised in addition to old fashioned economic planning arguments. It is proposed to change the definition of environment to remove social and economic considerations and to ensure that it is the health, safety and amenities of people that are of relevance. In particular, the definition of "*environment*" will include the following elements:

  - ecosystems and their constituent parts;
  - natural and physical resources; and
  - the health, safety and amenity values of people and communities.

- *Refine subdivision provisions* – The current presumption against subdivision should be reversed so that subdivision is allowed unless specific controls are necessary and justified and are set out in the planning documents.
- *Limit further information request* – Limiting the number of or the time in which requests can be made for further information would reduce cost and delays for resource consent applicants. The proposal is to limit the statutory requests for further information to the period between receipt of an application and any hearing and to require written application with objection rights in respect of any postponement of a hearing due to lack of information.
- *Introduce contestable resource consent processing* – This proposal involves making provision for a resource consent applicant to choose whether the council or a private processing company deals with the application from receipt, to the report to council for decision. (*This should run a shiver up the back of local government planners.*)
- *Require the use of Commissioners in resource consent hearings* – This proposal involves introducing appointed commissioners to make decisions on resource consents instead of committees of councillors. Improvement in the quality of decision making would enable the opportunity for a second hearing on the facts by a court to be eliminated. It is considered that the reduction in litigation opportunities would provide greater certainty, speed and cost efficiency. That is, councillors can set the policies in a planning scheme but it will be left to commissioners to determine if that policy is complied with.
- *Limit appeal rights to points of law* – With hearings at the council level being conducted by professional hearings commissioners, there would be no need to retain the opportunity for a de novo hearing before a court. Accordingly, it is proposed to limit appeals to points of law only. (*This should run a shiver up the back of lawyers*.)
- *Introduce direct referral to Environment Court to be available under certain circumstances* – An alternative decision-making route is proposed whereby certain complex or controversial applications could be referred directly to a court rather than being heard at the local government level. One can see the sense of this proposal when regard is had to the large shopping centre appeals that have been conducted over the last few years.
- *Increase emphasis on relevant environmental effects in considering resource consent applications* – This proposal is to make decisions on resource consents based on the relevant effects on the environment.
- *Remove the interim effect of a proposed plan* –This proposal is to make proposed plans have no effect for an initial period when first notified. This would allow problems to be resolved through the submission period.
- *Adjust compensation provisions* – This proposal involves allowing compensation to be payable where a property-specific rule restricts land use activities in cases where the land owner has applied and been refused resource consent.

New South Wales environment legislation

The NSW Parliament is currently considering the introduction of the Protection of the Environment Operations Act (**PEOA**). The Act is intended to consolidate a range of legislation relating to air, soil, noise and environmental offences and sets out wide ranging enforcement powers for the NSW Environmental Protection Authority and local governments. Under the PEOA, persons have a duty to report a pollution incident which can cause environmental harm. Failure to report can incur penalties of up to $25,000. The Act also imposes duties to report contamination. A person whose activities may result in land contamination and the owner of any land which is contaminated is required to notify the EPA in writing.

Noise policies

Draft policies for the control of stationary industrial noise and traffic noise have been released by the NSW EPA. The draft stationary noise source policy sets out how to address noise impacts from stationary industrial sources on residential and other sensitive land uses. The policy proposes noise criteria to protect against intrusive noise and preserve amenity and provides guidelines on the evaluation of noise impacts and describes uniform assessment procedures.

A new draft policy on road traffic, noise is also currently being considered. The policy specifies standards to protect the environment from road traffic noise and in particular sets out more stringent criteria in sensitive areas such as schools, hospitals and places of worship. The policy specifies strategies for land uses, housing design, driver education and traffic management projects such as dedicated truck routes, quiet zones and restricted access to residential areas during sleeping times.

The Queensland EPA

The Queensland government expects that its proposed EPA will be in place early next year. The EPA will be established as a statutory body with an annual budget of $1.6 million under the existing *Environmental Protection Act 1994*. The EPA will comprise certain parts of the former Department of Environment. The primary responsibilities of the EPA are anticipated to be environmental planning, provision of the regulatory framework and assisting industry with cleaner production.

Commonwealth Biodiversity Conservation Act

The Commonwealth government has announced that it intends to introduce a Biodiversity Conservation Act. The aim of the Act is to introduce an improved integrated framework for the conservation and sustainable use of Australia's biodiversity.

The proposed Biodiversity Conservation Act will replace the following existing Acts and the Regulations made under those Acts:

- *National Parks and Wildlife Conservation Act 1975*;
- *Whale Protection Act 1980*;
- *Wildlife Protection (Regulation of Exports and Imports) Act 1982*;
- *Endangered Species Protection Act 1992*; and
- *World Heritage Properties Conservation Act 1983*.

Commonwealth Environment Protection Act

The Commonwealth has also announced that it intends to introduce an Environment Protection Act. The main thrust of this Act will be to detail the Commonwealth's involvement in the environmental assessment and approvals process on matters of national environmental significance. The discussion paper in relation to this Act identifies that the following developments will be the subject of Commonwealth involvement:

- world heritage properties;
- Ramsar wetlands;
- places of national heritage significance defined under the Finalised National Heritage Places Strategy;
- nationally endangered or vulnerable species and communities;
- migratory species and cetaceans;
- nuclear activities, including the mining, milling, storage and transport of uranium, and the operation of nuclear reactors and the storage, transport and disposal of intermediate to high level radioactive waste;
- activities that have a significant impact on the environment in Commonwealth waters;
- environmentally significant activities where the Commonwealth is the proponent or which are regulated under the *Ozone Protection Act 1989*;
- proposals to import and export hazardous wastes under the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*; and
- Commonwealth actions or decisions affecting the environment outside Australia such as foreign aid decisions.

This paper was published as a Planning Law Update in the Queensland Planner 38:4, 38-42, December 1998.

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