

COUNTRY REPORT: AUSTRALIA

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In 2014, Australia's environmental regulation was largely characterised by a steady winding back and weakening of environmental safeguards, particularly with respect to climate change. The changes in this area are occurring rapidly and this report is correct up to the date of writing which was early November 2014. The Federal government has also weakened (or attempted to weaken) environmental regulation in protected areas such as the World Heritage-listed Tasmanian Wilderness region and the nationally-listed Victorian Alpine National Park. On a more positive note, Australia was successful in the International Court of Justice (ICJ), with respect to its challenge against Japan's scientific whaling program in the Southern Ocean. The first part of this report sets out a summary of the ICJ decision, followed by a description of recent developments in the areas of climate change regulation, biodiversity protection and activities of the EDO (Environmental Defenders Office). The second part of this report contains a critique of these developments; and the report concludes with a memorial to Glen Turner, a compliance officer with the NSW Office of the Environment, who was killed in the line of duty on 29 July 2014.

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 ICJ arguing that Japan's scientific whaling program (JARPA) breached Article VIII of the International Convention for the Regulation of Whaling (ICRW).¹ The ICJ handed down its decision on 31 March 2014,² and

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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>

² Whaling in the Antarctic (Australia v. Japan: New Zealand intervening). Judgment available from <http://www.icj-cij.org/docket/files/148/18136.pdf>

by a majority of 12 to 4 held that Japan had in fact violated Article VIII and should cease implementing JARPA II immediately. The prohibition on whaling also extended to the revocation of existing licenses and permits that may have been issued by Japan.³ The Court, however, refused Australia's application that the ICJ should restrain Japan from issuing licenses and permits in contravention of Article VIII, pointing out that the obligation to

*...refrain from authorizing or implementing any special permit whaling which is not for purposes of scientific research within the meaning of Article VIII... already applies to all States parties. It is to be expected that Japan will take account of the reasoning and conclusions contained in this Judgment as it evaluates the possibility of granting any future permits under Article VIII, paragraph 1, of the Convention.*⁴

Although Japan is currently complying with the ICJ findings, it has already indicated that it intends to modify its scientific whaling program to conform to Article VIII. Accordingly, whaling in the Southern Ocean is still on the agenda.

1.2 Energy Matters: Carbon Tax and Renewable Energy

The Abbott government has wasted no time in making good on its pledge to repeal the carbon tax and other provisions introduced in the Clean Energy Legislation package enacted by the Gillard government in 2011. However, the passage of the government's legislation has proved to be contentious, as it does not control the Senate, which is the Upper House in the Australian Parliament. Accordingly, the government has had to negotiate with the minority parties. For example, although legislation to repeal the carbon tax, the *Clean Energy Legislation (Carbon Tax Repeal) Act*, was introduced into Federal Parliament in December 2013, it was only passed by Parliament on 17 July 2014 after extensive government lobbying and compromise. Australia now has the dubious distinction of being the only country to have introduced a carbon tax and then repeal it. In line with government policy, the repeal was backdated to 1 July 2014.

Another tranche of legislation that has stumbled in the Senate includes *the Climate Change Authority (Abolition) Bill 2013*. That Bill aims at removing the carbon pricing mechanism that is no longer needed since the abolition of the carbon tax; however, it also includes the repeal of parts of other legislation such as *the National Greenhouse and Energy Reporting Act*

³ Ibid, paras 244-5.

⁴ Ibid, para 246.

2007 and the Renewable Energy (Electricity) Act 2000.⁵ Although the *Climate Change Authority (Abolition) Bill 2013* easily passed the lower house, where the government has a clear majority, it has stalled in the Senate, where it was rejected on the 3rd March 2014. As at the date of this report, the government has not sought to reintroduce the Bill.

The government is also pursuing further policy objectives by re-configuring the renewable energy target (RET) and initiating the Direct Action Plan. The RET is a target designed to encourage the use of renewable energy and is administered by the Clean Energy Regulator. The RET had been set so that Australia would have produced a minimum of 20% of its energy from renewable sources by 2020. The government announced a review of the RET on 17 February 2014 and the RET Review Report was released on 28 August 2014.⁶ The report primarily concluded that the costs of implementing the RET outweigh its benefits, although it did not recommend that the RET be abolished. Stakeholders fear that one option available to the government will not only close off the RET scheme to new wind and solar farms, but will also jeopardize incentives for households to adopt renewable energy sources such as solar panels. The Clean Energy Council, a peak industry body representing the renewable energy sector, is critical of the report pointing out that if implemented, the recommendations will have severe and negative impacts for the uptake of renewable energy.

