FEDERAL

Federal Marine Wildlife Initiatives

In August 1995 the federal government made the first substantial marine addition to *Schedules of the Endangered Species Protection Act* 1992 (Cth) - that of the wandering albatross and the key threatening processes of longline fishing (Evans, N., "Federal Marine Policy Developments" (1996)AELN 1: 4-5). Since then several more endangered marine species and fishing operations have been nominated for protection under this instrument. Although the outcome of these nominations has not been determined, several other recent and independent initiatives to reduce the impact of threatening activities upon marine non-target wildlife have occurred. These are outlined below.

Australia Nominates Albatross Under the Bonn Convention

In November last year the Commonwealth government nominated eleven species of albatross and two of cetacean for listing under the *Bonn Convention on the Conservation of Migratory Species of Wild Animals*. Of these, ten albatross species were entered under Appendix II of the Convention which requires that signatory nations make efforts for the species' global protection (Article IV). The Amsterdam Albatross and cetaceans were proposed for listing under Appendix I. This requires that states take actions to recover species and manage threats to them (Article III).

In response to these nominations, the Joint Standing Committee on Treaties released its 9th report which examined surrounding issues and recommended in favour of these nominations. Tabled in September 1997, the report suggested the use of conservation, rather than fisheries, legislation to implement requirements generated by these listings (p2). Although containing some curiosities such as cluster quotas - a method not applicable to the bycatch of conservation significant species - the report recommended several laudable initiatives. These include the broadening of the observer program, and the use of techniques such as night setting of bait to prevent albatross bycatch in longlining operations. In the tabling speech calls were made for continued funding, in particular, for research into the impacts of commercial fishing on endangered wildlife, and mitigation measures to combat incidental capture thereof (Hansard, House of Representatives, 1 September 1997, p7183).

Dugong Protection Areas in the Great Barrier Reef

Following the March 1997 release of a management plan to protect dugongs in Shoalwater Bay, in June Senator Hill as chair of the Great Barrier Reef Ministerial Council announced the Council's decision to declare a series of dugong protection areas (DPA) (for an overview of Shoalwater Bay dugong initiatives see Slater, J "The legal and policy issues involved in protecting a population of dugongs from gill netting in Shoalwater Bay, of the Great Barrier Reef World Heritage Area" (1997) AELN 2: 14-29). Dugongs contribute a recognised value to the world heritage status of the Reef. Consistent with the government's broader framework of a national system of marine protected areas to be formed under the *Ocean's Policy*, DPAs will be located along the Queensland coast where the mammals will be protected from one of their main threatening activities, that of gillnet fishing. It was the "unsustainable decline in dugong numbers" that motivated these encouraging moves towards ensuring the survival of dugongs.

Notwithstanding the World Heritage status of the region, there is scant means by which the federal government can implement DPA initiatives under its own legislation: the GBRMP boundaries under the *Great Barrier Reef Marine Park Act* 1975 (Cth) do not include a considerable portion of the area where dugongs are under threat, and the *World Heritage Properties Conservation Act* 1983 (Cth) lacks provision for the declaration of areas to be set aside within a property, allowing only for the prohibition of threatening activities throughout the entire property. Hence it is planned that these DPAs will be established under the combined workings of the *Nature Conservation Act* 1992 (Qld) and Queensland fisheries laws. Protected areas will operate within a two tier system; gillnetting will be prohibited in zone A, and in zone B safeguards will be put in place to minimise impacts upon the endangered mammal. The establishment of DPAs is now progressing apace, the federal government is at the stage of negotiating compensation for fishers who, as a direct result of these initiatives, will no longer be able to operate viably as gillnetters.

Commonwealth and National Bycatch Policies

The Australian Fisheries Management Authority (AFMA) convened a Commonwealth Bycatch Taskforce which, in June 1997, released for comment a draft Commonwealth Bycatch Policy. The policy recognises that bycatch is a problem in need of redress, and foreshadows bycatch action plans being prepared on a fishery-specific basis for all Commonwealth fisheries. As such, the policy provides a framework for the coordination of efforts, and supplements rather than replaces other initiatives such as that of threat abatement plans prepared pursuant to the *Endangered Species Protection Act* 1992 (Cth).

In late July, the Ministerial Council on Forestry, Fisheries and Aquaculture agreed to develop a nationally coordinated bycatch policy. As an initial step, a discussion paper will be released by the Council for public consultation at the end of the year. The final product is designed to complement and extend existing bycatch initiatives underway around Australia.

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Developments in Commonwealth Fisheries Law and Policy

Background

Commercial fisheries in Australia are managed under arrangements between the Commonwealth, states and the Northern Territory known as *Offshore Constitutional Settlement agreements*. OCS arrangements enable every fishery to be managed under a single authority regardless of the separation of jurisdiction between the two tiers of government. The Commonwealth generally manages those fisheries located adjacent to several states/NT and which would otherwise be regulated by multiple jurisdictions. Deepwater fisheries, and those which are the subject of international treaties, are also a Commonwealth responsibility. Most other fisheries are managed by the states/NT.

Broad policy capabilities lie with the Department of Primary Industries and Energy. Actual management of Commonwealth fisheries is carried out by the Australian Fisheries Management Authority pursuant to the *Fisheries Administration and Fisheries Management Acts* 1991 (Cth). A feature of these statutes is their reference to ecologically sustainable development (ESD) principles, and AFMA's statutory requirement to have regard to the impacts of fishing on non-target species and the marine environment. Since enactment of the AFMA legislation, fisheries laws in many states have also been replaced, enabling ESD principles to be codified as an objective of fisheries management right around the country.

