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Recent Developments in Australian Environmental Law and Policy

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Australia's Environmental Trends

In February, the Australian Bureau of Statistics released the comprehensive collection of data on our national environmental performance called 'Australian Environment: Issues and Trends'.[1]

It provides a compendium of facts about the Australian environment and where it is heading. Sadly, generally the trend continues to be worrying even in the face of complaints that our environmental rules are too restrictive for property owners, particularly farmers. Critical among the issues facing Australia is the decline of biodiversity, with the statistics showing increasing numbers of species categorised as 'extinct', 'vulnerable' and 'endangered' within the terms of the *Environment Protection and Biodiversity Conservation Act* (EPBCA). No amount of 'spin' can hide the fact that declines continue, and are likely to be made worse with climate change.

Related to this is the pressure of population and consumption statistics upon the environment. Among the important debates that are emerging is that about Australia's population policy (or lack of one). Part of this is about the link between population growth and the decline in biodiversity.

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[1] Available at www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4613.0ContentsJan2010?opendocument&tabname=Summary&prodno=4613.0&issue=Jan 2010&num=&view=.

Population, Property and Biodiversity

The Australian Conservation Foundation (ACF) has taken the interesting step of seeking to list human population growth as a threatening process under the EPBCA. This list includes human induced climate change, and processes like weed invasion or land clearing. History would suggest that such a listing has a political rather than legal effect. Officially it could trigger the development of a threat abatement plan.[2]

The action has put renewed focus on the population issue (though one wonders why the ACF did not also propose per-capita consumption of resources alongside population, to highlight the fact that it is how we consume as well as how many of us there are consuming that is the threat). If the nomination is accepted by the department, this will trigger a scientific study of the link between population and biodiversity loss, which may lead to a listing.

As a contrast to the ACF action, farmers have been pressing a point that laws to protect biodiversity (and other environmental laws) are effectively undermining their property interests. The National Farmers' Federation submission to the Senate Committee Inquiry on Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures claims that property rights are being stripped away through a range of government interventions to help conserve water and land. The submission seeks full compensation for any reduction of effective rights.[3]

What seems to be missing from the property rights discussion is consideration of how the granting of tradeable water rights in Australia has provided many farmers with significant additional rights (often with substantial economic value) over the last decade. What has attracted the attention of many is the plight of one farmer, Peter Spencer, who staged a 52 day hunger strike over these issues. This is one part of his long-running campaign to seek compensation involving many cases (and some quite strong criticisms from the courts).

In recent weeks the High Court considered the issue of compensation for erosion of property rights under the Australian constitution. For Mr Spencer and other farmers

[2] Available at www.acfonline.org.au/articles/news.asp?news_id=2749.
[3] Available at www.nswfarmers.org.au/__data/assets/pdf_file/0008/62657/Submission_to_Senate_Inquiry_190310.pdf.

who are seeking compensation for derogation of their rights, the decisions are not heartening. In *Arnold and Ors v Minister Administering the Water Management Act* 2000[4] some farmers sought compensation for reduction of their water entitlements, but the court found that there was no obligation for States to pay compensation even for resumption of interests. The issue of rural property rights is going to continue to be contested, at least until governments find better ways of funding conservation over private lands so that they can become less reliant on regulation to force unwilling owners to carry the costs of conservation and restoration[5]. Whilst strong control over irresponsible behaviours is essential, our country is finding that we need to create better mechanisms to promote positive actions, and the laws we have are not proving sufficient to this task.

This brings us to water law and policy, where new developments are many. The most significant development is that it has rained as it has never rained before over substantial parts of Australia, moving us rapidly from record drought conditions to record floods!

'Water is War'

This heading is the title of a workshop recently held at our University, bringing together researchers from a range of disciplines at our university. Sadly, there is a degree of truth in the title. Under Australia's uniquely 'marketised' National Water Initiative, water rights are tradeable but the volumes delivered are dependent upon administrative decisions about the available flows after environmental requirements are met. The arrangements are complex, and sustained drought has made them very contested. Some recent developments illustrate this.

The mechanism for bringing extraction into alignment with the reduced availability due to climate change has been the buyback of extraction rights. Whilst record rains have fallen in the north, there are questions about the volumes that will make it to the Southern outlet to the sea (and the cities and towns along the way). Only a third of the water that falls in the North may make it even into the centre of the system, due to extractive rights that are already granted.

[4] [2010] HCA 3.
[5] Our Centre recently prepared a report on the policy and financing issues of landscape conservation for the Victorian Government and are happy to provide copies to interested colleagues.

The key to improving this situation is the buyback of large upstream water licenses. The recent case of *Munya Lake Pty Ltd Ors v. The Chief Executive: The Department of Natural Resources and Water*[6] has made it clear that the Commonwealth can purchase water rights upstream, without the necessity of purchasing the property with which these are associated. This frees up the potential for large-scale buybacks under the Australian government's $3.1B scheme. Already the owners of one of the largest water right holders, whose entitlements exceed the volume of Sydney Harbour, have indicated that they are prepared to sell substantial water entitlements back to the government (after having been granted them only a few years ago, for a very small fee).

This is only one of the many hot topics in water law. With the transfer of planning authority for our major river system, the Murray Darling, to the Commonwealth now complete, we are soon expecting to see a new Basin Plan, and a new (probably more constrained) system of 'diversion' rights. This occurs against the backdrop of a great deal of legal activity.

