COUNTRY REPORT: AUSTRALIA
Environmental Developments Remain Highly Politicized in Australia

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Introduction

In 2012, environmental developments in Australia have centered on the operation of the *Clean Energy Bill* (2011), with the Government deciding to scrap the floor price for carbon in Australia and link its markets with those in the European Union (EU). At the same time, it appears that the *Clean Energy Act* has already had a positive impact on reducing carbon emissions. Other developments include the controversy generated by the presence of the super-trawler, Abel Tasman, in Australian waters, and the consequential amendment of the *Environment Protection and Biodiversity Conservation Act* (1999) (Cth) to give the Minister additional powers to deal with the super-trawler. Finally, the Federal Government released the long-awaited draft *Biosecurity Bill* (2012) for public comment.

Policy Developments

The Carbon Floor Price

On 1 July 2012, Australia's Carbon Pricing Mechanism came into operation. At its inception, this mechanism was to have been based on a fixed price for each ton of carbon emitted, until 1 July 2015. After that date the regime would have converted to a cap and trade emissions scheme where the price was assumed to be market-based. Nevertheless, the scheme also provided that the Government would enact regulations to ensure a minimum, or 'floor price', for carbon of $15 per ton from 2015-2018. The Government reasoned that a floor price would ensure that polluters paid a minimum for the 'privilege of polluting' and at the same time would encourage industry to invest in cleaner and cheaper sources of energy.

The floor price, however, was unpopular with industry, environmental groups and some economists. Industry was concerned with the administrative and financial burdens it would place on them, while economists and environmental groups noted that when the floor price

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was phased out, industry could access inexpensive Clean Development Mechanism credits, perhaps as cheap as $3.60 per ton.[1] Were this to occur, the price of carbon would fall so low that it would not act as an incentive to find cleaner energy. The death knell for the floor price came when Rob Oakeshott, an independent MP in the Federal Parliament, indicated that he no longer supported the establishment of a floor price, leading to the Government abandoning the regulations.

As an alternative, the Government is introducing two initiatives: first a quantitative restriction on the amount of CDM credits that Australian industry can access; and second, the linking of Australia's carbon markets with the European Union Emissions Trading Scheme (ETS). With respect to the first initiative, Australian industry can now use CDM credits for up to 12.5% of their total emissions, reduced from 50% under the previous scheme. This will have the effect of stopping the price of carbon in Australia falling too low and otherwise providing a disincentive for investments in clean energy. The second initiative, the linking of Australian and European markets, will not only allow Australian industry to access European permits, but will also allow the Australian market to sell Australian permits in the largest carbon market established so far. This development potentially benefits those who can generate carbon credits, by for example, planting trees and creating carbon sinks. Another consequence of linking the two markets is that it also links the Australian price for carbon with the European price. At the moment, European permits are currently trading at approximately $9.80 per ton, but eighteen months ago the price was approximately $20 per ton. A price under $15 per ton makes acquiring carbon credits on the market cheaper for Australian industry than the floor price which would have applied until 2018. At the same time, the quantitative limitation on CDM credits means that Australian industry will pay a sufficiently high price for carbon to encourage investment in cleaner energy.

Drop in Emission Intensity

Media reports indicate that the *Clean Energy Act* has already had a positive impact on reducing the intensity of carbon emissions in the first few months of its operation. The Australian Energy Market Operator[2] has noted that in the first quarter of the operation of the new scheme, electricity sold to users on Australia's eastern seaboard generated approximately 7.6% fewer carbon emissions for each megawatt of power than had

[1] The Clean Development Mechanism allows emission reduction projects in developing countries to generate Emission Reduction Units that can then be traded. See *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, Article 12.
[2] The Australian Energy Market Operator (AEMO) is charged with overarching responsibility for the functioning of the electricity and gas markets in Australia. See further http://www.aemo.com.au/.

previously been generated for the same quarter in 2011. The Minister for climate change, Greg Combet, noted that while the carbon price is a 'key driver' of these changes, it is not the only factor at work. Other significant developments include: the fact that coal-fired power stations are being phased out; a reduced demand for electricity in some production sectors; and the fact that industry is on track to meet its renewable energy targets.

