2011 . Vol 26 No 5

Contents

Co-consulting Editors:
The Hon Justice Rachel Pepper, Land and Environment Court of New South Wales
Rachel Walmsley, Policy and Law Reform Director, Environmental Defenders Office New South Wales

Acting Co-consulting Editor:
Nicola Rivers, Law Reform Director, Environment Defenders Office Victoria

Commissioning Editor:
Sonya Redman, Lawyer, Minter Ellison

Editorial Board:
Dr Rachel Baird, Consultant, Brisbane, Clayton Utz
Suzanne Dickey, Lawyer, Finlaysons
Dr Philippa England, Senior Lecturer, Griffith University
Jessica Feehely, Principal Lawyer, Environmental Defenders Office (Tasmania)
Marita Foley, Barrister, Victorian Bar
Robyn Glindemann, Barrister, Allens Arthur Robinson
Professor Simon Molesworth AM QC, Victorian Bar
Shauna Mounsey, Associate, Lavan Legal
Commissioner Linda Pearson, Land and Environment Court of New South Wales
John Taberner, Consultant, Freehills
Andrew Walker, Barrister, Victorian Bar
Rupert Watters, Barrister, Victorian Bar

Information contained in this newsletter is current as at June 2011

LexisNexis Butterworths

Australian
Environment
Review

Experiences in biobanking: lesson for practitioners

Tom Grosskopf, Althea Kannane *and* ***John Seidel*** *NSW OFFICE OF ENVIRONMENT AND HERITAGE*

Overview

The New South Wales Biodiversity Banking and Offsets Scheme (biobanking), is a voluntary, market-based scheme designed to build a market for the delivery of environmental services by the private sector.

Biobanking operates in the context of the Environmental Planning and Assessment Act 1979 (NSW), an Act established to facilitate the orderly and economic use and development of land in the state.[1] As such, it is a scheme that seeks to optimise the biodiversity conservation outcomes within a system that presupposes a certain level of development. To retain its integrity, the scheme has absolute limits past which it cannot be applied. These limits are set at the threshold where the outcomes will neither improve nor maintain biodiversity values.

Biobanking, for the first time, provides an assessment methodology[2] that allows the impacts of developments to be objectively calculated. The result of such an assessment is a biobanking statement,[3] which sets out the "biodiversity credits" required to offset the impacts of the development.

Biobanking also enables the calculation of the "biodiversity credits" generated by landowners who commit to protecting and enhancing biodiversity values on their land.[4] The commitment to these prescribed actions is called a biobanking agreement.[5] Agreement credits can be sold, generating funds for the long-term management of the site and potentially a profit for the landowner.

The market operates when credits are sold to offset the impacts on biodiversity that occur as a result of development.[6] If credits are purchased as an offset, they must be retired and are removed from the market, ensuring they are only ever used as an offset once.[7] Credits can also be sold to individuals and organisations seeking to invest in conservation outcomes, including philanthropic organisations and government.

A short history

The BioBanking Scheme (the scheme) commenced in July 2008 and is supported by the provisions of Pt 7A of the Threatened Species Conservation Act 1995 (NSW) (TSC Act) and the Threatened Species Conservation (Biodiversity Banking) Regulation 2008.

The scheme was a response to continued cumulative loss of biodiversity to development despite the existing assessment and mitigation measures. Site by site development assessment provided a limited sense of the relative ecological importance of the vegetation or habitat in the landscape. There was no way to value the biodiversity alongside the measureable economic value of development. The biobanking market was seen as a means to value biodiversity to better reconcile economic and conservation objectives.

What is happening now?

Participation in biobanking is growing in terms of numbers of biobanking agreements and statements, and the engagement of ecological assessment professionals.

The consulting sector has embraced the scheme. There are currently 68 biobanking assessors accredited to use the assessment methodology in development and conservation assessments, including a number in local councils and catchment management authorities.

Five sites in New South Wales, totalling 267 hectares, are now under biobanking agreements (for conservation). In addition, some 50 landowners have expressed an interest in establishing an agreement. Three sites, totalling 23 hectares, are subject to biobanking statements (developments requiring offsetting).

What are the benefits of biobanking?

Biobanking offers three key advantages over the more established "Assessment of Significance" (AOS) and "Species Impact Statement" (SIS) processes. These advantages arise from the transparent, scientifically-based assessment methodology, the standardised approach to development offsetting and the creation of an investment stream for conservation.

For landowners, biobanking creates a mechanism through which they can earn an income and be properly resourced to manage their land for conservation. This

occurs through payments from the sale of their biodiversity credits, delivered through the BioBanking Trust Fund.[8] Healthy habitat and bushland become valuable assets in the land market, rather than future liabilities.

The environmental benefit of this arrangement is the guarantee of funding for the ongoing care and enhancement of the biodiversity values of the offset. Biobanking agreements create a permanent obligation for management and legally secure the offset in perpetuity.[9]

For developers, the scheme sets clear standards for assessment and offsetting, permitting better forecasting of associated costs. The scheme offers greater certainty to developers with respect to meeting their threatened species responsibilities and provides a more secure biodiversity approval. A biobanking statement cannot be appealed to the Land and Environment Court under the Environmental Planning and Assessment Act 1979.[10]

For practitioners, biobanking provides a systematic, repeatable and defensible assessment methodology with clear procedural expectations. The methodology sets out the rules for assessing vegetation type and condition, threatened species, and site value and landscape value — data the methodology uses to calculate the biodiversity credits. It also establishes the rules for credit matching and offsetting, and the circumstances in which development does not improve or maintain biodiversity values even with offsets.[11] The methodology assesses and offsets all impacts on biodiversity values, eliminating a source of criticism (subjectivity in the identification of impacts) from the assessment process.

Tools for practitioners

A range of information and assessment tools are readily available to support participants and practitioners in biobanking.

Biobanking assessors play a crucial role in the operation of the scheme. Before a site can be considered for a biobanking agreement or biobanking statement, it must first be assessed by an accredited biobanking assessor.[12] Accredited assessors have received formal training in the application of the BioBanking Assessment Methodology and have appropriate tertiary qualifications and ecological survey experience. For details on the accreditation program go to www.environment.nsw.gov.au.

The BioBanking Credit Calculator is a software program that applies the assessment methodology to site survey data, and calculates the number and type of credits required at a development site or created at a conservation site. An operational manual provides detailed guidelines on how to apply the methodology and use the calculator. The calculator accesses three databases to complete the credit calculations:

- the Vegetation Types Database, which contains around 1600 vegetation types for New South Wales;
- the Vegetation Benchmarks Database, which identifies the range of measures that represent the benchmark condition for the vegetation type; and
- the Threatened Species Profile Database, which contains information for all listed threatened species, populations and communities.

The assessment methodology, credit calculator, operational manual and databases are all also publicly available at www.environment.nsw.gov.au.

Landowners, developers, local decision makers, conservation groups and other interested parties also have access to the biobanking public registers, which provide information on biodiversity credit supply, demand, availability and prices.[13] These tools provide all the information the market needs to operate.

Lessons for practitioners

In comparison to the established AOS and SIS processes, biobanking is a new approach, and implementation is informing the practice of accredited assessors, the Office of Environment of Heritage and local councils. There are many considerations that have emerged for practitioners.

First, as biobanking is voluntary, advice provided by a consultant to a development proponent plays a key role in the assessment process pursued for gaining development consent. Factors such as the potential for a "significant impact" in an AOS process, or a "red flag" in a biobanking assessment,[14] can bias a client toward or away from biobanking. Clients often request a desktop biobanking assessment and then seek approval through other processes that require fewer offsets. The mitigating factor in this context is the higher level of security of a biobanking statement and the Office of Environment of Heritage endorsement inherent in a statement's approval.

Second, local councils are becoming increasingly wary of being left with responsibility to manage offset lands into the future without resources. This seems particularly so where offsets are a negotiated outcome of an SIS process. Securing an offset through a biobanking agreement can provide assurance to councils of an on-going revenue stream for managing the land.

Separately, councils regularly voice a concern that biobanking allows for development within their local government area (LGA) to be offset outside their LGA. Their awareness of the potential to use biobanking agreements to make strategic gains in biodiversity conversation in their LGAs is often limited.

Third, some practitioners are concerned about the availability of certain types of credits at a reasonable

price. This is particularly the case for credits for already significantly cleared ecosystems such as coastal and Sydney Basin vegetation types. It is in fact a design feature of the scheme that these types of credits are rare and expensive, as this directs development to areas where the ecological impact is lower. Ideally, these price signals inform the developers, determining authorities and the community of the true biodiversity costs of development.

Practitioners have also raised a number of specific issues through existing feedback forums:

- there are efficiencies to be found in the assessment methodology that will deliver the same level of ecological assessment;
- the pricing of biobanking assessments by assessors is subject to variation due to potential requirements for additional reports on the use of more appropriate local data or "red flag" issues;
- information on price and supply of credits is still limited, hampering the open trading of credits; and
- the continued involvement of the Australian Government through the Environment Protection and Biodiversity Conservation Act 1999 can delay the progress of development assessments.

Some of these issues will be resolved as the scheme grows. For example, price and supply information will increase as more trades are made. The scheme is currently subject to a statutory review that will examine the practical experiences to date to ensure biodiversity values are properly assessed and that the market is operating efficiently.

Conclusion

Biobanking is an innovative and practical approach to the conservation of biodiversity and the offsetting of development impacts. It aims to optimise biodiversity outcomes in a context of presumed opportunity for development by creating a market that values healthy bushland and habitat.

The scheme's greatest strengths are its objective assessment methodology, its clear standards for offsetting, and the security and effective management of offset areas. These features enable landowners, developers, practitioners and decision-makers to move beyond the false choice between economic activity and protecting biodiversity.

Practitioners and participants are well resourced to utilise the scheme and engagement is steadily growing. The statutory review will be an opportunity to consolidate lessons learned and ensure biobanking is effective and efficient in achieving its biodiversity conservation objectives.

Tom Grosskopf,
Director, Landscapes and Ecosystems Conservation Branch,
Althea Kannane,
Program Manager, and
John Seidel,
Principal Project Officer,
NSW Office of Environment and Heritage.

Footnotes

1. Environmental Planning and Assessment Act 1979, s 5.
2. Threatened Species Conservation Act 1995, Pt 7A, s 127B.
3. Above note 2, Div 6.
4. Above note 2, s 127W.
5. Above note 2, Div 2.
6. Above note 2, ss 127Z and 127ZG.
7. Above note 2, s 127Y.
8. Above note 2, s 127ZW.
9. Above note 2, ss 127G, 127I, 127J and 127Z(4).
10. Above note 2, s 127ZO.
11. Threatened Species Conservation (Biodiversity Banking) Regulation 2008, s 3.
12. Above note 11, s 12(2).
13. Above note 11, Pt 8.
14. Above note 11.

