COUNTRY REPORT: AUSTRALIA

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The most significant developments over the last year in Australia have centred on three areas: first, the challenge by Australia in the International Court of Justice to Japanese whaling in the Southern Ocean; second, the continuing debate about energy matters including the carbon tax and mining; and third, the streamlining of development approval processes by the Federal Government and also by the New South Wales (NSW) Government. The issues raised by these matters comprise a mix of policy, legislation and court cases, and are dealt with in the first part of this report. The second part of the report provides a short critique of these developments. It should also be noted that following a change of Federal government in September 2013, the former Department of Sustainability, Environment, Water, Population and Communities is now known as the Department of the Environment, and will be referred to as such.

Part 1 – Recent Developments in Policy, Statute and Case Law

1.1 Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)

In May 2010 Australia commenced proceedings in the International Court of Justice (ICJ), against Japan's continued whaling in the Southern Ocean.[1] New Zealand intervened in 2012 in support of Australia's position.

Globally, whaling operations are administered in accordance with *the International Convention for the Regulation of Whaling (ICRW)*. Article VI(c) of that convention provides for the establishment of Whale Sanctuaries; while Article VIII allows governments to grant their nationals a permit to kill, take or treat whales for scientific research. In 1985 the International Whaling Commission (IWC) agreed to a moratorium on commercial whaling, but the moratorium would not apply to scientific research conducted in accordance with Article VIII of the ICRW. Additionally, in 1994, the IWC established the Southern Ocean Whale Sanctuary.

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[1] Whaling in the Antarctic (Australia *v.* Japan: New Zealand intervening). Case available from http://www.icj-cij.org/docket/index.php?p1=3&p2=1&case=148&code=aj&p3=1 .

Both before and after 1994, Japan had set up whale research programs, to be conducted in the Southern Ocean under the rubric of 'JARPA'. The first JARPA continued until the 2004-5 season, while JARPA II was designed to run from 2005-2013. Australia contends that JARPA II breaches the ICRW.

Australia's main arguments center on whether JARPA II is truly a scientific program, or is instead a guise for commercial whaling. If JARPA II is the latter, then according to Australia it not only breaches the moratorium on commercial whaling but it also breaches the ban on commercial whaling in the Southern Ocean Whale Sanctuary. In making this argument Australia considers that differences between JARPA and JARPA II are significant. For example, JARPA concentrated on the hunting of minke whales in numbers of approximately 400 per season. By way of contrast, JARPA II authorises the hunting of minke, fin and humpback whales. The Antarctic minke whale, fin whales and humpback whales are listed by *the Convention on International Trade in Endangered Species, (CITES),* and are also found on the IUCN Red List of Threatened Species. Accordingly, in addition to arguments based on the operation of the ICRW, Australia also claims that JARPA II breaches CITES and hastens the threatened status of the species in question.

Japan disputes these allegations and states that its activities accord with the scientific exception contained in Article VIII of the ICRW; and that furthermore, the JARPA II program has produced valuable scientific outputs. The proceedings closed in July 2013 and a decision is expected early in 2014.

1.2 Energy Matters: Carbon Tax and Mining

Climate change and energy matters continue to be contentious in Australia. The new Federal government, led by Prime Minister Tony Abbott, has already released draft legislation to change Australia's carbon regime. In addition, at both the state and federal levels, recent developments indicate that governments are willing to prioritize mining interests above environmental and social concerns.

Carbon Tax

In 2011, the Gillard government passed the *Clean Energy Act 2011*. A key feature of this legislation was the Carbon Pricing Mechanism that commenced on 1 July 2012 and was due to end on 30 June 2015. The mechanism imposed a fixed price per ton of carbon emitted, to be paid by 500 of the nation's highest polluters. On 1 July 2015 the scheme would have

converted to a trading scheme that was fully market-based. In 2011, the then leader of the opposition, Tony Abbott pledged that he would repeal the carbon tax. A draft exposure of the new laws was released on 15 October 2013 and was open for public comments until the beginning of November.[2] The laws will repeal the carbon tax from 1 July 2014 and abolish the office of the Climate Change Authority (CCA).