Super-Trawler Abel Tasman

On 30 August 2012 the super-trawler Margiris sailed into South Australian waters. It was intended that the Margiris would undergo maintenance and repairs in order to be licensed as an Australian-flagged boat in accordance with the *Shipping Registration Act* (1981) (Cth). The registration was finalized on the 5 September 2012 and at the same time the Margiris was renamed the 'Abel Tasman'. The owners of the Abel Tasman had expected that the Australian Fisheries Management Authority (AFMA) would give final approval for the super-trawler to take up to 18,000 tons of fish from Australia's southern oceans. In Australia, the allocation of fishing rights are regulated primarily by two pieces of legislation, the *Fisheries Administration Act* (1991) and the *Fisheries Management Act* (1991) (Cth). The former establishes the AFMA as a statutory authority to administer fish resources in the Australian Fishing Zone (AFZ), while the latter sets out operational provisions with respect to the management of fish stocks in the AFZ. Section 7 of the *Fisheries Administration Act*, and section 32 of *Fisheries Management Act*, charge the AFMA with the determination and allocation of fishing rights. In effect, this means that the AFMA sets the total allowable catch within the AFZ and grants licenses and fishing permits in that regard. Section 6(b) of the *Fisheries Administration Act* notes that in carrying out its functions, the AFM should ensure that:

> '…the exploitation of fisheries resources and the carrying on of any related activities are conducted in a manner consistent with the principles of ecologically sustainable development (which include the exercise of the precautionary principle), in particular the need to have regard to the impact of fishing activities on non-target species and the long term sustainability of the marine environment.'

The owners of the Abel Tasman contend that they commenced negotiations with the AFMA in early 2012 and received assurances that their proposal to fish in Australian waters was approved.

However, from the moment the Abel Tasman arrived in Australia, it generated a storm of controversy. Environmentalists, recreational fishers and politicians questioned the decision to allow the super-trawler access to Australian waters. Environmental groups, such as Greenpeace, contend that super-trawlers are not only larger than conventional trawlers, but that their operation has contributed to the collapse of fish-stocks in many parts of the world.[3] The AFMA on the other hand maintains that its determination of the allowable catch for the Abel Tasman at almost 18,000 tons is conservative and is based on the best available science. Notwithstanding the stance of the AFMA, Tony Burke, the Minister for Sustainability, Environment, Water, Population and Communities, sought legal advice on what powers he had to intervene. Although details of the advice have not been made public, Tony Burke openly acknowledged that he was cautioned he could not overturn the decision of the AFMA. At the same time, Jo Ludwig, the Minister for Agriculture Fisheries and Forestry, noted that from a fisheries perspective, he himself also did not have power to interfere with the decision of the AFMA.

In response, the government passed the *Environment Protection and Biodiversity Conservation Amendment (Declared Commercial Fishing Activities) Act* (2012) (Cth) that introduced section 390SD into the *Environment Protection and Biodiversity Conservation Act* (1999) (Cth). The new legislation gives the Environment Minister, in conjunction with the Fisheries Minister, the power to make an interim declaration for 60 days with respect to certain commercial fishing activities. In accordance with these additional powers, on 20 September 2012, Tony Burke announced that he had made the *Interim (Small Pelagic Fishery) Declaration* (2012), precluding the Abel Tasman from fishing in Australian waters for up to two years.[4] The *Declaration* does not revoke the fishing permit issued by the AFMA. Rather it gives the Government time to undertake additional assessments of the environmental impact of the fishing activities. In accordance with s390SE of the *Environment Protection and Biodiversity Conservation Act*, the Minister undertook extensive consultation with those potentially affected by his decision and on 20 November 2012 made a final *Declaration* extending the ban for two years. In the meantime, the owners of the Abel Tasman are keen to resume fishing as soon as possible and have offered to reduce their fishing take.

[3] See Greenpeace, '10 Frightening Facts About Super Trawlers' (available at http://www.greenpeace.org/australia/en/news/oceans/top-10-facts-about-super-trawlers/).
[4] T. Burke, 'Interim (Small Pelagic Fishery) Declaration 2012' (available at http://www.environment.gov.au/coasts/fisheries/pubs/small-pelagic-interim-declaration.pdf).

Legislative Developments

New Biosecurity Bill for Australia

In July 2012, the Federal Government started releasing portions of the draft *Biosecurity Bill* (2012) for public comment. The *Bill* is designed to replace the *Quarantine Act* (1908) (Cth), that is now more than 100 years old. The release of the draft follows two recent reviews of Australia's quarantine regime, or biosecurity, as it is now known. The first review was conducted under the auspices of Professor Narin, and published in 1996 as *Australian Quarantine: A Shared Responsibility*.[5] The second review was conducted under the guidance of Roger Beale, and pubished in 2008, as *One Biosecurity, A Working Parthership* (*Beale Review*). The *Beale Review* stressed the importance of a seamless and cross-jurisdictional approach to biosecurity and acted as catalyst for the draft *Biosecurity Bill*.[6] Upon release of the *Bill*, the Government expressed the view that: 'The new legislation is intended to make Australia's biosecurity system more responsive and streamlined, enabling the Australian Government to better manage the risks of animal and plant pests and diseases entering, establishing, spreading and potentially causing harm to the Australian population, the environment and economy'.