The Product Stewardship Scheme: landfill no longer the end of the line for e-waste at the end of its useful life

Claire Smith *and* ***Rebecca Hawke*** *CLAYTON UTZ*

In a bid to significantly reduce the amount of waste sent to landfill in Australia, the federal government is proposing a national scheme to extend producer responsibility to include take-back and recycling of various products at the "end of their useful life". An initiative under the National Waste Policy, the Product Stewardship Bill (the Bill), establishes an overarching legal framework under which any number of product-specific schemes will sit. The first of these is set to be the National Television and Computer Product Stewardship Scheme (the e-waste scheme).

The proposed e-waste scheme sets aggressive targets that aim to lift recycling rates for televisions, computers and computer peripherals (e-waste) from 10% to 80% by 2021. It could be in place as early as the final quarter of this year, affecting manufacturers and importers as well as e-waste recyclers, local councils and other e-waste service providers.

Product stewardship legislation framework

The Bill, introduced into Federal Parliament on 23 March of this year, sets out a national legislative framework:

- requiring liable parties to be members of an approved "arrangement", ie, a set of measures that are implemented in order to meet the product stewardship obligations and requirements of that liable party or group;
- providing enforcement provisions and powers to the regulator to assess and approve product stewardship arrangements, and monitor and enforce compliance by liable parties and administrators of arrangements through both civil and criminal penalties; and
- providing parties with the right to appeal specified decisions.

The detail of product-specific schemes such as the proposed e-waste scheme will be contained in the underlying regulations (these are yet to be released).

Three tiers of product stewardship

There will be three tiers of approach to product stewardship:

- voluntary schemes;
- co-regulatory schemes; and
- mandatory schemes.

The voluntary provisions will provide an accreditation avenue for purely voluntary product stewardship schemes. The Department of Sustainability, Environment, Water, Population and Communities (SEWPC) reports that the tyre industry is being targeted as appropriate for an industry-led, voluntary accredited, product stewardship scheme which will aim to increase recycling and expand the market for tyre derived products at the end of their useful life. In addition, existing voluntary schemes, such as those for mobile phones, may seek accreditation under these provisions of the Bill.

A co-regulatory approach involves a mandatory requirement for liable entities to join product stewardship schemes and the use of government regulation to set outcomes, consistent requirements and targets for those schemes. Liable entities will, however, have some flexibility in how those outcomes, requirements and targets are met. The proposed e-waste scheme will be a co-regulatory scheme.

Under a mandatory approach, regulations will be more prescriptive than the co-regulatory approach and dictate both the outcome/requirement and how that will be met.

Products to be covered

The Bill is silent on the specific products that may be regulated, but it contains a set of criteria to act as "basic filter criteria to help determine whether the Bill should apply to a particular class of product". The "product stewardship criteria" are satisfied if two or more of the following apply:

- the products are in a national market;
- the products contain hazardous substances;

- there is the potential for conservation of materials or energy or resource recovery benefits;
- reusing, recycling, recovering, treating or disposing of the products involves a significant cost to the commonwealth, state, territory or local governments;
- consumers are willing to pay to reduce the impact of the products; and
- taking action will offer business opportunities that would make a contribution to the economy.

One of the reported sticking points in the passage of the Bill is the concern raised by stakeholders that these criteria are too broad to act as an appropriate filter to determine products to regulate under product stewardship schemes, creating uncertainty for business. The Senate Environment and Communications Legislation Committee report, dated 9 May 2011, recommends dealing with this concern by amending the Bill to include provisions requiring:

- development of a list of priority products to be covered by product stewardship schemes (which would be released annually); and
- establishment of an advisory group consisting of waste management experts, industry representatives, environmental groups, community representatives and government to advise the environment ministerial council on declaring priority products.

Opposition senators further recommended the criteria be reworked to have a clear and limited meaning relevant to the objects of the Act and that the government consider increasing the threshold number of product stewardship criteria to be met from two to at least three.

The Bill is recommended to pass during the winter parliamentary sittings (which run until 7 July). E-waste regulations will follow quickly with a view to having the e-waste scheme up and running in the final quarter of this year.[1]

The e-waste scheme

The first set of regulations (to be made under the co-regulatory provisions of the Product Stewardship Act, if passed) will set up the e-waste scheme for collecting and recycling televisions, computers and computer peripherals. Although draft regulations are yet to be released, many of the proposed details are set out in the National Television and Computer Product Stewardship Scheme consultation paper, released by SEWPC on 8 March this year.

Liability

Under the e-waste scheme, liability falls on importers and domestic manufacturers (if any) of televisions, computers and computer peripherals sold in Australia, above a certain threshold, who are "constitutional corporations". Primary liability does not fall on retailers or consumers.

A threshold of 5000 units has been suggested based on 2008 Customs importation data (although whether the threshold will be set by reference to units or weight of e-waste is yet to be settled). This threshold is intended to protect small business by capturing 95.3% of total units sold in Australia but excluding 95.5% of importers. It is likely that the regulations will include anti-avoidance mechanisms so that a company cannot split up to form multiple companies under the threshold.

Arrangements

Liable entities will meet their obligations by each becoming a member of an approved co-regulatory product stewardship "arrangement" for the collection and recycling of e-waste at the end of its useful life. An arrangement is a set of activities or measures taken to achieve the outcomes and requirements specified in the regulations. The arrangement may be multi-membered, or a liable party may develop and implement its own arrangement. Each arrangement will need to be approved by the regulator and will need to nominate an arrangement administrator — the entity responsible for administering the arrangement on behalf of member liable parties. Approved arrangements would be reviewed every five years.

The e-waste scheme is flexible enough to allow collection in a variety of different ways, which may include local drop-off points, kerbside collection, return by mail, or return to a store selling computers or televisions. Events for collection or drop-off might be on demand or scheduled, frequent or annual depending on the arrangement, coverage, location (ie, metropolitan versus rural), etc.

Scheme targets

A target is an enforceable minimum performance outcome required under the e-waste scheme. Targets may be based on a minimum number of units or may be weight-based. The difficulty is that while Customs importation data (which SEWPC is currently using to estimate which importers will be potentially liable) uses units, the Australian waste industry has traditionally dealt with weight.

There will be overarching e-waste scheme targets and a proportion of these will be allocated to each approved arrangement. The collective e-waste scheme targets will focus on the collection of waste television and computer products for recycling and will increase on a year to year basis until they reach 80% of waste televisions and computers in 2020–2021.

Arrangements will be required to accept any brand of the relevant product, not just products imported or manufactured by their members. This is designed to deal with issues associated with orphan and legacy waste (ie, from an importer or manufacturer who no longer exists or operates in Australia).

Scheme costs

The government's intention is that the e-waste scheme will avoid additional cost to consumers at the end of the product's useful life. Industry will cover the cost of implementing the scheme, including collection, infrastructure, recycling, awareness and education programs and governance activities. It is likely, however, that these costs will be built into the purchase price of the product or absorbed by manufacturers/importers.

Penalties for non-compliance

The Bill contains civil penalties, enforceable undertakings and infringement notice provisions. If a liable party fails to join an approved co-regulatory arrangement, it will be in breach of a civil penalty provision. Before bringing proceedings, it is intended that the regulator will provide a notice requiring the liable party to join an arrangement within a specified period. If that does not happen, the regulator may bring civil penalty proceedings. The proposed civil penalty is $22,000, with a proposed maximum penalty of $110,000 plus 10% for each day that the offence continues. The Bill allows criminal proceedings to be commenced against a person for conduct that is the same as conduct constituting a contravention of a civil penalty provision regardless of whether a civil penalty order has been made.

The regulator may accept a written undertaking as an alternative to civil penalty proceedings or criminal prosecution. If the arrangement's administrator has failed to take all reasonable steps to comply with the regulations, it is intended that the regulator will have the power to provide an informal warning, issue an improvement notice or, if necessary, cancel the arrangement's approval.

Implications for local governments and current e-waste recyclers

Although liability under the e-waste scheme will rest on importers and domestic manufacturers, the scheme will have wide flow-on effects because waste is regulated at all levels of government, and both governments and the private sector are already participating voluntarily in the e-waste recycling sector. The Senate Committee report recommends that the product stewardship legislation preserve or protect existing product stewardship schemes at the state level so as to not reduce their targets or effectiveness.

Arrangement administrators may seek to engage with local councils and e-waste service providers in order to:

- co-locate collection sites at existing waste facilities;
- purchase e-waste collected independently; or
- negotiate service contracts to operate collection sites and recycling facilities on an arrangement's behalf.

Councils and e-waste service providers will need to consider how to integrate their current e-waste recycling arrangements with the new legislation. For example, many councils currently charge for their e-waste recycling service but the e-waste scheme places responsibility on manufacturers and importers and does not permit the charging of consumers when they hand back their e-waste. Consequently, televisions and computers that consumers have paid to drop at council waste collection depots will not be permitted to be included in the e-waste Scheme.

While the transition from voluntary to mandatory recycling regimes may present teething problems, for e-waste recycling service providers it also presents new opportunities by significantly expanding the demand for their services. The scheme's Implementation Working Group has received approval from Standards Australia to establish an Australian standard for the collection, storage, handling, transport and treatment of e-waste. This will inform e-waste service providers as to some of the standards they will be required to meet in order to contract with an approved e-waste arrangement. The Draft Interim Industry Standard, released on 23 September 2010, requires e-waste to be collected at no cost to the public, as well as setting draft standards for recyclers in relation to certification, goods receiving and storage, processing and handling, traceability, data security and destruction, and downstream processes. E-waste service providers will need to ensure that they can meet arrangement requirements and relevant standards for recycling.

Implications for liable entities

Liable entities will need to decide whether to set up their own arrangement or contract with an established multi-party arrangement, and how to pass through their additional regulatory costs. In the latter case, entities will need to carefully consider any contract they enter into with the multi-party arrangement together with the ability of the multi-party arrangement to fulfil the e-waste scheme obligations and what happens in the event that the arrangement is wound up or its licence is cancelled.

