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Considering the Myriad Developments of 2011

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Introduction

Environmental developments in Australia in 2011 have been dominated by the passage through the Federal parliament of the *Clean Energy Legislation 2011*. This package addresses many aspects of alternative energy and greenhouse gas emissions control. Other important environmental matters include the continuing debate on management of the Murray-Darling Basin together with increasing concern over coal seam gas extraction. These developments are overviewed below.

The Murray Darling Basin

The implementation of the Water Act 2007, concerned with the management of the nationally significant Murray-Darling Basin, continues to be controversial. Contentious matters range from determining the volume of water that should be diverted for environmental services and extend towards developing an understanding of the impact of coal seam gas extraction on the region. The Murray-Darling Basin Management Plan, which was released in 2010, recommended that 3000GL to 4000GL of water be diverted to the environment. This created a public backlash from those who held existing water entitlements and resulted in a revision of the plan. In late May 2011, the Murray-Darling Basin Authority announced that it planned to divert less than 3000GL for environmental purposes - an announcement that coincided with the resignation of a group of leading scientists who had been working on the plan. The second matter flows from an inquiry, announced by the Australian Senate, into

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the management of the Murray-Darling basin. Part of this inquiry includes a special examination of the impact of coal seam gas extraction - also an awkward issue for other regions of Australia. The report is due to be released in late 2011.[1]

Coal Seam Gas Extraction

As with other jurisdictions, coal seam gas extraction has emerged as a contentious issue in Australia. Extraction is most likely to occur in New South Wales and Queensland although other areas, such as Western Australia, are possible candidates. The Australian Government favours the use of coal seam gas as an energy source, claiming it is cleaner than coal or oil because it generates lower greenhouse gas and other emissions.[2] Licenses for exploration and drilling have been granted in districts extending from St Peters, within the boundaries of Sydney, to the Western Sydney region and Western Australia's Pilbara. Following the grant of approval to extract natural gas from the Pilbara region, Tony Burke, the federal Minister for Sustainability, Environment, Water, Population and Communities, commented that: 'the strict conditions [imposed] on the proposed project will help to protect threatened and migratory species such as dugongs, marine turtles, sawfish, dolphins and whales and the marine environment.' Notwithstanding the Government's optimism, coal seam gas extraction has generated significant public protests. The farming community, tourist industry and wine industry have all raised concerns that coal seam gas mining will contaminate ground water and aquifers and that these concerns have not been adequately investigated.

Biodiversity and the Hawke Inquiry

At the end of 2009 the Federal Government released a review of the *Environment Protection and Biodiversity Conservation Act 1999* - the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999, chaired by Dr Hawke. In August 2011 the Federal Government released its response to this report. The report made 71 recommendations for amendments to the *Environment Protection and Biodiversity Conservation Act* (1999) that would have strengthened the involvement of the Federal Government in environmental matters. It identified five processes to enhance this involvement - harmonisation, accreditation,

[1] For further details see: http://www.aph.gov.au/senate/committee/rat_ctte/mdb/info.htm.
[2] See *Background Note - The Development of Australia's Coal Seam Gas Resources*, July 2011, (available at http://www.aph.gov.au/library/pubs/bn/sci/CoalSeamGas.htm.)

standardisation, simplification and oversight. These processes focus on drawing together environmental regulation at the State and Territory levels. The Federal Government accepted 56 of the recommendations, two of which relate to the creation of new matters of national environmental significance: namely, ecosystems of national significance and vulnerable ecological communities. Notwithstanding these additions, the majority of the recommendations accepted by the Federal Government focus on advancing strategic approaches for a more streamlined assessment process in order to cut 'red tape for business and [improve] the timeliness of decision making'.[3]

Tasmanian Forests

Land clearing is a major issue for the protection of the Australian environment. For the last thirty five years, bitter campaigns have been fought against the backdrop of the Tasmanian forest industry. On 7 August 2011, an accord was reached between the Federal and Tasmanian Governments when they entered into the Tasmanian Forests Intergovernmental Agreement. The Agreement provides a $AU276 million package to allow the Tasmanian forest industry to adapt in a sustainable manner while at the same time preserving high conservation old growth forests. The assistance package includes $AU85 million to support those whose livelihood will be affected by the reduction of native forest harvesting and $AU43 million to protect high conservation areas. Immediately upon the signing of the Intergovernmental Agreement, the Tasmanian Government placed 430,000 hectares of native forests into an informal reserve, an arrangement which will be formalised when the Tasmanian and Federal Governments enter into a detailed conservation agreement.