The draft *Bill* reaffirms Australia's appropriate level of protection as very low, but not zero. It provides more flexible and up-to-date regulatory mechanisms including compliance and enforcement tools, such as enforceable undertakings. Importantly, the *Bill* will establish an Inspector General of Biosecurity as an independent statutory agency. This agency will review the functioning of the Director of Biosecurity, but not the merits of decisions made by the Director.

The *Bill* is anticipated to be tabled into Parliament before the end of 2012.

[5] M. Nairn *et al*, *Australian Quarantine, A Shared Responsibility* (1996) Department of Primary Industries and Energy, Canberra (available at http://www.daff.gov.au/__data/assets/pdf_file/0009/111969/nairn_report.pdf).

[6] R. Beale *et al*, *One Biosecurity, A Working Partnership* (2008) Commonwealth of Australia (available http://www.quarantinebiosecurityreview.gov.au/report_to_the_minister_for_agriculture_fisheries_and_forestry).

Recent Cases

A significant case decided by the Land and Environment Court of New South Wales in 2012 was *Barrington-Gloucester-Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure* [2012] NSWLEC 197.[7] The case was brought by the Environmental Defenders Office of New South Wales on behalf of the plaintiffs and involved a legal challenge to the approval of the Gloucester Gas Project. The project is a large one that encompasses 110 coal seam gas wells along a 100 kilometer pipeline. The plaintiff's concerns largely centered on the risks of water contamination, especially with respect to groundwater, as the latter lacked comprehensive data.

One of the points of appeal was whether the Minister correctly formulated and properly considered the precautionary principle with respect to the project. The court noted, that although the precautionary principle is not specifically referred to in the part of the *Environmental Planning and Assessment Act* (1979) (NSW) that was relevant to the approval in question, if the Minister does not consider principles of ecologically sustainable development (ESD), including the precautionary principle, 'the failure may lead to an inference that he or she failed to consider the public interest…'.[8] However, the court also noted with approval statements in paragraph 241 of the earlier case, *Australians for Sustainable Development Inc v Minister for Planning* [2011] NSLEC 33, that the need to consider principles of ESD does not mean that the court, on judicial review, can also conduct a merits review or 'hold decisions invalid merely because in the court's view insufficient weight was given to the principles, or because in the court's view incorrect results were reached in light of the principles'.

Accordingly, the court is only obliged to consider principles of ESD, including the precautionary principle, at a high level of generality.[9] In order for the decision-maker to be bound to consider ESD and its principles at a more specific level, the legislation must expressly or impliedly oblige this action.[10] In the case before the court, there was nothing that would derogate from this view, as it was up to the decision-maker to determine the

[7] *Barrington-Gloucester-Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure* [2012] NSWLEC 197 (available at http://www.austlii.edu.au/au/cases/nsw/NSWLEC/2012/197.html). Points of claim made by the Environmental Defenders Office are available at http://www.edo.org.au/edonsw/site/pdf/casesum/110705bgspa_points_of_claim.pdf.
[8] *Barrington-Gloucester-Stroud Preservation Alliance Inc vs Minister for Planning and Infrastructure*, paragraph 160.
[9] Ibid, paragraph 171.
[10] Ibid, paragraph 173.

extent of scientific uncertainty, and the proportionate response.[11] The reaction of the Environmental Defenders Office sums up the significance of the case and highlights gaps in the planning system operating in New South Wales:

> 'The [Land and Environment Court] was satisfied that the precautionary principle was considered by the [decision-maker] and that an adaptive management approach has been taken through the conditions. However,…In our view, it is crucial that…a decision-maker should be required not to just to *consider* ESD but be required to protect the environment and act consistently with ESD principles in approving a development.'[12]

A Critical Consideration of Recent Domestic Developments

From this Report, it is clear that a number of environmental matters remain highly politicized in Australia. The prime example is the carbon debate that is still coloured by the acrimonious atmosphere in Federal politics.