The repeal of the carbon tax is being promoted as necessary in order to lower business expenditure and ease the cost of living for families. The carbon tax will be replaced by the introduction of a 'Direct Action' plan. Pursuant to this scheme, the government will create a fund to pay industry for reducing emissions. Although full details of the scheme have not yet been released, the Direct Action plan has already drawn criticism from economists and academics.[3]

The proposed abolition of the CCA is also troubling. The rationale behind this move is that once the carbon tax is repealed '[m]any of the functions currently performed by the Authority will not be needed'.[4] Yet, the functions of the CCA include making recommendations on emissions reduction goals as well as evaluating Australia's progress towards these goals and also its international obligations. In its first draft report, *'Reducing Australia's Greenhouse Gas Emissions: Targets and Progress Review Draft Report,'* the CCA noted that Australia could do more to meet its international obligations and that its current emissions reduction targets are not adequate.[5]

It is not clear whether these changes will have an easy passage through the Australian parliament. Abbott's government does not yet control the upper house and amongst the other parties, neither the Labor Party nor the Greens support the amendments.

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[2] The draft laws were released on the web site of the Office of the Environment: http://www.environment.gov.au/carbon-tax-repeal/consultation.html.

[3] See for example, report in the Sydney Morning Herald, by Matt Wade, Gareth Hutchens, ' Tony Abbott's New Direct Action Sceptics' 28 October 2013, available from http://www.smh.com.au/federal-politics/political-news/tony-abbotts-new-direct-action-sceptics-20131027-2w9va.html#ixzz2jGBpuh1f; Stephen McGrail, 'Climate Action Under an Abbott Government', 10 May 2013, available from http://researchbank.swinburne.edu.au/vital/access/manager/Repository/swin:32811.

[4] Department of the Environment, Fact Sheet 'Repealing the Carbon Tax', available from http://www.environment.gov.au/carbon-tax-repeal/index.html.

[5] Climate Change Authority, 'Reducing Australia's Greenhouse Gas Emissions: Targets and Progress Review Draft Report,' Australian Government, (2013), see 'Executive Summary' section. Available from http://climatechangeauthority.gov.au/content/reducing-australia%E2%80%99s-greenhouse-gas-emissions-targets-and-progress-review-draft-report-0.

Mining

In February 2013 the then Minister for the Environment, Tony Burke, approved a series of coal and coal seam gas developments, predominantly located in New South Wales. It is estimated that these developments would have had the potential to add approximately 47 million tons of greenhouse gases a year to Australia's emissions.[6] For these reasons the approvals were condemned by the NSW Greens and environmental groups, such as, the Nature Conservation Council of NSW.

Residents in the vicinity of one of these developments, the Maules Creek Mine in the Narrabri area, commenced legal action. They formed an association known as the 'Northern Inland Council for the Environment' that became the plaintiff in the litigation. The case was run by the EDO (Environmental Defender's Office) on behalf of the Inland Council. The latter argued that the approval process was discredited because the Minister rushed his decision and did not take into account important environmental impacts. These included the fact that the open cut mine would impact negatively on the Box-Gum ecosystem, which has been listed as an endangered ecological community under the NSW *Threatened Species Conservation Act 1995* and also as a critically endangered ecological community under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). The case was heard on 16 September 2013 by Cowdroy J who reserved his decision, which has not yet been handed down. On 25 September Griffiths J in the Federal Court of Australia refused an interlocutory injunction to restrain the mine operator from carrying out works in accordance with the original approval pending the decision of Cowdroy J. His Honor Griffiths J stated that while the case presented serious issues, the Plaintiff's case for the interlocutory injunction was not strong.[7] Mining litigation elsewhere, however, has gone against the proponents of the mine.

A case in point is the decision in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48. The litigation involved an appeal to the Land and Environment Court against Warkworth Mining Limited and the Minister for Planning and Infrastructure on the basis that approval for

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[6] See posting 'Gas and Coal Plans Approved by Burke', Natural Resources Review 19 Feb 2013, available from http://nationalresourcesreview.com.au/2013/02/gas-and-coal-plans-approved-by-burke/.

[7] Northern Inland Council for the Environment Inc v Minister for the Environment, Heritage and Water [2013] FCA 993 (25 September 2013), available from http://www.austlii.edu.au/au/cases/cth/FCA/2013/993.html.

expansion of the mine did not adequately take into account environmental and social consequences.

In 1981 Warkworth received approval to conduct an open cut coal mine in the Hunter Valley of New South Wales. Although the original approval was given in 1981, at the time of the hearing the mine operated under approval DA 300-9-2002-1 issued by the Minister for Planning in May 2003. The 2003 approval was subject to a biodiversity offset, which meant that part of the land on which the mine operated could not be disturbed. In seeking to expand its operations, Warkworth would have mined closer to residential areas and also in the biodiversity offset area. Nevertheless, the Minister approved the mine's expansion, but subject to a number of conditions that were designed to protect biodiversity in general and several endangered ecological communities.