As a precursor to implementing its Direct Action Plan (DAP), the government released an “Emissions Reduction Fund Green Paper” on 20 December 2013.⁷ According to the government, the DAP will protect the environment, create jobs and maintain Australia’s international competitiveness. As already noted in Australia’s Country Report in the 2013 edition of this eJournal, proposals for the DAP have drawn criticism from economists and academics who argue that the Plan will not be as effective as an emissions trading scheme.⁸

⁵ Climate Change Authority (Abolition) Bill 2013

http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5136

⁶ RET Review Report, <https://retreview.dpmc.gov.au/ret-review-report-0>

⁷ Australian Government, Department of the Environment, “Emissions Reduction Fund Green Paper” (2013). Available from <http://www.environment.gov.au/climate-change/emissions-reduction-fund/green-paper>

⁸ 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> ;

In order to establish the DAP the government needs to create an Emissions Reduction Fund from which it will pay polluters to reduce their carbon emissions through specific projects. The enabling legislation had been delayed in the Senate; however, following intensive negotiations on 28-30 October 2014 the government announced that an arrangement had been concluded with the minority parties. It is a matter of some irony, that part of the compromise includes a review of emission trading schemes operating in other countries and the possibility of establishing a modified scheme in Australia.

1.3 Biodiversity Protection

In similarity with the winding back of the carbon tax and emissions trading scheme, the Federal Government has also attempted to wind back protection in the World Heritage Listed Tasmanian Wilderness area, and has already wound back protection in the Victorian Alpine National Park. The events in Tasmania are mirrored by the Tasmanian State Government's repeal of the *Tasmanian Forests Agreement Act 2013*. More positive developments include the appointment of a Federal Threatened Species Commissioner and the Victorian State Government updating its regulation with respect to invasive species.

1.3.1 The Tasmanian Wilderness

The Abbott government has a policy platform of de-listing some 74,000 hectares of the Tasmanian wilderness from the World Heritage Register on the grounds that the land in question is "degraded". The government has already made application to the World Heritage Committee to de-list these areas and set up a Senate Committee to evaluate the matter. The report of the Senate, which was released on 15 May 2014, concluded that:

...the argument that 'degraded' areas, such as previously logged forest and plantations, should be removed from the extended Tasmanian Wilderness World Heritage Area because they detract from the integrity of the property is without merit. Further, the committee considers that the Government, by not providing adequate detail to the World Heritage Committee as to how much of the 74,000 hectares actually fits this description, undermines its own arguments for the delisting.⁹

Stephen McGrail, 'Climate Action Under an Abbott Government', 10 May 2013, available from <http://researchbank.swinburne.edu.au/vital/access/manager/Repository/swin:32811>

⁹ Environment and Communications References Committee, *Tasmanian Wilderness World Heritage Area*, Commonwealth of Australia, (2014) parag 4.3.

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communicatio

The Government did not accept this decision; it did, however, agree to undertake community engagement with Tasmania's Indigenous community concerning the impact of government policies on Indigenous cultural heritage values.¹⁰ It is also telling that the proposed de-listing has been disallowed by the World Heritage Committee and has been criticised by the International Union for the Conservation of Nature (IUCN), which was providing advice to the World Heritage Committee.¹¹ Notwithstanding the recommendation of the Senate Committee and the decision of the World Heritage Committee the government has announced it intends to pursue its objectives through other channels.

The approach of the Federal Government is consistent with the current Tasmanian Government's push to open up the Tasmanian Forests to logging. Some three years ago, on 7 August 2011 the Gillard government and the former Tasmanian government entered into the Tasmanian Forests Intergovernmental Agreement. That Agreement provided approximately \$AU276 million to allow the Tasmanian forest industry to convert to a "more sustainable and diversified footing" while protecting old growth forests and identifying additional areas that could be placed into an informal conservation reserve. The Agreement was eventually made operational by *the Tasmanian Forests Agreement Act 2013*. However, the new State Government is on the record as wanting to "tear up" *the Tasmanian Forests Intergovernmental Agreement*.¹² Accordingly, on 25 September 2014, that government repealed *the Tasmanian Forests Agreement Act 2013* and replaced it with *the Forestry (Rebuilding the Forest Industry) Act 2014*, which opens up the Tasmanian forests to logging.

ns/Tasmanian_Wilderness_World_Heritage_Area/Report/~media/Committees/Senate/committee/ec_ cte/tasmanian_wilderness/report/report.pdf

¹⁰Commonwealth of Australia, *Australian Government Response to the Senate Environment and Communications References Committee Report: Tasmanian Wilderness World Heritage Area*, October 2014.