Conclusion

Voluntary product stewardship is not new in Australia. Consumers are familiar with the mobile phone

industry's MobileMuster, South Australia's bottle/container deposit scheme, or e-waste "take back" schemes run by local councils. The Product Stewardship Bill does, however, propose product stewardship on a much larger scale. This has the potential to irrevocably change the way waste is managed in Australia affecting importers, manufacturers, waste service providers and governments at all levels. Whether individual product-specific schemes will be successful will depend on many factors, including whether they are voluntary, co-regulatory or mandatory, consumers' willingness to participate, and the ability of arrangements and waste service providers to recycle, recover, re-use and dispose of those products.

In the European Union, the Waste Electrical and Electronic Equipment Directive makes manufacturers financially responsible for the collection, treatment and recovery of waste electrical equipment, and obliges distributers to allow consumers to return their e-waste free of charge. However, despite rules on collection and recycling of e-waste in Europe for the better part of a decade, the rate of recycling is currently only about 33%. A target of 45% over four years, eventually rising to 65%, is considered achievable. Considering the European experience, it is questionable whether Australia's target of 80% recycling of e-waste by 2020–2021 is too ambitious given the lack of existing recycling facilities.

Whether or not the Bill is passed, and the first scheme under the new national framework gets off the ground as quickly as proposed, remains to be seen, but this is certainly an exciting time for those in the business of e-waste recycling.

Claire Smith,
Partner, and
Rebecca Hawke,
Solicitor,
Clayton Utz.

Footnotes

1. As this article was about to be published, the Senate amended then passed the Product Stewardship Bill on 15 June this year. The successful amendments included a tightening of the "product stewardship criteria".The product stewardship criteria will now be satisfied in relation to a class of products if:
   (a) the products are in a national market; and
   (b) at least one of the following applies:
      (i) the products contain hazardous substances;
      (ii) there is the potential to significantly increase the conservation of materials from waste from the products;
      (iii) there is the potential to significantly reduce the impact the products have on the environment or the health or safety of human beings.

   A product stewardship advisory group will also be established.The Bill now moves to the House of Representatives for consideration.

Winds of change: assessment of planning permits for Victorian wind farms goes local

Sallyanne Everett *CLAYTON UTZ*

Local councils have regained the power to issue planning permits for wind farms of all scales, and greater consideration is to be given to local amenity impacts under amendments to Victorian planning schemes which came into effect on 15 March this year.

However, the amendments do not go as far as to include a mandatory two kilometre buffer between non-consenting residents and wind turbines, which had been flagged prior to the state election. Nor is there any mention of any "shared payment system" for landowners with properties within one kilometre of a wind turbine, as foreshadowed in the coalition policy on wind farms prior to the election.

While the changes may be welcomed by local councils and residents, it may cause headaches and delays for proponents of large wind energy facilities. In particular, the burden of technically assessing wind energy facilities could be one that local councils are ill-equipped to bear.

What are the changes?

Amendment VC78 (VC78) modifies the way in which wind energy facilities are dealt with under the Victorian Planning Provisions (VPPs) and under all Victorian planning schemes. First, previously, the Minister for Planning was the authority responsible for assessing permit applications for wind energy facilities having a generating capacity of 30MW or more. This responsibility will now reside with local councils, subject to any ministerial call-in or referral by council of specific permit applications.

Second, the changes seek to promote greater consideration of the effects of a wind farm development on the local community through an amendment of cl 19.01 (Renewable Energy) of the State Planning Policy Framework. The objectives of cl 19.01-1 now include several new strategies including:

> In considering proposals for renewable energy, consideration should be given to the economic and environmental benefits to the broader community of renewable energy while also considering the need to minimise the effects of a proposal on the local community and environment.

Third, VC78 amends cl 52.32 of the Particular Provisions — Wind Energy Facilities to include application requirements for:

- submission of a plan showing all dwellings within two kilometres of a proposed turbine; and
- submission of a concept plan showing associated transmission infrastructure, electricity utility works and access roads.

However, locating wind turbines within two kilometres of a residence is still possible even where the resident does not consent.

Further, the need to submit a concept plan showing associated or additional transmission infrastructure does not require specific routes and other infrastructure requirements to be finalised at the time of application, as recently explained by the Victorian Civil and Administrative Tribunal in *Mt Mercer Wind Farm Pty Ltd v Moorabool Shire Council* [2011] VCAT 836. In that case, the tribunal found that the level of definition required for a concept plan is "at the concept and strategic level" and that VC78 had not significantly altered the application requirements in this regard.

VC78 also updates the VPPs to refer to the current noise standards, using the latest New Zealand standard, NZS6808:2010, Acoustics — Wind Farm Noise. This is in response to the Victorian Supreme Court decision of *The Sisters Wind Farm Pty Ltd v Moyne Shire Council* [2010] VSC 607; BC201009671. Here, the court found that where the planning scheme and 2009 planning guidelines referred to the superseded 1998 New Zealand standard, it was not possible to replace this with a reference to the latest New Zealand standard by implication. The latest New Zealand standard includes the requirement to assess whether a high amenity noise limit is applicable to a proposal, and sets a lower noise limit of 35dB (or 5dB above background noise, whichever is greater) in particularly quiet rural areas where the lower limit is justified by special local circumstances.

VC78 also incorporates updated planning guidelines — Policy and Planning Guidelines for Development of Wind Energy Facilities in Victoria, March 2011 (the guidelines). The updated guidelines generally follow the previous format, although notably removed are sections

outlining the government's renewable energy policy and the requirement to give "considerable weight" to the policy objective of developing renewable energy resources.

Councils retain the ability to refer assessment of wind energy facility applications to the Minister for Planning and the explanatory report accompanying VC78 notes in particular that this may be utilised where a proposal straddles local government boundaries.

What does VC78 mean for developers of wind energy facilities?

VC78 has immediate effect. Developers of new wind energy facilities will need to review their proposals to ensure that compliance with the new controls and guidelines can be achieved. Consultation with local residents and the community will continue to be important, given the increased emphasis on local impacts for such proposals.

The potential for an environment effects statement to be required for large, complex facilities straddling more than one municipality would also appear to have increased.

Developers with a planning permit for a wind energy facility issued before 15 March of this year are exempt from any obligation under the new provisions forming part of the amendment for a period of 12 months. This will enable permit amendment and extension applications to be dealt with as if the changes had not been made, provided the application is made during the 12-month transition period and any extension of time for commencement specifies a commencement date of no later than 15 March 2012.

What does VC78 mean for councils?

While the government has recognised that local councils will face increased resource and administrative costs in assessing and dealing with compliance issues associated with wind energy facilities, it has stated that "expert advice" will be made available to balance this, although no details are provided. Councils have also been reassured that the Department of Planning and Community Development will be on hand to assist with the transition.

Outlook

In practical terms, this shift in responsibility could be a heavy burden for some councils. Unless the transition is managed properly and there is clarity over what and when expert assistance will be provided to councils, there is the potential for assessment of wind energy facilities to be delayed.

Further, a narrow focus on local amenity impacts may de-prioritise the wider benefits that renewable energy facilities may bring.

For developers, the changes could mean increased delay and cost associated with the assessment and approval of particularly large complex facilities, with the amendment paving the way for Victorian Civil and Administrative Tribunal review of proposals not referred to the Minister for Planning and assessed by a planning panel, as has occurred for larger projects in the past.

Further change is also afoot with measures to be progressively implemented as they are developed. These will include additional arrangements to support nearby residents and could see the introduction of a two kilometre buffer as well as shared compensation arrangements for non-participating land owners within one kilometre of a wind farm, consistent with coalition policy. However, the form, nature and extent of these further changes is unknown, as is their timing for introduction.

Sallyanne Everett,
Partner,
Clayton Utz.

Report on the 2011 National Environment, Energy and Resources Law Summit (Canadian Bar Association)

Robyn Glindemann *ALLENS ARTHUR ROBINSON*

From 7–9 April this year, the National Environment, Energy and Resources Law section of the Canadian Bar Association held its annual environmental conference in Banff, Alberta. The theme of the conference was "Water and the Law" and the 100 or so delegates present heard from Canadian, American and international speakers on a wide range of water related issues.

The striking realisation apparent at the beginning of the conference was the shared history of water law and policy between Canada and Australia. This goes beyond borrowing from each other's policies or philosophies (such as the Alberta water law in the 1900s being borrowed from early water legislation in Victoria) and extends to many Australian colonial and (new) state administrators travelling to Canada and the United States to work on water projects and water policy in North America and vice versa. While some parts of Canada adopted the western United States approach to water allocation (the doctrine of prior appropriation), the rest of Canada and eastern United States adopted the riparian doctrine which also applied in Australia. However, all jurisdictions have substantially moved from common law positions as times and access to resources changed. Canada is perceived as a country that has plenty of water (indeed it does have some of the world's biggest fresh water supplies), but it has many of the same problems as Australia such as where fresh water for consumptive use is located and getting it to where it is actually needed, climate change issues and encouraging dynamic water trading markets.

Outlined below are some key points arising out of the conference.

Watershed management and the integration of water and environmental policy has been renewed in North America through the Watershed Initiative developed by International Joint Commission (a United States/ Canadian body established by the Boundary Waters Treaty 1909) and is being pursued in various Canadian provinces. One example is the government of Alberta's *Water for Life* document (2005) which forms the (non-legislative) foundation for watershed management in Alberta (see www.waterforlife.alberta.ca). Its renewal in 2008 set the stage for integrated resource management and cumulative impact assessments in the province. The strategy sets a 30% reduction on the use of water from 2005 levels by 2015 and has three key objectives — safe, secure drinking water supply, healthy aquatic ecosystems, and reliable quality water supplies for a sustainable economy. The legislative component of Alberta's watershed planning comes through the Water Act (2001) of Alberta and the *Framework for Water Management Planning* document produced in 2001 pursuant to that Act. Even though the Act does not provide an explicit foundation for integrated planning of water resources, the framework states that water must be managed using an integrated approach using watershed management as a basis, and that water management plans developed under the Water Act may adopt an "integrated approach to planning with respect to water, land and other resources" (s 9(2) of the Water Act).

The trade of water between Canada and the United States remains a vexed issue from a policy and legal perspective. There is some debate as to how the North American Free Trade Agreement (NAFTA) should apply to the trading of water between Canada and the United States (eg, a bulk export of water to the drier states in the Midwestern United States). Accordingly, there is potential for a serious trade dispute to arise between the United States and Canada in relation to water.

The Canadian Government, as well as the various provincial governments, has recognised that there has been serious underinvestment in water and waste water infrastructure. Although investment in infrastructure is largely the domain of municipal or local governments, there are some serious barriers in the path of municipalities that wish to upgrade. These include an inability to estimate how much money is needed and the complexity of managing assets over a large area. Public private partnerships are gaining momentum.