The Land and Environment Court held that the conditions were inadequate and refused the application to expand the mine. Preston CJ noted that there were significant adverse impacts relating to 'biological diversity, noise and dust, and social impacts' that were inadequately addressed by the Minister's approval.[8] Furthermore, his honour noted that the economic evaluations provided by Warkworth did not address these issues appropriately.[9] Warkworth appealed this decision. The appeal was heard in August 2013 and the judgment was reserved. In the interim, the New South Wales Government has passed a legislative amendment, *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Resource Significance) 2013* that will prioritise mining projects above environmental and social matters.

Clause 12AA of *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* now provides that the aims of the policy are to promote the development of significant mineral resources, a matter that is to be determined by the project's economic benefits and consideration of whether 'other industries or projects are dependent on the development of the resource.'[10] The amendments have raised economic issues to a level that arguably conflicts with principles of ecologically sustainable

[8] Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited [2013] NSWLEC 48, paragraph 14 Available from: http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=164038.
[9] Ibid, paragraphs 14-20.
[10] State Environmental Planning Policy (mining, Petroleum Production and Extractive Industries) Amendment (Resource Significance) 2013, clause 12AA(4).

development, including the precautionary principle.[11] These concerns are further reinforced by clause 12AA(4) that creates a test of proportionality, pitting environmental and societal concerns against the significance of the resource.[12]

In Western Australia, the decision in *The Wilderness Society of WA (Inc) v Minister for Environment* [2013] WASC 307 has similarly been decided against the Western Australian Government. The Government was the proponent of a $AU40 billion natural gas hub at James Price Point in the Kimberley region of that state. Before the case was heard, 'Woodside', the operator of the mine, shelved plans to develop the mine due to cheaper alternatives becoming available through fracking. Accordingly, the plaintiffs in the litigation who were the Wildness Society, and a traditional owner, were content to withdraw the proceedings. However, the Western Australian government wished the case to proceed. They pointed out that they were the proponents, and that Woodside was merely the operator. The government was keen to source another operator, hence the decision in the case would be crucial those plans.

The Plaintiff's argument proposed that the approval was improper and invalid under the *Environmental Protection Act 1997 (WA).* Martin CJ held that three of the approvals were unlawful because the chair of the Environmental Protection Authority (EPA) made the decisions sitting on his own, due to the fact that the other four members of the Authority's board had declared conflicts of interest. In these circumstances, the court held that the chair 'did not validly discharge the obligation imposed upon the EPA by s 44 of the Act'.[13] The WA state government is considering its options, but continues to purchase land in the James Price Point area in the hope of developing the gas hub.

Water Trigger

Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) restricts a person from taking any action that is likely to have a significant impact on matters of national environmental significance without first obtaining consent from the Minister of the Environment. In June 2013, the Federal Government amended the EPBC Act by adding section 24D, in effect providing what is known as a 'water trigger'. The section

[11] The Law Society of New South Wales, Young Lawyers, Environment and Planning Law Committee, Submission on the State Environmental Planning Policy (mining, Petroleum Production and Extractive Industries) Amendment (Resource Significance) 2013 NSW Young Lawyers, (2013) at 5. Available from http://www.lawsociety.com.au/cs/groups/public/documents/internetyounglawyers/763290.pdf.
[12] Ibid.
[13] The Wilderness Society of WA (Inc) v Minister for Environment, paragraph 286.

applies to large-scale coal mines and coal seam gas extraction where such developments will have a significant impact on water resources. Any such proposed developments are now a matter of national environmental significance, and require approval from the Minister for the Environment. Section 24D applies to developments proposed by the Commonwealth and Commonwealth agencies as well as trading corporations within the meaning of section 51(xx) of the Australian Constitution. As the Bills Digest entry notes:

> *The practical effect of this amendment would be that the Minister would have the power to impose water specific conditions on large coal mining and coal seam gas projects, whereas at present this power is limited to conditioning water impacts only to the extent that any such impacts relate to an existing matter of national environmental significance protected by the EPBC Act.*[14]

This is a promising development, yet seems at odds with streamlining of approvals being promoted at both the Federal level and also by some state governments.