This plan is being prepared under the Water Act 2007. It is intended to identify limits to extraction and risks, and set legally enforceable frameworks within which States will set their own water management arrangements. It will also re-set the frameworks for interstate water trading, which has been a contested issue between some of the states.

There is likely to be conflict between the Australian government, farmers and others over the draft plan, and most likely between states. The time plan for the production of the new plan is breathtakingly short, with its intended announcement in mid 2010. Farmers groups are complaining that the opportunity for consultation is too limited, given the impact that this plan will have. They are being joined in this complaint by water catchment authorities, and some local governments. This is occurring against the backdrop an opposition proposal to conduct a referendum to take control of this river system if State governments do not voluntarily relinquish their constitutional control before mid 2012. Needless to say this is a contested political topic, which may have significant constitutional implications.

[6] [2010] QSC 58 (3 March 2010).

Not all of the institutional and legal pressure is towards increased extraction. There is growing legal movement, reflecting political pressure, from environmentalists. The public interest Environmental Defender's Office (EDO) is leading the charge with its litigation.

In January the EDO claimed that the NSW Minister for Water is obliged legally to review the licenses that have been issued for our largest hydro-electricity scheme, the Snowy Mountains scheme. Working on behalf of an environmental and (some) farming interests, the EDO claims that under a new requirement for a mandatory environmental review of the scheme, that review will be invalid unless the issues of sustainability are properly taken into account. This is another interesting example of how environmental administrative law is increasingly central to the political and legal dynamic of sustainability in Australia. This is occurring in part due to the vacuum in the Australian legal system arising from the absence of any fundamental bill of rights or environmental (or social) charter.

An interesting development is a claim by Aboriginal people for indigenous water rights in Northern Australia. This is a political movement, but it 'feeds into' a significant reworking of water rights in practice across large parts of Australia, particularly as the allocation of water occurs through a process of administrative decisions ratified by Ministerial action (even where private extractive rights exist). Such a development is also interesting given the failure of water allocation arrangements to provide Aboriginal people with substantial 'as of right' allocations of newly created water property.

The interaction between water for households or farming and other demands is also attracting increasing attention. Notably (as in some other countries like the USA), water conflict related to the extraction of fossil fuels is re-emerging as a significant issue. This is because mining and gas extraction can either disrupt groundwater, or because the mining process can contaminate water with salt or other pollutants. A recent 'win' for farmers and environmentalists has interesting potential implications for mining, but also for property rights more generally. In early February the judgement in *Brown & Anor v Coal Mines Australia; Alcorn & Anor v Coal Mines Australia Pty Ltd*[7] was handed down by the NSW Supreme Court. Once again, this was the use of an administrative action in an attempt to create legal and political

[7] [2010] NSWSC 143 (5 March 2010).

pressure to better consider environmental concerns. Those opposing mining were able to oblige the Minister to expand the range of people and interests considered in granting a mining exploration license across private lands. The litigants were able to prove an error in law, requiring that the Minister to expand the range of interests notified of a potential determination. Whilst this will not radically alter the dominance of extractive considerations in such decisions, it is interesting as another example of the range of laws being used to shift power relations in environmental disputes.

Some Brief Comments

Most of the news above relates to rural landscapes and natural resource issues. For those with other interests, the following are brief indications of some developments.

- After a great deal of political bargaining between environmental and business interests, the national Building Ministers' Forum of the Council of Australian Governments has approved changes to the national building code to require six-star energy efficiency in new residential buildings. We wait to see if the housing sector will fall into economic disaster as a result, as indicated by some in the housing industry. This development is of particular legal interest because it illustrates the way in which Australian governments have created a complex network of federal/state/local government arrangements to manage the fragmentation inherent in the Australian Constitution.
- An interesting development is the failure of many appliance manufacturers to satisfy the 'Six Stars' energy efficiency standards to which they are certified. This is another scheme in which the national government sets the over-arching standards and the states are responsible for enforcement. Whilst enforcement action by the Australian Consumer and Competition has been limited (though breaches are apparently quite common), it is reported that one major manufacturer was recently required to pay for substantial rebates to consumers and offer refunds to over 1500 white-good purchasers. The link between complex constitutional arrangements, administrative action, and civil accountability (as an alternative to 'traditional regulation') is a theme that recurs in Australia in recent times. Whether it is as efficient as some would hope is untested (and doubted by this commentator).
- Australia has often sought to take a high moral position in marine sustainability. This is most notable in our sometimes fraught relations with our close trading

partner, Japan, over whaling. A recent development is the arrest of a New Zealand citizen who boarded the Shonan Maru in the southern ocean. It will be interesting to see how the combination of legal rights and political contests will be played out in this matter.

- There is perhaps a link between the vexed issue of whaling, our relationship with Japan and our failure to support tighter international controls over bluefin tuna harvesting. Whilst the IUCN reports that numbers of this species may be as little as 18% of traditional stocks, and that the extractive pressures are rapidly increasing, Australia did not support the proposed CITES Appendix 1 listing of the species. Further developments on marine conservation and harvesting of endangered species will, of course, occur.

Conclusion

As always, it seems, the Australian environmental news tells the story of interesting and innovative legal developments, against a background of continuing erosion of the ecological values that the law is intended to protect. I suspect that many of us would be happy with less news of environmental legal battles, and more news of environmental successes. We live, as always, in hope.