Thirty percent of households in Canada drink bottled water or treated tap water, indicating low confidence in Canadian potable water supplies. It has been 10 years since the Walkerton incident, where seven people died and thousands became seriously ill as a result of an *e coli*

outbreak in the town water supply for Walkerton. The province of Ontario is in the process of drawing up water source protection plans which will allow for the better protection of water sources in the province. There is also a new Safe Drinking Water Act (2002), which imposes strict requirements for water treatment and monitoring, reporting and training, and testing of water utilities in the province. The maximum fine that can imposed under the Act on a corporation is $6 million (raised to $10 million for subsequent offences), while individuals face maximum penalties of $4 million (raised to $7 million for subsequent offences) and/or imprisonment for up to five years, less a day. Licences under this legislation have been issued since February of this year. Before a licence can be issued, a municipality must have an approved operating and management plan for its water source, as well as permits to take water from the water source and operate water works and an approved financial plan. The issue of financial viability of utility operators is important and was one of the key recommendations coming out of the Walkerton inquiry. The inquiry report stated that full cost accounting and full cost recovery of water systems was the key to their safe operation. The Sustainable Water and Sewerage Systems Act (2002) in Ontario requires full cost accounting, but that Act is not operational because many municipalities cannot support the detailed regulations needed to implement the cost recovery mechanisms.

Safe drinking water on reserves

The delivery of safe drinking water to First Nations (Aboriginal) groups on their reserves is very complex. A 2005 inquiry into drinking water on reserves stated that First Nations's drinking water supplies are not safe. A subsequent expert panel noted that there were many barriers to improving drinking water safety on reserves. These included the traditional or customary attitudes towards water protection among First Nations people, having adequate financial resources to maintain infrastructure, the cumbersome policies of the Department of Indian and Northern Affairs Canada (the federal department responsible for managing First Nations's issues), the lack of community support and the necessity for that support to be there for First Nations to take responsibility for safe water and the fact that there is no clear preference for regulatory oversight to be exercised by either the federal, or the relevant provincial, government. Another challenge for delivering safe water to some communities is their smallness and remoteness.

One in seven communities cannot be reached by road and the reduced economies of scale, and the need to train and retain qualified people on reserves contributed to the challenge. To respond to this challenge, the previous Federal Government introduced Bill S-11, the Safe Drinking Water for First Nations Act, which would have allowed the government to draft legally enforceable drinking water standards for First Nations communities. The Chief of the Assembly of First Nations had expressed some concern with the Bill, saying that, if the standards were to be enforced, there would need to be capacity building within First Nations groups to assist them in meeting the standards. The chief was also concerned at the prospect of the Act overriding regulatory instruments made by First Nations communities themselves under a land claim or self-government agreement. Prior to the May federal election in Canada, the Bill had been referred to a parliamentary committee but, given the lack of First Nations support for the Bill and the subsequent election, it is unlikely the Bill will be revived.

Bottled water royalties imposed

The province of Quebec has imposed a royalty on water use within the province. The royalty applies to bottled water, mining operations and 21 other named industries that take more than $75m^3$ of water per day from a distribution system. The money raised from the royalties is intended to go to government initiatives on integrated water management, but there is still no definition around what those initiatives are.

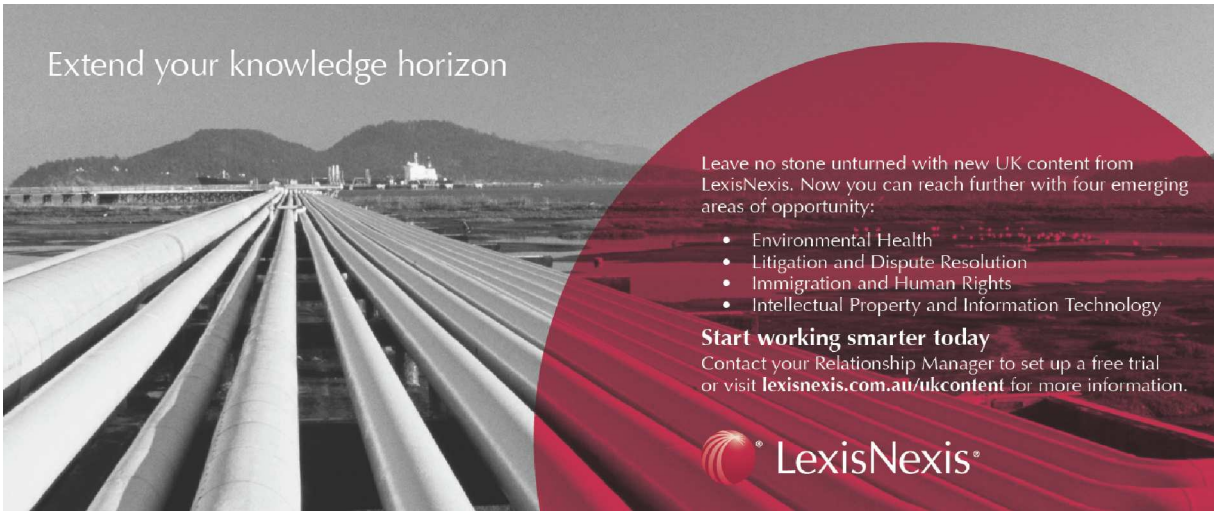
Water quality and mining

The issue of coal seam methane, shale gas production and water quality remains vexed in Canada. While the production of water from shale gas and coal seam methane operations in Canada has been occurring for a much longer period than in Australia, there is still a deep degree of fear and this distrust among the public. The focus to date has been on the disclosure of contaminants in "frac" fluids. These are fluids injected into rock structures to "fracture" them and thus release the gas for collection. The fluids contain a range of hazardous and potentially hazardous chemicals. Another significant issue is disposal of the huge volumes of water generated and the difficulties that have arisen in efficiently dealing with this water within pre-existing water rights regimes. An interesting example explored at the conference arose out of the Western United States, where water use is regulated at both the state and federal level and, unlike Australia, water rights are effectively given to a water user when the user can demonstrate a beneficial use for the water (rather than the Crown allocating water rights upon application). One approach that has been adopted has been to deem the produced water as a by-product of gas production, and so the user has no rights to that water because the user has not "taken" it. The result is that either the user must dispose of the water (pursuant to federal oil and gas statutes, and potentially the federal Clean Water Act) or obtain a permit, usually from a state

regulator, to put the water to a useful purpose. Because the Western United States adopted the "prior appropriation" doctrine of water rights, rather than the riparian doctrine that prevails in Australia, the "first in time" principle will apply to the produced water. This means that the entity that produced the water from a coal seam gas operation might not actually have "first rights" to it because there may be another entity with prior rights to the water and a permit to use the water may be denied. In this case, the produced water is largely wasted. A second approach has been to treat the de-watering process as a beneficial use for the produced water, which creates rights to that water in the user but with no attendant obligations on the user to actually put that water to a useful purpose (as opposed to simply disposing of it). Colorado has adopted the first approach to produced water, while Wyoming has adopted the second. Neither is particularly satisfactory.

Papers from the conference are available for purchase from the Canadian Bar Association. Also see the publications page at www.cba.org.

Robyn Glindemann,
Special Counsel,
Allens Arthur Robinson.



Australian
Environment
Review

North Stradbroke Island Protection and Sustainability Act 2011: something big for Straddie

Dr Philippa England *GRIFFITH UNIVERSITY*

North Stradbroke Island (NSI), the second largest sand island in the world, is one of a chain of sand islands straddling the coast of South East Queensland. It lies close to Brisbane and within the Moreton Bay Marine Park, a wetland of international importance recognised under the 1971 Convention on Wetlands of International Importance (the Ramsar Convention).[1] However, unlike Fraser Island, a declared world heritage area protected from sand mining since 1977, the mining of sand and heavy metals is permitted on NSI.

NSI is home to a significant indigenous community, comprising of the Noonucal and Gorenpul tribes of the Quandamooka people. In 1990, the Quandamooka Lands Council (QLC) was established to represent the views of NSI traditional owners. The QLC has been involved in a native title claim over NSI, Peel Island and the central part of Moreton Bay since 1995.[2]

Mining on NSI is conducted by one company, Sibilco (formerly known as Unimin). In 2007, the lease for one of its biggest mines, the Enterprise Mine, expired. Sibilco applied for a renewal of that lease. Pending the issue of a new lease, Sibilco continued sand mining on the island. In July 2010, the Queensland Court of Appeal upheld the Supreme Court's decision that the company was guilty of illegally conducting sand mining on the island.[3]

In 2010, with the renewal of the lease for the Enterprise Mine still pending, Sibilco announced that its other major mine, the Yarraman Mine, will close in 2015 due to resource depletion. The Yarraman Mine accounts for approximately one-third to one-half of all mine related employment on NSI. Sibilco has argued that, among other things, a new and expanded lease for mining at the Enterprise Mine would help absorb the jobs that will be lost at the Yarraman Mine in 2015. With the future of both the Enterprise Mine and the Yarraman Mine under review, the Queensland Government decided this was an opportunity to change the course of development on NSI. With "something big for Straddie" in mind, the North Stradbroke Island Protection and Sustainability Act 2011 (Qld) is part of a package of measures designed to transition the economy of NSI away from mining and towards nature based recreation, tourism and education.[4] The stated ultimate goal is for 80% of the island to be protected as national park, jointly managed by the traditional owners of the land and the state.

The NSI Protection and Sustainability Act 2011

The purpose of the North Stradbroke Island Protection and Sustainability Act Qld 2011 (the Act) is to substantially end mining interests over land in the NSI Region[5] by the end of 2019 and to finally end mining in the region by 2025. In addition, it seeks to protect and restore the environmental values of the region and to facilitate the staged creation of areas to be jointly managed by the state and the traditional owners of the region (s 2 of the Act). The Act is said to provide, once and for all, "a balanced resolution" of the divergent interests of miners, environmentalists and traditional owners, and is part of a transitional economic strategy to develop an economy for NSI that does not rely on mining.[6]

The end of mining activities

The Act states in s 8 that all NSI mining interests that were otherwise due to continue after 2019 will end on 31 December 2019 and cannot at any time be renewed. New applications are prohibited and any outstanding applications are taken to have been withdrawn under s 10. An NSI mining interest can no longer be granted (s 14). No compensation is payable (s 6) and the Act prevails over all other legislation including the Mineral Resources Act 1989 (s 7).