¹¹ World Heritage Committee, IUCN Evaluations of Nominations of Natural and Mixed Properties to the World Heritage List, WHC-14/38.COM/INF.8B2.ADD , IUCN Report for the World Heritage Committee, 38th Session Doha, Qatar, 15 - 25 June 2014 (page 33). Available <http://whc.unesco.org/archive/2014/whc14-38com-inf8B2-Add-en.pdf>

¹² Stephen Smiley, *Tasmanian Liberals Unveil Details of Legislation to Repeal Forest Peace Deal*, 8 May 2014, <http://www.abc.net.au/news/2014-05-08/tasmanian-liberals-unveil-details-of-legislation-to-repeal-fore/5440554>

1.3.2 Threatened Species Commissioner

On 2 July 2014 the Federal Government appointed its first Threatened Species Commissioner.¹³ A Department of the Environment media release notes that the appointment is intended to halt the tide of extinctions and bring national focus to conservation efforts:

*The Threatened Species Commissioner will work with the community to increase awareness of threatened species and bring together the partners and resources necessary to implement priority practical actions needed to protect our species. One of his roles as Threatened Species Commissioner will also be to contribute to the streamlining and reform of Australia's statutory recovery processes.*¹⁴

The new commissioner is especially interested in minimising the impacts of invasive species, and the development of a new feral cat bait that is regarded as effective and humane.

1.4.3 Invasive and Non-native Species

In a success story, the Tasmanian Parks and Wildlife Service announced that it had successfully eradicated pests such as rabbits, mice and rats from Macquarie Island.¹⁵ The total eradication of invasive species from any area, even a contained one such as an island, is a challenging undertaking. The project was jointly funded between the Tasmanian and Federal governments to the tune of \$AU24.6 million, representing a substantial investment in the eradication project.

On a less positive note, the Federal Environment Minister, Greg Hunt has approved a trial of cattle grazing in the Victorian Alpine National Park, notwithstanding the Park's classification on the National Heritage Register. Cattle grazing had been banned since 2005 and the issue has been simmering since. Mr Hunt has indicated that the trial "will compare the effectiveness and impacts of livestock grazing regimes"; however, the move has been

¹³ Australian Government, Department of the Environment, Fact Sheet, Commissioner's Role <http://www.environment.gov.au/biodiversity/threatened/commissioner/role>

¹⁴ Media Release on appointment of Threatened Species Commissioner <http://www.environment.gov.au/minister/hunt/2014/mr20140702.html>

¹⁵ Macquarie Island Pest Eradication Project <http://www.parks.tas.gov.au/index.aspX?base=12997> .

criticized as a futile exercise that will only cause damage to the park.¹⁶ Greens Senator, Richard Di Natale, introduced a private member's bill into the Senate (*Environment Protection and Biodiversity Conservation Amendment (Alpine Grazing) Bill 2014*), to ban the cattle grazing. The Bill is likely to be defeated in the lower house, but is a strong symbolic gesture.

On 20 August 2014, the Victorian Government introduced *the Invasive Species Control Bill*.¹⁷ The Bill was developed under the auspices of the Department of Environment and Primary Industries and is designed to update and replace noxious weeds and pest animal provisions in legislation such as *the Catchment and Land Protection Act 1994* and *the Conservation Forests and Lands Act*. The new legislation is also designed to enhance Victoria's biosecurity regulation in accordance with *the Intergovernmental Agreement: National Environment Biosecurity Response Agreement (NEBRA)*.¹⁸

1.4 EDO

Previous Country Reports for Australia discussed the work of the EDO (Environmental Defenders Offices) and the challenges they face following withdrawal of funding by various State governments. On 21 May 2014, the Victorian branch of the EDO was re-branded as Environmental Justice Australia. The EDO is involved with cutting-edge environmental litigation and the following are two examples:

- The NISW EDO has successfully defended an appeal in *Warkworth Mining Limited v Bulga Milbrodale Progress Association* [2014] NSWCA 105. In the original decision in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48 the NSW Land and Environment Court held that an application by Warkworth Mining Ltd to expand its mining operations should be refused because impacts relating to "biological diversity, noise

¹⁶ James Bennett, 'Cattle grazing trial set to be approved for the Alpine National Park' ABC News, 6 March 2014 available from <http://www.abc.net.au/news/2014-03-06/cattle-grazing-trial-set-to-be-approved-for-the-alpine-national/5302258>.

¹⁷ Invasive Species Control Bill:

[http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs.nsf/ee665e366dcb6cb0ca256da400837f6b/98644BB588B23D75CA257D3A007B3B49/\\$FILE/571332bi1.pdf](http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs.nsf/ee665e366dcb6cb0ca256da400837f6b/98644BB588B23D75CA257D3A007B3B49/$FILE/571332bi1.pdf)

¹⁸ NATIONAL ENVIRONMENT BIOSECURITY RESPONSE AGREEMENT (NEBRA)

<https://www.coag.gov.au/node/74>

and dust, and social impacts” had not been adequately addressed.¹⁹ On Appeal, the Court was unanimous in confirming the reasoning of the NSW Land and Environment Court and dismissing the application of Warkworth.