Disbanding of the Department of the Environment

Following a change of government in New South Wales, the incoming premier, Barry O'Farrell, announced that the New South Wales Department of Environment, Climate Change and Water (Department of the Environment), would be abolished and its functions and responsibilities subsumed into other departments, such as the Premier's Department. The latter will also oversee National Parks and the Environment Protection Authority (EPA). The EPA is currently undergoing a

[3] The full response can be accessed from: http://www.environment.gov.au/epbc/publications/epbc-review-govt-response.html.

restructure and will shortly be established as an independent statutory authority. It is anticipated that as part of the abolition of the Department of the Environment, the Department of Primary Industries will be allocated the management of marine national parks and land clearing.

Recent Legislative Developments

The Federal Government's *Clean Energy Legislation 2011*, introduced by the Gillard Government, has dominated legislative developments over the last six months. The legislation consists of 18 statutes designed to establish an Emissions Trading Scheme (ETS), supplemented by the *Steel Transformation Plan Act 2011*. The latter specifically addresses the manufacture of steel and provides $300 million over four years to assist the Australian steel industry to operate in a low carbon economy. At the time of writing, the *Clean Energy Legislation 2011* had been passed by the House of Representatives on 12 October 2011, the Senate on 8 November 2011 and was awaiting Royal Assent.

Carbon pricing has been a polemic and highly politicized issue in Australia for a number of years. In 2009, the Rudd Government shelved plans to introduce a cap-and-trade emissions scheme, known as the Carbon Pollution Reduction Scheme, due to lack of bipartisan support. In a similar vein, once the Gillard Government announced its intention to introduce a carbon pricing mechanism, the opposition made a promise 'in blood' to repeal the legislation if their party were to gain power.

Notwithstanding this controversy, the *Clean Energy Legislation 2011* is for all intents and purposes, law. The legislation recognizes that it is in the national interest to minimize average global temperature increases to no more than 2 degrees Celsius beyond pre-industrial levels. Accordingly, a key objective of the legislation is to set a price on carbon emissions to encourage investment in clean energy and to support Australia's economic growth.

Three key features of the *Clean Energy Legislation 2011* are the introduction of a Carbon Pricing Mechanism, the creation of a Clean Energy Regulator and the establishment of a Clean Energy Authority. The legislation targets approximately 500 of the nation's highest polluters, referred to as 'liable entities'. These include firms such as electricity producers, mining companies, and heavy industry firms, as well as

a number of public authorities responsible for managing land fill. The liable entities contribute to approximately 60 percent of Australia's carbon emissions making Australia's scheme a broad-based one. Direct carbon emissions from agriculture, fisheries and forestry product sectors are excluded from the carbon pricing mechanism. However, from 2014-2015 the Government will extend the mechanism to heavy on-road vehicles.

The Carbon Pricing Mechanism commences on 1 July 2012 with the imposition of a fixed price per ton of carbon emitted - a procedure that has led to the pricing of carbon to be dubbed as a 'carbon tax'. From 1 July 2012, liable entities will pay $23 per ton and the price will increase to $24.15 on 1 July 2013 and $25.40 on 1 July 2014. During these first three years there will be no cap on the number of units that liable entities can acquire. The cap starts from 1 July 2015 when the regime converts to a trading scheme that is fully market-based. Due to the fact that it is anticipated to cost the average family approximately $9.90 per week in higher living costs the carbon price mechanism is proving to be unpopular - at least in these early stages. The Government, however, proposes to offset higher living costs by introducing tax cuts and additional benefits for those on welfare and pensions.