The only exceptions are for the five mining leases identified in s 8(2) which relate to the Yarraman, Enterprise and Vance Mines operated by Sibilco. These leases are dealt with individually by the Act:

- Lease 1109 (Yarraman Mine): Sibilco had previously indicated it will be closing down the Yarraman Mine in 2015 due to depletion of its resources. The Act confirms this date and provides for mining interests in the Yarraman mine to cease in 2015 (s 9).

- Lease 1105 (Enterprise Mine): Sibilco's preference with respect to the Enterprise Mine was for a new lease to be granted through to 2027, allowing continued and accelerated mining especially after 2015 when the Yarraman Mine is due to close.[7] In this respect, Sibilco's ambitions have been compromised, for the Act provides for the cessation of mining at Enterprise by the end of 2019 under s 17. Until that time, mining will have to follow a restricted mine path designed to allow mining at current rates but without any accelerated activity and avoiding areas of high conservation value.

  Although Sibilco may apply for an amendment to its licence under provisions of the Environmental Protection Act 1994, permissible changes are limited in this case to amendments that are reasonably necessary to facilitate mining and that do not have the overall effect of increasing the mine path area by more than 5%.
- Leases 1108, 1124 and 7064 (Vance Mine): The Vance Mine is a silica mine with a relatively small annual footprint.[8] Whereas Sibilco was prepared to forfeit its rights to exploit the Vance Mine as early as 2015, the Act provides for these leases to end on 31 October 2025 under Schs 1 and 2.

  The mining outcomes enshrined in the Act are reasonably (although some might say unreasonably) favourable to Sibilco. The Act does not terminate before its expiry any pre-existing mining lease on which there will be an active mine at the time of termination, and furthermore, grants Sibilco a new lease over the Enterprise Mine valid until 2019. This allows the mining company a 9–15 year adjustment period while an alternative economy develops.[9] Although by no means will everyone be happy with this outcome,[10] all parties should now be able to proceed with a reasonable degree of certainty about the future of mining on NSI.

Indigenous interests and environmental protection

The new economic strategy for NSI is to build an economy based around recreation, tourism and nature based education. To that end, the Queensland Government declared a new national park over 20% of the land on NSI on 27 March of this year, and plans ultimately to increase the total area of land protected as national park to 80%.[11] While the NSI Protection and Sustainability Act 2011 is the main mechanism for dealing with mining interests on NSI, amendments have also been made to the Aboriginal Land Act 1992, the Nature Conservation Act 1992 and the Sustainable Planning Act 2009 to facilitate the joint management of protected land on NSI by the state and traditional owners. The main changes are outlined below.

Amendments to the Aboriginal Lands Act 1991

The Aboriginal Lands Act 1991 (ALA) has been amended to make land on NSI transferable land within the meaning of that Act. Part 5B of the ALA has also been amended so that its provisions relating to indigenous management agreements and national parks in the Cape York Peninsula may also be applied to the NSI region. The Cape York management model allows Aboriginal land to be protected in perpetuity without requiring the freehold titleholders to lease the land back to the state (as otherwise provided for in the ALA). Instead, new s 83KA ensures that before land which is a protected area on NSI can be granted under the ALA, the trustees or proposed trustees and the state must enter into an indigenous management agreement and the grant is conditional on the land becoming an indigenous joint management area. Five types of protected area provided for in the Nature Conservation Act 1992 are included in this arrangement — they are national park (scientific), national park, national park (recovery), conservation park and resource reserve. This model was also preferred by the traditional owners of NSI.[12]

Amendments to the Nature Conservation Act 1992

New Pt 4 Div 3 Subdiv 3 in the Nature Conservation Act 1992 (NCA) replicates the Cape York provisions on indigenous joint management areas with appropriate variations to suit NSI. The management principles for each of the five types of protected area that may be used have also been amended to ensure that, in an indigenous joint management area, the land will be managed firstly in accordance with its protected area status, and then, subject to that principle, in ways that are consistent with any Aboriginal tradition applicable to the area as far as practicable.[13] New s 42AL of the NCA ensures that a lowering of the class of protected area will only be possible with the consent of the indigenous landholder and on a motion of parliament with 28 days notice. Likewise, the removal of land because of a change in boundaries is only possible if title for the land is surrendered and on a motion of parliament with 28 days notice.

Amendments to the Sustainable Planning Act 2009

The Sustainable Planning Act 2009 has been amended to prohibit development applications for quarrying or dredging activities involving over 10,000 tonnes of material per annum on NSI.[14]

Implementation

The government has allocated $27.5 million over five years for the implementation of the NSI strategy. This budget includes the establishment and joint management of protected areas in the NSI region, as well as funds for implementing an indigenous land use agreement with the Quandamooka people.[15] Proud of her government's achievements, Premier Bligh announced in March this year that "I, like so many other Queenslanders, want to see North Straddie transformed from a mining island to an island paradise… This is the start of something big for Straddie".[16]

Dr Philippa England,
Senior lecturer,
Griffith University.

Footnotes

1. See further, www.savestraddie.com.
2. The application (No QC95/2, Federal Court number QUD6010/98) was lodged on 3 January 1995, and is listed as still active on the Native Title Tribunal website.
3. *Unimin Australia Ltd v Queensland* [2010] QCA 169; BC201004555 (09/14638) Brisbane Chief Justice and Chesterman JA and Atkinson J 2 July 2010.
4. North Stradbroke Island Protection and Sustainability Bill 2011, explanatory notes, p 1.
5. The NSI region includes the North Stradbrook and Peel Islands.
6. Above note 2, explanatory notes, p 4.
7. Above note 2, explanatory notes, p 9.
8. Above note 2, explanatory notes, p 3.
9. Above note 2, explanatory notes, p 4.
10. Anon, "Island groups totally oppose continued destructive sand mining", accessed 3 June 2011, available at www.savestraddie.com.
11. "Premier declares first new national park on North Straddie", Joint Statement to the Press by the Premier and Minister for Reconstruction, Anna Bligh, and Environment and Resource Minister, the Honourable Kate Jones, 27 March 2011.
12. Above note 2, explanatory notes, p 17.
13. Nature Conservation Act 1992, ss 16, 17, 19A, 20 and 21.
14. Sustainable Planning Act 2009 (Qld), Sch 1.
15. Above note 2, explanatory notes, p 5.
16. Above note 11.

Part 3A of the New South Wales Planning Act to be repealed and replaced with state significant development and infrastructure regime

Penny Murray *and* ***Sonya Redman*** *MINTER ELLISON*

On 16 June this year, consistent with its March election promise, the New South Wales Coalition Government introduced a Bill in parliament to repeal Pt 3A of the Environmental Planning and Assessment Act 1979.[1] The Bill not only seeks to repeal Pt 3A but make changes to the operation of joint regional planning panels (JRPPs) and the Planning Assessment Commission (the PAC), and introduces a new approval regime for state significant development (SSD) and state significant infrastructure (SSI). SSD and SSI provisions will replace Pt 3A and largely return the planning assessment pathways for large projects to that experienced prior to the introduction of Pt 3A.

This article will outline the key elements of each and discuss the implications of transitional provisions for Pt 3A projects and changes to the PAC and JRPPs.

The new Div 4.1 for state significant development

The Bill reintroduces the concept of state significant development that existed prior to the introduction of Pt 3A in 2005 with some changes.

State significant development is development that is declared to be state significant development by a state environmental planning policy (SEPP)[2] or by the minister, if the minister obtains and makes publically available advice from the PAC about the state or regional planning significance of the development.[3]

A major point of difference is that SSD will not be able to be declared as "critical infrastructure". Critical infrastructure provisions will now only apply to SSI projects generally carried out by public agencies or public-private partnerships.[4]

What types of projects will be state significant development is still unknown

As with Pt 3A projects, the types of projects capable of being declared as SSD will largely be dictated by SEPPs. The minister has indicated, via a policy statement, the likely projects that will be declared as SSD soon after the Bill is passed by parliament.

The list is similar to the list for Pt 3A projects in the State Environmental Planning Policy (Major Development) 2005 (Major Development SEPP) except that:

- the monetary or production capacity thresholds are higher in almost all cases, eg, the threshold for what is considered a state significant warehouse and distribution centre will now increase from $30 million to $50 million;
- marinas, shooting complexes, retail, commercial and residential development are excluded;
- certain petroleum exploration, underground coal gasification and certain large warehouses have been added; and
- certain state significant sites have been excluded.

In addition to the projects being declared SSD by a SEPP, the minister can also separately declare or "call in" projects as SSD. When the minister is considering to call in a proposal as a SSD, consideration will be given to the significant public benefits for state or regional communities, the complexity, environmental hazard and potential assistance required from state or local authorities, and whether the development will require a coordinated assessment due to its multiple local government or jurisdictional location.[5]

The minister may declare or call in a project as SSD upon receiving advice from the PAC (which must be made publicly available) about the state or regional significance of the development.[6] This latter limitation is likely to be a response to criticism that the process of declaring Pt 3A projects was highly political.

How will the state significant development regime work?

For development declared to be SSD, the minister is the consent authority,[7] however the minister may delegate the consent authority function to the PAC, the director general or other public authority.[8]

A SSD will not be designated development but will require an environmental impact statement to accompany a development application.[9] A SSD will not be

integrated development, and certain other approvals or authorisations will not be required unless an instrument specifically requires it for SSD (as was the case with Pt 3A projects).[10]

If a staged development application is made in respect of a SSD, the minister may refer some stages to council.[11] Once a council becomes the consent authority for a stage of a development, that part of the development ceases to be a SSD and once again will be integrated and/or designated development.[12]

All SSD applications will have their own notification and consultation requirements, which will require exhibition for at least 30 days.[13] The Environmental Planning and Assessment Regulation 2000 will be amended to require the exhibition period to be extended by an additional 15 days if the exhibition period coincides with school holidays.[14] Amendments to the application may require re-notification if the proposal substantially differs from the original proposal.[15] Modifications to approvals for SSD must be "substantially the same development" (unlike the somewhat wider power to modify under Pt 3A s 75W). The deemed refusal period will be 90 days.[16]

Similar to the process for other types of development applications, a SSD application will be subject to s 79C of the Environmental Planning and Assessment Act 1979 considerations (this was not the case with Pt 3A).[17] And if a PAC has been appointed, the minister must also consider the PAC's determination.

A development consent for a SSD can be granted if part (but not all) of the development is prohibited (this is similar to the situation prior to Pt 3A).[18] An application for the rezoning of a prohibited part or all of the development can be made concurrently with the development application.[19] If all of the development is prohibited and needs to be rezoned, the PAC will be involved to ensure the decision is made independently of politics.