The overturning of the floor price for carbon and concomitant linking of Australia's carbon markets with the EU have largely been seen as a positive development. Certainly, the business lobby has welcomed the move. However, Tony Abbot, the leader of the opposition, remains committed to repealing the Clean Energy Acts and overturning the entire carbon market mechanism. The stance of the Coalition is that should Australian industries purchase emission permits from the EU carbon market, they would be acquiring something which would be valueless once the Coalition repeals the Clean Energy legislation and dismantles Australia's carbon emissions trading scheme. Yet, political commentators have noted that linking Australia's scheme with the ETS might in fact make it more problematic for the Coalition to dismantle Australia's scheme due to strong international linkages and the difficulty of unravelling these connections.

Another action that has been criticised as broadening political interference was the decision of Tony Burke, the environment minister, to introduce legislation into Federal Parliament with respect to the Abel Tasman. While environmental groups hailed the legislation and the *Interim (Small Pelagic Fishery) Declaration* (2012) as a victory, political commentators noted that the passage of the legislation and the interim banning orders have the potential to destabilise Australia's fishing industry and the decision-making processes of the AFMA that

[11] Ibid, paragraph 177.
[12] Environmental Defenders Office, *Weekly Bulletin,* August 31, 2012, No. 775 (available at http://www.edo.org.au/edonsw/site/bulletin/bulletin775.php#01).

are based on sound science. One element of debate focuses on why it was necessary for Parliament to pass additional legislation to prop up the Minister's existing powers. Section 6(b) of the *Fisheries Administration Act* (1991), for example, already provides that the AFMA should be guided by the precautionary principle. Yet, the Minister for the environment and the Minister for fisheries were both advised that, under existing environmental and fisheries legislation, neither could stop the super-trawler on the basis of the precautionary principle.

As already noted, the advice given to the ministers was not publically released. However, it is likely to relate to the science-based foundations of the AFMA in setting catch limits. If the AFMA had set quotas for the Abel Tasman based on the best available science, there would be no need to invoke the precautionary principle; for the latter would only be triggered by uncertainty in scientific data. In this regard, the AFMA would undoubtedly argue that the science was not uncertain; hence, there was no need to invoke the precautionary principle. The Greens Party however, maintains that the science is incomplete, because research has not been carried out in small pelagic fisheries to evaluate the impact on fishing stocks of super- trawlers. This stance contrasts with the position of the Commonwealth Fisheries Association that has accused the government of ignoring the science and politicizing the matter.[13] The furore created by the Abel Tasman highlights that the boundaries between the best available science and the operation of the precautionary principle are still evolving and that governments may need to enact legislation and/or issue policy documents that set out a common understanding of how the principle is to operate in practice. The need for legislative elucidation was also noted by the court in *Barrington-Gloucester-Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure*, a case that has been discussed above.

The draft *Biosecurity Bill* (2012) is designed to operate as framework legislation with much of the detail being fleshed out by policy and regulations. Accordingly, interest groups have found it difficult to comment on the potential effectiveness of some of the *Bill*'s provisions. However, it appears that the important role that biosecurity plays in protecting Australia's natural environment from invasive alien species has not received the prominence it deserves. The *Beale Review*, for example, noted that the environment should be given equal consideration to agriculture, stressing that more effort is required that reflects 'the nature of the incursion risk'.[14] Yet, apart from one or two isolated examples, such as the

[13] B Backham & L. Vasek, 'New Laws Will Curb Super-trawler from Fishing in Australian Waters for at Least Two Years', *The Australian,* 11 September 2012 (available at http://www.theaustralian.com.au/national-affairs/new-laws-will-curb-super-trawler-from-fishing-in-australian-waters-for-at-least-two-years/story-fn59niix-1226471776823).
[14] Beale *et al* (supra note 6), XXIII.

regulation of ballast water, the *Bill* does not fully engage with the interlinkages that connect invasive alien species, biosecurity and the environment. In particular, the *Beale Review* recommended that an independent statutory authority called the National Biosecurity Authority be established to coordinate and manage biosecurity risks.[15] Yet, the Federal Government appears reluctant that the Department of Agriculture, Fisheries and Forestry (DAFF) relinquish its hold over biosecurity. Accordingly, the draft *Bill* continues to place Australia's biosecurity within DAFF instead of an independent statutory authority.[16]

[15] Ibid, X.
[16] Invasive Species Council, *Exposure Draft of the Biosecurity Bill 2012: A Submission from Environment NGOs* (2012) Unpublished – copy on file with author) 2012, at 8, 21 and 26.