As part of the regime, the Government has also announced a $1.7 billion Land Sector Package which includes the $429 million Carbon Farming Futures Program. The funds will be used for research into strategies to reduce carbon emissions by agricultural activities as well as creating support for the Carbon Farming Initiative (CFI). The CFI will provide accreditation for projects that reduce emissions or store carbon and where the projects meet international standards can also be accredited as 'Kyoto Compliant'.

The *Clean Energy Regulator Act 2011* establishes the Clean Energy Regulator as a statutory authority to administer the Carbon Pricing Mechanism, enforce the law and educate the public. In addition, the Clean Energy Regulator will work closely with existing regulatory bodies such as the Australian Securities Investment Commission and the Australian Competition and consumer Commission. The *Climate Change Authority Act 2011* establishes the Climate Change Authority as an independent review body to advise the Government.

Recent Jurisprudence

Case law and enforcement over the last six to twelve months have focused on procedural matters regarding litigation commenced in the public interest as well as issues relating to land clearing and habitat degradation.

In the context of public interest litigation, costs orders can be a significant determinant of whether plaintiffs pursue a case. Hence the courts are mindful of the impact of such orders in encouraging or discouraging litigation. In *Australians for Sustainable Development Inc v Minister for Planning*[4] the plaintiffs challenged a development approval made by the Minister for Planning for the Barangaroo site in Darling Harbour, Sydney. The approval included the provision of 900 parking spaces which would have involved substantial excavation, and the use of the excavated material as land fill in a proposed public park. The Barangaroo site was once a gas works and the Environment Protection Authority believed that disturbance of the site would present risks to human health and facilitate the streaming of toxins into Sydney Harbour. Accordingly, the Authority indicated that the site needed to be de-contaminated prior to excavation. The plaintiff used these facts to challenge the development approval, arguing that the development did not comply with *State Environment Planning Policy No 55 - Remediation of Land* (SEPP 55), which provides guidelines for managing contaminated land.

The case was heard in the Land and Environment Court in February 2011 and two weeks after the completion of the hearing, the New South Wales Minister for Planning made a special order by executive action that SEPP 55 did not apply to the Barangaroo project. Judgement in the litigation was delivered on 10 March 2011, by which time, the main ground for the plaintiff's case no longer applied. Justice Biscoe had no choice but to dismiss the application. Yet, as his honour pointed out, had the Minister not issued an order to exempt the Barangaroo development from SEPP 55, the plaintiffs would have won their case.[5] His honour also pointed out that the timing of the order meant that the parties had expended substantial resources on the litigation. In view of the lateness of the amendment, Biscoe J ordered that the Minister should pay the costs of the plaintiff on an indemnity basis.[6]

[4] [2011] NSWLEC 33.
[5] Para 298.
[6] Paras 298-302.

With respect to unauthorized land clearing and habitat degradation, the Federal Government aims at remediation of the damage. One means of achieving this outcome is to secure an enforceable undertaking. For example, on 12 October 2011, the Federal Department of Sustainability, Environment, Water, Population and Communities secured an enforceable undertaking from Springvale Coal Pty Limited and Centennial Angus Place Pty Limited with respect to environmental damage caused by long wall mining operations. The damage included erosion, loss of habitat and an increased susceptibility of the area to weed infestation. The companies entered into a voluntary undertaking to contribute $1.45 million towards a fund administered by the Australian National University to research protection of wetland areas.[7]

In the second case, a delegate of the Federal Minister for Sustainability, Environment, Water, Population and Communities made a remediation determination on 17 May 2011, against Douglas Rutledge for authorizing or permitting the clearing of 30 hectares of the Weeping Myall Woodland. This Woodland is listed as an endangered ecological community and the Government was able to stop the clearing before the site was irreparably damaged. The determination ordered that Mr Rutledge cease farming activities in the area and repair or mitigate the damage.[8]