Merit and objector appeal rights are available for certain state significant development but not if the approval was determined by the PAC or after a public hearing by the PAC (as opposed to just a review).[20]

The Bill permits the minister to grant approval to a SSD subject to a condition requiring an applicant to acquire and retire biodiversity credits of a number and class specified by the minister.[21] This was also the case for Pt 3A projects.

New Pt 5.1 for state significant infrastructure

SSI will also be declared in SEPPs. The word "infrastructure" has a circular definition to mean infrastructure for the purposes of infrastructure. The department has released its policy statement[22] providing that infrastructure like ports, rail, water supply, pipelines and telecommunication cables are proposed classes of development for SSI.

The process of assessment for SSI has a number of similarities with the SSD assessment process including the minister as the consent authority,[23] an exhibition period of at least 30 days,[24] the requirement for an environmental impact statement,[25] and biobanking special provisions.[26]

However the new Pt 5.1 is very similar, if not the same in all material respects, to Pt 3A. Critical state infrastructure is dealt with under this part as well and permits a declaration for critical infrastructure to be made if, in the opinion of the minister, the infrastructure is essential for the state for economic, environmental or social reasons.[27]

The new part has the same approval process as Pt 3A albeit the minister cannot delegate his powers to approve critical infrastructure. Importantly, the rights of the public to enforce compliance with the conditions of approval have been removed for critical infrastructure,[28] unless a legal challenge is commenced within three months after public notice of a SSI decision was given.[29]

What are the implications for development that could be or was declared as a Pt 3A project?

The first transitional provisions commenced by the New South Wales Coalition were amendments to the Major Development SEPP, amended on 13 May 2011. The amendment ensured that the following projects that were capable of being declared as Pt 3A projects under the Major Development SEPP transition back to being assessed and determined under Pt 4:

- residential, commercial, retail projects with a capital investment value greater than $100 million; and
- coastal subdivisions.

These amendments did not affect other types of Pt 3A projects, except that the government continued its policy of not accepting any applications under Pt 3A for new projects excluding modifications to existing approvals.

Implications for $100 million residential, commercial, retail and coastal subdivision developments that were Pt 3A projects

For approved projects, the approval is unaffected and can continue to be implemented (and modified) relying on Pt 3A.

For projects without declaration, the minister will not make any new Pt 3A declarations,[30] and all applications must be dealt with under Pt 4.[31]

For projects with declaration and environmental assessment requirements issued between 8 April 2009 and 8 April 2011, these projects will be able to be determined under Pt 3A.[32] For all other applications, the Pt 3A declaration is revoked.[33] The Department of Planning has identified all such projects on its website.[34]

For projects where a concept plan has been approved, and staged project approvals have also been approved, the approvals are unaffected and can continue to be implemented relying on Pt 3A.[35]

For projects where a concept plan has been approved and environmental assessment requirements were issued for a staged project application before 8 April this year, the application can continue to be assessed under Pt 3A.[36]

For projects where a concept plan has been approved and no environmental assessment requirements were issued for a stage(s) of the project before 8 April this year, the Pt 3A declaration for that stage(s) is revoked and any such applications will be determined under Pt 4.

For concept plan approval projects where the Pt 3A declaration has been revoked for part or all of the project and future applications are to be determined under Pt 4, the development approved in the concept plan is deemed permissible despite any prohibition under the local environmental plan, but must be consistent with the concept plan.[37]

Implications for other types of Pt 3A projects

For those projects that could have been declared a Pt 3A project but haven't been declared, there is no possibility that the project will be determined under Pt 3A. The project will now be subject to Pt 4, the SSD or SSI depending on the declarations.

For those Pt 3A projects already in the system, the Bill creates a concept of "transitional Pt 3A projects". In essence, these are Pt 3A projects:

- already approved, or
- for which project applications (but not concept plan applications) have been lodged and the proponent has either received environmental assessment requirements (EARs) or the minister has declared under the regulations it to be a transitional project.

For Transitional Pt 3A Projects, the provisions of Pt 3A prior to its appeal will continue to apply, including the determinations and orders made under that part before its repeal. This would permit, for example, modifications under s 75W. However, there is scope for future regulations to be made that will modify its application.

For non-transitional Pt 3A projects, where EARs were issued for a concept plan application, the concept plan can continue to be determined under Pt 3A (including subsequent modifications). If approved, future development will be determined under Pt 4 and may be carried out despite prohibitions under local planning instruments.

For all other potential Pt 3A projects or Pt 3A projects in the system — such as those that have not received EARs — Pt 3A will not apply. The project will have to be determined under Pt 4 of the Act. It will only be dealt with as SSD or SSI if the appropriate declaration is made by the minister or under a SEPP.

"Significant" projects

For projects lodged by the private sector and that may continue under Pt 3A, the PAC will determine the applications if they are deemed to be "significant" (ie, there are less than 25 submissions and council is not in opposition to the project) otherwise they will be determined under delegation.

The PAC will determine all "significant" projects lodged by the private sector. Most public infrastructure projects will be determined by the minister.[38]

Changes to PACs and JRPPs

Planning Assessment Commission (the PAC)

The involvement of the PAC in the planning assessment process has been increased. The PAC can be asked to do anything to which can be delegated to it under Act.[39] For this reason, the PAC membership may increase its members to up to nine.[40] Members can now only serve a maximum of two three-year terms.[41]

The Bill introduces a de-politicisation of rezoning of land for state significant development by requiring SSD projects that are wholly prohibited, and requires rezoning to now be within the jurisdiction of the PAC for approval of the rezoning and any development application.[42]

The Bill also deletes the ability for the Environmental Planning and Assessment Regulations 2000 to provide provisions for the circumstances in which public hearings are to be held by the PAC.[43] Additionally, the minister can request a review be conducted by the PAC in relation to any development with or without a hearing.[44] This means that public hearings for the PAC reviews will no longer be compulsory.

Joint Regional Planning Panels (JRPPs)

JRPPs as a consent authority will be limited to development in new Sch 4A, which overrides any current delegations,[45] namely:

- development with a capital investment value (CIV) of over $20 million (currently it is $10 million);[46]
- crown development with a CIV of over $5 million;[47]

- private infrastructure and community facilities with CIV of over $5 million, eg, education facilities, child care centres, and health service facilities;[48]
- eco-tourist facilities with a CIV of over $5 million;[49]
- extractive industries, waste management facilities or marinas that meet the designated development criteria for those facilities;[50]
- large coastal subdivisions or those within an environmentally sensitive area;[51]
- council development with a CIV of over $5 million or which includes development on land owned by the council (we note that this could potentially include road reserves and easements);[52] and
- other development with a CIV of between $10 million and $20 million if council has not determined it within 120 days for reasons other than the fault of the applicant.[53]

However, JRPPs will not determine applications in Sydney (where the Central Sydney Planning Committee has jurisdiction), or where the consent authority is not the council or for SSD.

The makeup of JRPPs (with three state and two local council appointees) will remain the same, except that the appointment of the state member as the chairperson must have the concurrence or deemed concurrence of the Local Government and Shires Association.

Section 82A internal reviews are will not be available following JRPP determinations.

What is still to come in relation to the new state significant regime?

A fair portion of the procedures relating to SSD will be contained in the regulations which are not before parliament, such as:

- the form and content of environmental impact statement;
- how declarations are to be made for state significant development; and
- what applicants must do in responding to objections made during the exhibition of the development.

The types of development and sites that will be classed as SSD or SSI will be declared in a SEPP shortly after the Bill is passed.

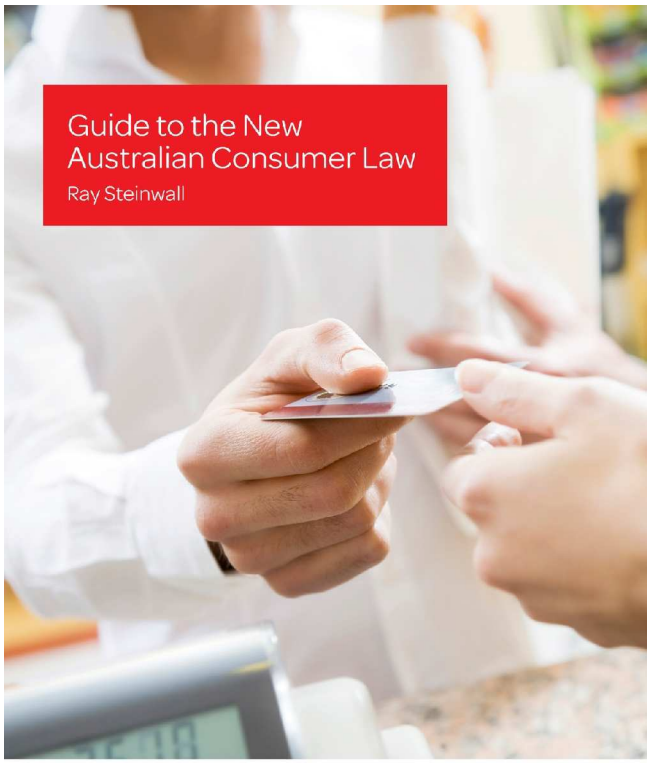
It is also likely that future regulations will be made to vary the savings and transitional provisions relating to Pt 3A.

Penny Murray,
Partner, and
Sonya Redman,
Solicitor,
Minter Ellison.

Footnotes

1. The full text of the Bill can be found at www.parliament.nsw.gov.au.
2. Proposed s 89C(2).
3. Proposed s 89C(3).
4. Department of Planning and Infrastructure, "Environmental Planning and Assessment Amendment (Pt 3A Repeal) Bill 2011: an overview", June 2011, p 3.
5. Department of Planning and Infrastructure, "Ministerial 'call in' for state significant development", policy statement, June 2011.
6. Proposed s 89C.
7. Proposed s 89D.
8. Proposed s 23.
9. Proposed s 78A(8A).
10. Proposed s 89J.
11. Proposed s 89D(1).
12. Proposed s 89D(2).
13. Proposed s 89F(1).
14. Above note 4 at p 2.
15. Proposed s 89F(4).
16. Department of Planning and Infrastructure, "Policy statement: state significant development — procedures", June 2011, p 2.
17. Proposed s 89H.
18. Proposed s 89E(3).
19. Proposed s 89E(5).
20. Proposed ss 98(4) and 98(5).
21. Proposed s 89I.
22. Department of Planning and Infrastructure, "Policy statement: proposed state significant development and infrastructure classes", June 2011, p 11–12, available at www.planning.nsw.gov.au.
23. Proposed s 115W.
24. Proposed s 115Z(3).
25. Proposed s 115Y(2).
26. Proposed s 115ZC.
27. Proposed s 115V.
28. Proposed ss 115ZK and 115ZJ.
29. Proposed s 115ZJ(1).
30. NSW Department of Planning factsheet, "Arrangements for projects remaining under Pt 3A pending its repeal", p 1.
31. NSW Department of Planning, circular PS 11-014, p 1.
32. Above note 31.
33. State Environmental Planning Policy (Major Development) 2005, cl 17(6).
34. The list of revoked projects and projects that remain under Pt 3A can be found at www.planning.nsw.gov.au.
35. Above note 33, cl 17(5).