1.3 Streamlining Approvals

The newly-elected Federal Government is working at a policy level with the State Governments to streamline development approvals to circumvent 'green tape.' It proposes to do this by way of bilateral agreements in the form of Memoranda of Understanding. It also appears that the first bilateral agreement has been signed with the Queensland Government.[15] Section 45 of *the EPBC Act* envisages the use of bilateral agreements that incorporate State environmental processes; and section 45(4) provides that the Minister needs to publish the agreement 'as soon as practicable.' The agreement with Queensland has reportedly been signed, but a copy has not been released. This is somewhat problematic given the fact that the Memorandum of Understanding with Queensland is the first agreement and will undoubtedly serve as a precedent for similar arrangements**.** The use of bilateral agreements may also present a further difficulty as any environmental benefits flowing from the evaluation process will depend on the inclusivity of mechanisms at the state level. If the following changes, proposed by the NSW Government, are an indication there is cause for much concern.

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[14] Environment Protection and Biodiversity Conservation Amendment Bill 2013, Bills Digest no 108 2012-13, available from http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1213a/13bd108.

[15] Andrew Powell, Minister for Environment and Heritage Protection, media release 'One Step Closer to Streamlining Environmental Approvals', released 25 September 2013, available from http://statements.qld.gov.au/Statement/2013/9/25/one-step-closer-to-streamlining-environmental-approvals.

In October 2013 the NSW Government introduced two bills into Parliament: *the Planning Bill 2013*; and *the Planning Administration Bill 2013*. These bills are part of a design to overhaul planning laws in NSW and will replace the *Environmental Planning and Assessment Act* 1979. One of the main areas of concern stems from the removal of community rights and merits review. In a submission to the NSW Government on the proposed changes, the EDO had this to say:

> *…there is a fundamental imbalance in relation to merits review and appeal rights as proposed. While there are expanded rights for proponents and developers, community review and enforcement rights are restricted by the draft legislation. Under the guise of giving the community new upfront engagement rights, existing review rights are being removed.*[16]

The amendments have passed through the lower house and have been introduced into the upper house, where they are expected to become law by early 2014.

Part 2 – A Critical Consideration of Recent Domestic Developments

Recent policy and legislative changes evince a discernable trajectory towards juxtaposing environmental matters against industry and development. The effect is to erode the notion of 'sustainability' from the concept of sustainable development. To start with, governments have shown that they are not averse to using legislation to overthrow a court's interpretation of the law. *The State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Resource Significance) 2013* provides a clear example. These amendments were introduced after the decision in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* and overcome the reasoning of Preston CJ in that case. As already noted, his Honour found that economic issues should not necessarily trump environmental and social ones, yet that result is precisely what the amendments promote.

In an analogous manner, policy at the Federal level that adopts State environmental impact procedures has the potential to whittle away community participation if State processes are not based on a solid foundation of open justice. In late 2012, for example, the NSW State government embarked on a path to remove much of the funding given to the EDO.[17] If this is considered in the light of the same government's proposed changes to the planning laws, it

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[16] EDO, *NSW White Paper Submission – Executive Summary*, June 2013, available from http://www.edo.org.au/edonsw/site/pdf/pubs/130621EDONSWWPSubmission_ExecSummary.pdf.
[17] Sophie Riley, 'The Last Word: Environmental Justice in NSW', (2013) 18 (1) *Alternative Law Journal* 68.

is clear that these revisions will severely curtail the rights of citizens to participate in environmental decision-making and environmental review. This is not a welcome change, especially in view of the fact that litigation discussed in this report has been undertaken by concerned individuals and/or community groups. The troublesome state of Australia's planning laws is underscored by the near-miss Australia has had with the threat by UNESCO to classify the Great Barrier Reef as being in danger.[18] Although Australia narrowly avoided this embarrassment, UNESCO did voice concern with 'coastal development and intensification and changes in land use within the GBR catchment'.[19] These matters squarely rest on the design and implementation of adequate and appropriate planning laws.

It is perhaps a somewhat cynical observation that while Australia is quick to point the finger at Japanese whaling, Australia appears far less concerned with environmentally-damaging activities where those activities benefit the Australian economy. The promotion of economic matters also appears to be at the heart of alterations to Australia's climate change regime. Regrettably, Australia appears to be losing its environmental compass, something it needs to monitor carefully.

[18] See, UNESCO: Committee Decisions, 37COM 7B.10 Great Barrier Reef (Australia) (N 154), available from http://whc.unesco.org/en/decisions/4959.
[19] UNESCO 'Great Barrier Reef', available from http://whc.unesco.org/en/list/154.