Finally, a case from the New South Wales Land and Environment Court dealt with the types of matters that judges take into account when settling a penalty for environmental crimes. In the case of *Director-General, Department of Environment and Climate Change v Walker Corporation Pty Ltd (no 4)*[9] the defendant was found liable, through its contractor, for breaching section 12(1) of the *Native Vegetation Act 1993 (NSW)* by clearing seven species of native vegetation. The issue before the court was how to determine the appropriate penalty. Justice Pepper noted that courts should synthesize 'objective and subjective circumstances surrounding the commission of the offences'.[10] The objective circumstances could include a deterrence factor. However, the defendant maintained that the penalty should not include a deterrence factor because, from its point of view, this was an isolated

[7] For more information, see: http://www.environment.gov.au/epbc/compliance/pubs/enforceable- undertakingcentennial.pdf.
[8] A copy of the determination may be found at: http://www.environment.gov.au/epbc/compliance/pubs/ remediation-determination-rutledge.pdf.
[9] [2011] NSWLEC 211.
[10] Para 23.

incident where the defendant had otherwise 'operated faultlessly since 1973'.[11] The court disagreed and considered it important that the defendant was a property development company that owned a large portfolio of properties in New South Wales. Accordingly, there could be commercial motivation for land clearing, making deterrence an important consideration in the imposition of a penalty.[12] The defendant was fined $200,000.

A Critical Consideration of Recent Domestic Developments

One trend from this report is the predilection by Government towards development without adequate public consultation and an appropriate level of transparency. The growth in coal seam gas extraction is a case in point. Similarly, the circumstances surrounding the decision in *Australians for Sustainable Development Inc v Minister for Planning* reveal the shabby side of Ministerial discretion. The design and implementation of effective planning laws goes to the heart of sustainable development. It is, therefore, a questionable use of Ministerial powers to change these laws by special orders so as to ward off a likely defeat. Such a course of action not only lacks transparency and accountability, but also raises more fundamental issues regarding the democratic validity of these powers.

On an analogous note, the decision by the premier of New South Wales to disband the Department of the Environment is perplexing. While the Premier considers that his decision has 'elevated' environmental issues to his direct attention, environmentalists have criticized the decision as a political cave-in to factional interests. In particular, the shifting of responsibility for land clearing to the Department of Primary Industries can be seen as an endorsement for the agriculture product sector, which has long considered land clearing a problematic issue. The danger is that by disbanding the Department of the Environment, environmental issues and policies will potentially be overshadowed by commercial considerations.

At the Federal level, the Government's response to the review of the *Environmental Protection and Biodiversity Conservation Act 1999* has been largely positive. As already noted, the government has accepted the creation of two new matters of national environmental significance, ecosystems of national significance and

[11] Para 130.
[12] Para 131.

vulnerable ecological communities. Henceforth, proposals and developments that are likely to have a significant impact on these two matters will need to be better addressed in accordance with the *Environmental Protection and Biodiversity Conservation Act 1999.* However, this encouraging outcome needs to be counterbalanced against the fact that the bulk of the 56 recommendations accepted by the Federal Government relate to streamlining assessments for development applications, especially in a strategic context. This signals a greater reliance on State and Territory processes, which could lead to a reduced role for the Federal Government, contrary to the tenor of the Hawke review.

Turning to a much more positive event, the passage of the *Clean Energy Legislation 2011* is timely. Australia is one of the worst carbon polluters, producing approximately 500 million tonnes of carbon per annum. Up till the passage of the legislation, industry could regard this as an externality because manufacturers and service providers were permitted to pollute without a fee or penalty. With the advent of the Clean Pricing Mechanism, industry will need to take the cost of pollution into account in the same manner as other production costs such as raw materials and labour. It is anticipated that the Emissions Trading Scheme will provide economic encouragement for industry to develop cleaner ways of producing energy. Although some critics indicate that the legislation does not go far enough and should have targeted reductions in coal mining, the scheme is an historic step forward and does much to promote investment in clean energy technology.