36. Above note 33, cl 17(5).
37. Above note 31, p 2.
38. Above note 33 at p 3.
39. Amendment to s 23D.
40. Proposed Sch 3 cl 2(1) of the Environmental Planning and Assessment Act 1979.
41. Proposed Sch 3 cl 5(3) of the Environmental Planning and Assessment Act 1979.
42. Proposed s 89E(6).
43. Proposed deletion of s 23E(b) of the Environmental Planning and Assessment Act 1979.
44. Amendment to ss 80(6) and 80(7).
45. Proposed ss 23G(2A) and (2B).
46. Proposed Sch 4A cl 3.
47. Proposed Sch 4A cl 5.
48. Proposed Sch 4A cl 6.
49. Proposed Sch 4A cl 7.
50. Proposed Sch 4A, cl 8.
51. Proposed Sch 4A, cl 9.
52. Proposed Sch 4A, cl 4.
53. Proposed Sch 4A, cl 10.



LexisNexis
Butterworths 1911 to 2011

Prepare your business with this practical take-anywhere guide to the new Australian Consumer Law.

Australian
Environment
Review

Jones v Kaney — expert witness immunity abolished

Michelle Bradley *LAND AND ENVIRONMENT COURT OF NSW*

Courts are increasingly in need of expert assistance in order to deal with the specialised matters that come before them. This is especially true of courts that deal with complex environmental matters that can require a range of experts from engineers to ecologists. In order to encourage experts to give evidence in court, expert witnesses have historically been granted immunity from suit. Expert witness immunity protects experts from being sued as a result of evidence the expert gave in proceedings and in respect of out of court conduct, provided the conduct has a sufficient connection with the proceedings.[1] However, the justification for expert witness immunity has recently been called into question by the landmark decision of the Supreme Court of the United Kingdom in *Jones v Kaney* [2011] All ER (D) 346 (Mar); [2011] 2 WLR 823; [2011] UKSC 13, which abolished the immunity of expert witnesses from suit for breach of duty in that jurisdiction. In considering the rationale put forward by the House of Lords for the abolishment of the immunity of expert witnesses in the United Kingdom, the possible implications of the decision for Australia are explored.

Expert witness immunity

Witness immunity has a long history, and as early as the sixteenth century a disappointed litigant could not sue those who had given evidence in the hearing.[2] Witness immunity stems from a broader immunity from suit of all persons directly taking part in a trial. Lord Mansfield in *R v Skinner* (1772) 98 ER 529 (at p 530) stated that "neither party, witness, counsel, the jury, or Judge can be put to answer civilly or criminally, for words spoken in office."

Witness immunity is a "true immunity" from suit, and not just a protection for the purposes of the law of defamation.[3] The immunity is broad and extends to protect witnesses from other forms of action in tort,[4] such as claims that witnesses conspired to injure the litigant.[5] It does not matter that the disappointed litigant alleges that the witness acted negligently, deliberately or even maliciously, the immunity still stands.[6] The immunity also extends to preparatory steps for trial,[7] however, there must remain a connection with the evidence that is to be given in court.[8] Opinions not to be used in court proceedings given principally for advising the client on the merits of their claim will not be covered by the immunity.[9] Finally, the immunity covers the report or reports that an expert witness adopts as, or incorporates into, their evidence.[10]

Despite the breadth of the immunity, there are some limitations that have been held to apply. For example, the immunity has been held not to extend to disciplinary proceedings before professional tribunals where fitness to practice was in issue,[11] or to preclude prosecutions for perjury, contempt of court or perverting the course of justice.[12] In addition, the immunity for expert witnesses does not apply to advice given in a context that does not have a connection with the evidence that is to be given in court.[13]

The rationale for witness immunity is based on three main objectives:

1. the immunity of witnesses serves to encourage "freedom of expression" or "freedom of speech" so that the court will have full information about the issues in the case;[14]
2. the immunity protects witnesses who give evidence in good faith from being harassed by unjustified and vexatious claims by disgruntled litigants;[15] and
3. the immunity avoids a multiplicity of actions where the evidence would be tried again, undermining the finality of judgments.[16]

In addition to these objectives, the particular purpose served by the immunity of expert witnesses, as opposed to witnesses of fact, is to ensure that they are able to balance the duty that they owe to their client with the overriding and paramount duty that they owe to the court. It was noted in *Stanton v Callaghan* by Chadwick LJ (at [101]) that:

The public interest in facilitating full and frank discussion between experts before trial does require that each should be free to make proper concessions without fear that any departure from advice previously given to the party who has retained him will be seen as evidence of negligence. That, as it seems to me, is an area in which public policy justifies immunity. The immunity is needed in order to avoid the tension between a desire to

assist the court and fear of the consequences of a departure from previous advice.

Jones v Kaney[17]

Despite the public interest facilitated by the immunity, the Supreme Court of the United Kingdom in *Jones v Kaney* decided to abolish the immunity of expert witnesses.

The factual background of the case originated from a road accident on 14 March 2001 in which the applicant, Mr Jones, was injured. Mrs Kaney, the respondent and a consultant psychologist, was engaged to give expert evidence in the personal injury claim commenced by Mr Jones. Mrs Kaney initially prepared a report in which she expressed the view that Mr Jones was suffering from post traumatic stress disorder (PTSD). Mrs Kaney later resiled from this opinion in a second report in which she stated that Mr Jones did not have all the symptoms of PTSD, but was still suffering from depression and some of the symptoms of PTSD.

Mrs Kaney and the respondent's expert, Dr El-Assra, were then ordered to hold discussions and prepare a joint report. Dr El-Assra prepared the joint report, which Mrs Kaney then signed without amendment or comment. The joint report was highly damaging to the case of Mr Jones. It stated that Mr Jones' psychological reaction was no more than an adjustment reaction that did not qualify as PTSD. The personal injury claim was then settled for much less than it would have been based on Mrs Kaney's initial report.

A negligence claim was brought by Mr Jones against Mrs Kaney. It was initially struck out by Blake J on the ground that Mrs Kaney's evidence was subject to expert immunity (*Jones v Kaney* [2010] All ER (D) 131 (Jan); [2010] EWHC 61 (QB)). Because the case involved a point of law of general importance Mr Jones was permitted to appeal directly to the Supreme Court of the United Kingdom.[18] The Supreme Court, by a majority of five to two, abolished the immunity of expert witnesses from suit for breach of duty, but retained the absolute privilege that experts enjoy in respect of claims for defamation.

In a judgment, with which the majority agreed, Lord Phillips considered in turn the various justifications for expert immunity. Initially, Lord Phillips addressed whether abolishing the immunity would have a "chilling effect" on the supply of expert witnesses. In holding that there was no justification for this view, his Lordship noted that "[a]ll who provide professional services which involve a duty of care are at risk of being sued for breach of that duty. Those professionals customarily insure against that risk".[19] The risk of being sued in relation to the provision of expert evidence was held not to constitute "a greater disincentive to the provision of such services than does the risk of being sued in relation to any other form of professional service".[20]

Next, Lord Phillips addressed whether the immunity was necessary to ensure that expert witnesses give full and frank evidence to the court. In considering whether experts would be less likely to resile from opinions initially given if the immunity was removed, his Lordship stated that:

> An expert will be well aware of his duty to the court and that if he frankly accepts that he has changed his view it will be apparent that he is performing that duty. I do not see why he should be concerned that this will result in his being sued for breach of duty. It is paradoxical to postulate that in order to persuade an expert to perform the duty that he has undertaken to his client it is necessary to give him immunity from liability for breach of that duty.[21]

His Lordship went on to note that the removal of advocate's immunity, for example, had not resulted in any diminution of the advocate's readiness to perform their duty to the court.[22]

Finally, Lord Phillips held that the removal of the immunity would not result in vexatious claims for breach of duty or a multiplicity of suits. In justifying this view his Lordship considered it difficult for a lay litigant to mount a credible case that his expert witness had been negligent and that it was "a rare litigant who has the resources to fund such a claim going to throw money away on proceedings that he will be advised are without merit".[23] However, his Lordship did concede that the risk of vexatious claims from those convicted of criminal offences may be greater, but unless the client first succeeds in getting his conviction overturned on appeal, the claims would be struck out as an abuse of process.[24]

In agreeing with Lord Phillips that the immunity should be abolished, Lord Brown stated that:

> … the most likely broad consequence of denying expert witnesses the immunity accorded to them… will be a sharpened awareness of the risks of pitching their initial views of the merits of their client's case too high or too inflexibly lest these views come to expose and embarrass them at a later date.[25]

Also in agreement, Lord Collins noted that:

> The practical reality is that, if the removal of immunity would have any effect at all on the process of preparation and presentation of expert evidence (which is not in any event likely), it would tend to ensure a greater degree of care in the preparation of the initial report or the joint report.[26]

Lord Hope and Lady Hale were in dissent. It was held by Lord Hope that the lack of a secure principled basis for removing the immunity from expert witnesses, the lack of a clear dividing line between what was to be affected by the removal and what was not, the uncertainties that this would cause and the lack of reliable

evidence to indicate what the effects might be, would suggest that the wiser course would be to leave matters as they stand until the law commission or, if appropriate, parliament addressed the issue.[27]

In echoing the sentiment that the abolishment of the immunity is more a matter for the law commission or parliament, Lady Hale noted that:

> … it does not seem to me self-evident that the policy considerations in favour of making this exception to the rule are so strong that this Court should depart from previous authority in order to make it. To my mind, it is irresponsible to make such a change on an experimental basis.[28]

Implications for Australia

In contrast to the position in the United Kingdom, the immunity of expert witnesses has been reaffirmed in a number of recent Australian cases (*Sovereign Motor Inns Pty Ltd v Howarth Asia Pacific Pty Ltd*; *James v Medical Board of South Australia* (2006) 95 SASR 445; 245 LSJS 393; [2006] SASC 267; BC200606717; and *Commonwealth v Griffiths*).[29] In addition, the High Court in *D'Orta-Ekenaike v Victoria Legal Aid*, in obiter, confirmed the position of general witness immunity.