- The Victorian branch of the EDO, Environmental Justice Australia, has commenced litigation against the Commonwealth Bank in a test case to determine the extent of shareholders’ power at the annual general meeting (AGM). Environmental Justice Australia is arguing that under the *Corporations Act 2001* shareholders have the right to request a resolution be added to the agenda for the AGM that compels the board of directors to report “on the amount of climate change causing carbon pollution it finances.”²⁰ Under section 198A of the *Corporations Act 2001*, directors are traditionally given wide powers of management. The courts have interpreted this type of provision as constituting a primary grant of power in favour of the board of directors, and one which generally cannot be usurped by the general meeting.²¹ As expected, the Commonwealth Bank is defending the action. The case is still in progress, but as Environmental Justice Australia notes, the case potentially creates an important precedent for clarifying shareholder rights in a range of environmental issues.

PART 2 – A CRITICAL CONSIDERATION OF RECENT DOMESTIC DEVELOPMENTS

Environmental regulation at the Federal level has been characterised by a regrettable tendency to wind the clock back that is frequently underpinned by deal-brokering and policy made on the run. This is strikingly illustrated by the winding back of the Clean Energy Legislation package. Not only has the government had to negotiate with the minority parties, but it was also forced to re-visit the possibility of establishing an emissions trading scheme. Coupled with the changes to the RET, these types of compromises are likely to cause confusion and uncertainty in the renewable energy sector, something that does not bode well for Australia’s being able to meet its international climate change obligations.

¹⁹ *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?jgmid=164038>

²⁰ For more information see fact sheet, ‘*We’re Taking the Commonwealth Bank to Court*’ available from <http://www.envirojustice.org.au/blog/we%E2%80%99re-taking-the-commonwealth-bank-to-court>

²¹ *Automatic Self-Cleansing Filter Syndicate Co v Cuninghame* [1906] 2 Ch 34; *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2KB 113.

Another prominent illustration derives from the decision to permit cattle grazing in the Victorian Alpine National Park. As already noted, the ban on cattle grazing dates back to 2005. At that time, the Victorian government released a report on the impacts of cattle grazing, titled: *Report of the Investigation into the Future of Cattle Grazing in the Alpine National Park* (Alpine Report).²² The Alpine Report found that cattle were damaging the park's biodiversity²³ and concluded that "cattle grazing is inconsistent with the primary objects ...of national parks and wilderness areas [and is also] not compatible with the national and International standards for a national park".²⁴ The cattle were thus banned from the national park. Consequent to this, on 7 November 2008, the Victorian alpine region was added to the Australian National Heritage List as part of the Australian Alps National Parks and Reserves. The decision to re-allow cattle grazing not only opens the park to the environmental damage as identified in the 2005 Report, but also goes against the spirit of listing the park on the National Register.

Finally the activities of the Government in seeking to de-list some 74,000 hectares from the World Heritage Listed, Tasmanian Wilderness have drawn widespread condemnation and opprobrium. This is yet another regrettable example that reveals a deep-seated desire to favour development over conservation and that also displays a short-sighted approach to environmental matters. Australia is in danger of damaging its reputation as the Abbott government pursues economic objectives at the expense of Australia's hard-fought environmental protection.

IN MEMORIAM

On 29 July 2014, Mr Glendon Turner, a compliance officer with the NSW Office of Environment and Heritage, was shot dead by a land owner. The land owner and Mr Turner (in his capacity as a compliance officer) had been involved in a long-running dispute with respect to illegal land clearing. A newspaper report states that Mr Turner "has been remembered as a passionate advocate for the farming community who loved to help other

²² Department of Sustainability and Environment, *Report of the Investigation into the Future of Cattle Grazing in the Alpine National Park*, Victorian Government (2005).

<<http://www.environment.gov.au/epbc/notices/assessments/victoria-alpine-national-park/pubs/b6-alpine-grazing-taskforce-2005.pdf>>.

²³ Ibid, 5.

²⁴ Ibid at 6.

people out.”²⁵ The implementation of the *Native Vegetation Act 2003* (NSW) has been contentious, with conservationists and land managers frequently at odds with each other. Partly as a result of this friction, the NSW Government introduced the *Native Vegetation Regulation 2013* to reduce red tape and provide land managers with more flexibility to rotate crops, manage invasive species and use self-assessable codes. These regulations would not have applied to the land clearing in question, as these pre-dated the amendments and would in any case have exceeded the scope of the self-assessable codes.

²⁵ Lucy Carter and Tim Lamacraft, 'Environment Officer Glen Turner, Shot Dead Near Moree, 'Loved the Farming Community'', ABC News, 31 July 2014, available from <http://www.abc.net.au/news/2014-07-31/tributes-for-slain-nsw-environment-officer-glen-turner/5637656>