In *Commonwealth v Griffiths*, Mr Griffiths was convicted on the basis of a certificate stating the substance in his possession was a prohibited drug. On appeal, the conviction was overturned and a verdict of acquittal was entered on the basis that the testing of the substance had been manipulated. Mr Griffiths commenced proceedings against the commonwealth, who conducted the laboratory where the tests were done and the expert that did the testing. The New South Wales Court of Appeal held that the immunity protected both the commonwealth and the expert from being sued. In doing so, the Court of Appeal noted that:

> The immunity is founded ultimately in consideration of the finality of judgments… Accordingly, a trial based upon the negligent performance of [Mr Griffiths'] testing would involve the retrial, not only of the evidence given at trial but also of the preparatory steps taken to prove an essential ingredient of the charge brought against Mr Griffiths, namely, that the substance was the prohibited substance.[30]

Special leave to appeal to the High Court was refused on the basis that:

> [A] case in negligence, even if it could otherwise in law be made out… could not succeed if the witness immunity doctrine is engaged in the circumstances of [the] case.[31]

In considering whether Australia would be likely to follow the United Kingdom's lead and abolish expert immunity it is important to note that, unlike the United Kingdom, Australia has chosen to retain advocate's immunity. Throughout the judgment of *Jones v Kaney*, the experience and consequences of the removal of the immunity from advocates was held up as a model for the negligible likely adverse impacts of the abolishment of the immunity for experts, particularly given that the removal of immunity from advocates had not resulted in a flood of vexatious claims or diminished the ability of advocates to perform their duty to the court in the United Kingdom.[32]

Yet this comparison offers little comfort in Australia. In *D'Orta-Ekenaike v Victoria Legal Aid*, the majority of the High Court declined to follow the decision of the House of Lords in *Arthur JS Hall & Co v Simons* in restricting the immunity of advocates. The central justification for retaining advocate's immunity was the principle "that controversies, once resolved, are not to be reopened except in a few narrowly defined circumstances".[33] The concern over the finality of judgments is equally applicable to expert's immunity because abolishing the immunity would create an exception to that tenet, in that there would be re-litigation of a controversy as a result of what had happened during, or in preparation for, the hearing.

Nevertheless, as has been noted by Bergin J in a recent paper, the comparison of advocates and experts is somewhat "paradoxical, particularly when the Code of Conduct exhorts experts not to take on the role of an advocate".[34] One of the main differences between experts and advocates is that the expert owes an overriding duty to the court to act wholly impartially when giving evidence, which can conflict with the duty that he or she owes to his or her client. This distinction supports the argument that once the expert is giving evidence in court, or preparing to do so, he or she can no longer be held liable for breach of duty to his or her client.[35]

The court in *Jones v Kaney* found that there was no conflict between the duty of the expert to the client and the duty to the court, as the expert agrees with the client that he or she will perform the duties that he or she owes to the court. Practically, however, it is difficult to see how these two duties will not result in tension, thereby resulting in the expert being less candid in their opinions given in joint conferences or in open court, especially where to do so would harm the interests of the party retaining him or her.

In addition, in opening experts up to liability for breach of duty, and the consequential increase in insurance premiums, there is a risk that experts will be reluctant to provide their services to the court. This disincentive to the provision of services was dismissed in *Jones v Kaney* because it was considered no greater than in any other professional service and because the supply of experts was considered to exceed demand in most fields. However, the risk of limiting the supply of experts is especially concerning for courts that deal with

environmental matters as it has been noted that there is a "limited pool of experts" to begin with.[36]

The High Court noted in *D'Orta-Ekenaike v Victoria Legal Aid*, in relation to the retention of immunities, that "what is at stake is the public interest in the 'effective performance' of its function by the judicial branch of government".[37] In order to fulfil this public interest and effectively perform, courts need candid expert assistance. In order for processes like joint conferencing and concurrent evidence to work effectively and to facilitate the giving of expert evidence, experts need to be unconstrained and, if factual assumptions change, know that they can resile from a previously held and expressed opinion without fear of being sued. The retention of the immunity, therefore, is in the public interest: to ensure the proper and efficient administration of justice.

If the immunity is to be removed in Australia, one proposal put forward by Bergin J in order to reduce the uncertainties that would result, is to have panels of experts so that:

> When an issue arises in litigation upon which the court will require expert assistance a witness or witnesses in the relevant specialty could be drawn by ballot (or some other method) from the panel. The expert or experts so drawn would then provide the relevant reports, take part in the relevant meetings and give concurrent evidence, if that process is appropriate in the particular case. There is also the need to consider the necessity for pre-litigation advice. It may be worth considering a prelitigation panel consisting of experts who are willing to provide advice on the merits of particular cases.[38]

The aim of such a system is to establish a regime in which the expert's only duty is to the court, thereby reducing the liability of experts to their clients and diluting adversarial bias.[39]

Conclusion

There is no doubt that the immunity of expert witnesses in Australia will very soon be tested by a litigant claiming breach of duty by his or her expert. If Australian courts decline to uphold the immunity there will be ramifications not only for how experts conduct themselves in preparation for and during proceedings, but also for the administration of justice in courts that rely so heavily on expert assistance.

However, given the strong policy justifications for the retention of the immunity it is unlikely, in my view, that courts in Australia would decide to abolish the immunity for experts. This is particularly so, given the refusal of the High Court to abolish advocate's immunity.

Michelle Bradley,
Tipstaff to Justice Rachel Pepper,
Land and Environment Court of New South Wales.

Footnotes

1. *Commonwealth v Griffiths* (2007) 70 NSWLR 268; 245 ALR 172; [2007] NSWCA 370; BC200710981 at [42] and [84].
2. *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; 214 ALR 92; [2005] HCA 12; BC200500919 at [39].
3. *Arthur JS Hall & Co v Simons* [2002] 1 AC 615 at 740; [2000] 3 All ER 673; [2000] 3 WLR 543; [2000] UKHL 38 as cited in *Jones v Kaney* [2011] All ER (D) 346 (Mar); [2011] 2 WLR 823; [2011] UKSC 13 at [1].
4. *Jones v Kaney* [2011] All ER (D) 346 (Mar); [2011] 2 WLR 823; [2011] UKSC 13 at [12].
5. *Cabassi v Vila* (1940) 64 CLR 130; [1941] ALR 33; (1940) 14 ALJR 336; BC4100010; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; 214 ALR 92; [2005] HCA 12; BC200500919 at [39].
6. Above note 2 at [39].
7. *Watson v M'Ewan* [1905] AC 480; [1904-7] All ER Rep 1.
8. Above note 1 at [84].
9. Above note 1 at [84]; *Stanton v Callaghan* [2000] 1 QB 75; [1998] 4 All ER 961; [1999] 2 WLR 745 per Chadwick LJ at [100]–[102].
10. *Stanton v Callaghan*, above note 9, at [100]–[102].
11. *Sovereign Motor Inns Pty Ltd v Howarth Asia Pacific Pty Ltd* [2003] NSWSC 1120; BC200307497; *Meadow v General Medical Council* [2007] QB 462; [2007] 1 All ER 1; [2006] EWCA Civ 1390.
12. Above note 1 at [46].
13. Above note 1 at [84].
14. Above note 2 at [41].
15. Above note 4 at [15].
16. Above note 2 at [42].
17. Above note 4.
18. Above note 4 at [1].
19. Above note 4 at [52].
20. Above note 4 at [53].
21. Above note 4 at [56].
22. Above note 4 at [57].
23. Above note 4 at [59].
24. Above note 4 at [60].
25. Above note 4 at [67].
26. Above note 4 at [85].
27. Above note 4 at [173].
28. Above note 4 at [190].
29. Leave to appeal to the High Court was refused, see *Griffiths v Ballard* [2008] HCATrans 227.
30. Above note 1 at [93].
31. Griffiths v Ballard [2008] HCATrans 227 per Gummow ACJ.

32. Above note 4 at [57]; Justice P A Bergin, *The Expert's Lament* (paper presented at the Land and Environment Court of New South Wales Annual Conference 2011, Sydney, 5–6 May 2011) at [53].
33. Above note 2 at [45].
34. *The Expert's Lament*, above note 32.
35. Above note 4 at [47].
36. Justice Pepper, *Expert Evidence in the Land and Environment Court* (speech delivered at Australian Professional Certificate in Expert Evidence for the Land and Environment Court, Sydney, 23–25 May 2011) at [3].
37. Above note 2 at [42].
38. *The Expert's Lament*, above note 32 at [58].
39. *The Expert's Lament*, above note 32 at [60].

Recently cited in the NSW Court of Appeal, **Austin and Black's Annotations to the Corporations Act** is everything you need to navigate the corporate compliance and litigation landscape.

Features:

- Now containing over 800 annotations and growing fast
- Written by two leading experts in the field, R.P. Austin and A.J. Black

View a demo or a sample chapter at www.lexisnexis.com.au/abaca
or call Customer Relations on 1800 772 772

LexisNexis

© 2011 Reed International Books Australia Pty Ltd (ABN 70 001 002 357) trading as LexisNexis. LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., and used under licence.

Australian
Environment
Review

IN-HOUSE EDITOR: Banita Jadroska PUBLISHER: Veronica Rios
SUBSCRIPTION INCLUDES: 10 issues per year EDITOR DIRECT: PO Box 976 Civic Square ACT 2608
EDITOR EMAIL: banita.jadroska@lexisnexis.com.au SYDNEY OFFICE: Locked Bag 2222, Chatswood Delivery Centre NSW 2067 Australia
TELEPHONE: (02) 9422 2222 FACSIMILE: (02) 9422 2404 DX 29590 Chatswood www.lexisnexis.com.au
ISSN 1035-137X Print Post Approved PP 255003/06151 Cite as (2011) 26(5) *AE*
This newsletter is intended to keep readers abreast of current developments in the field of environmental issues. It is not, however, to be used or relied upon as a substitute for professional advice. Before acting on any matter in the area, readers should discuss matters with their own professional advisers. This publication is copyright. Except as permitted under the *Copyright Act 1968* (Cth), no part of this publication may be reproduced by any process, electronic or otherwise, without the specific written permission of the copyright owner. Neither may information be stored electronically in any form whatsoever without such permission. Inquiries should be addressed to the publishers.
Printed in Australia © 2011 Reed International Books Australia Pty Limited trading as LexisNexis ABN: 70 001 002 357
Printed on 100% recycled paper.