ANAO Audit of AFMA

The management of Commonwealth fisheries by AFMA was the subject of an efficiency and effectiveness performance audit carried out by the Australian National Audit Office in mid-1996.[1] The particular purpose of the audit was to examine the systems and procedures AFMA had in place for planning and operations. The audit concluded that AFMA's processes and administrative framework are appropriate for its role, but that insufficient attention had been paid to ESD and the environmental impacts of fishing. The ANAO reported that AFMA's management structures needed to change to ensure that its enabling legislation was being better complied with.

Recommendations pertaining to the environmental performance of Commonwealth fisheries management include that AFMA -

* develop a schedule for conducting environmental impact assessments of all Commonwealth fisheries pursuant to the *Environment Protection (Impact of Proposals) Act* 1974 (Cth) (the *EP(IP)Act)*
* issue a statement to guide staff and management advisory committees regarding the consideration of environmental impacts in management decisisons
* negotiate a memorandum of understanding to refer decisions of significance under the *EP(IP)Act* to Environment Australia for environmental impact assessment
* better link the ESD objective with fisheries management activities.

House of Representatives Inquiry

Following its release, the ANAO audit report was reviewed by the House of Representatives Standing Committee on Primary Industries, Resources and Rural and Regional Affairs.[2] The House Committee was generally very critical of the ANAO and its auditing procedures, and recommended that aspects of the audit report be ignored. Insofar as the environmental issues raised by the ANAO are concerned, the House Committee recommended against formalizing the current informal arrangements existing between AFMA and Environment Australia as it believed that the requirements of the *EP(IP) Act* were being fulfilled. The government is currently preparing its response to both the ANAO and House Committee reports.

Legislative Amendments

A legal requirement of increasing relevance to fisheries management is the precautionary principle. A 1996 decision of the High Court of New Zealand has confirmed that the precautionary principle must now be observed in fisheries management as a matter of customary law. The case *Greenpeace New Zealand Inc v. Minister of Fisheries* established that the existence of the precautionary principle in international treaties requires fisheries decisions in New Zealand to be consistent with this approach, notwithstanding the absence of any express reference thereto in the relevant enabling statute.[3]

The Commonwealth in June acted to give effect to the precautionary principle in fisheries management. During the last sittings before the winter recess the *Fisheries Administration Act* 1991 (Cth) and *Fisheries Management Act* 1991 (Cth) were amended to impose upon AFMA and the Minister for Resources additional environmental management responsibilities. The legislation now requires that Commonwealth fisheries be managed according to the objective of -

> "ensuring 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 and 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".

1 Australian National Audit Office "Commonwealth Fisheries Management" Audit Report No 32,1996

2 House of Representatives Standing Committee on Primary Industries, Resources and Rural and Regional Affairs "Managing Commonwealth Fisheries: The Last Frontier" Parliament of the Commonwealth of Australia, 1997

3 S Mascher, "Taking a Precautionary Approach: Fisheries Management in New Zealand" (1997) 14 EPLJ 70-79

The implications of this amendment and the New Zealand High Court decision mentioned above are yet to be determined. Clearly, though, the legal and philosophical foundations of fisheries policy have shifted to embrace a much greater environmental basis. There is a need to translate this policy shift into management practice, and there are underway current Commonwealth efforts to this end.

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The Cost of Coronation Hill

The most obvious lesson from the recent High Court decision regarding the Hawke Government's 1991 ban on mining at Coronation Hill in the Kakadu National Park is that conservation costs money.

In a strong decision Justice Kirby said

> "it is one thing to expand a National Park for the benefit of everyone who will enjoy its facility. It is another to do so at an economic cost to the owners of valuable property interests...whose rights are effectively confiscated to achieve that end".

The High Court majority (4 to 3) concluded that property rights could not be "sterilised" without fair compensation being paid. The Federal Government ban on mining had effectively confiscated the property rights of Newcrest Mining in breach of section 51(31) of the Constitution which states that the Government can compulsorily acquire property but only on just terms. No compensation was offered to Newcrest. The decision should cause Government to consider and carefully assess the cost of their conservation initiatives.

The Hawke Government decision to ban mining at Coronation Hill in the Northern Territory was based in part on its perceived obligations under the *World Heritage Convention.* The Government nominated the area for world heritage in December 1991 despite strong protests from the Northern Territory Government, and it was successfully listed one year later by the World Heritage Committee.

The issue of paying compensation to those adversely affected by world heritage listing and management has raised its head on many occasions since the Federal Government, using its world heritage powers, stopped the damming of the Franklin River in 1983. More recently the House of Representatives Standing Committee on the Environment recommended in its Report on Managing Australia's World Heritage that the Commonwealth should

> "provide compensation in cases of substantial disturbance to individuals and business as a result of the ongoing management of world heritage areas".

There is a

> "moral necessity to provide compensation at the time when world heritage listing begins to affect individuals and business",

the Committee said.

Another example of the inadequate compensation provisions of our world heritage regime was highlighted on 20 August 1992 when the Federal Government unilaterally and without notice to the owner of the community, closed Bender's quarry in Tasmania's South West World Heritage area. The Government denied legal liability for the payment of compensation for the loss of this business. The quarry business had operated continually for 40 years and was independently valued at between $3 and $5 million. An out of court settlement was effected some 18 months after closure following the 1993 federal election.

Farmers on leasehold property in the Willandra Lakes World Heritage region of NSW had to negotiate and wait nearly 14 years before they were compensated by the Federal Government for being adversely affected. The High Court appears to have endorsed the principle that those with property rights in or near the relevant conservation areas should not be forced to carry the burden and/or the cost for the entire community. If the public is to benefit - and they do - the public must pay.

Our litany of world heritage conflict and controversy reflects poorly on Australia. Our world heritage procedures stand in stark contrast to those in the USA, Canada, UK and New Zealand. In an examination of the world heritage procedures in these four countries, unlike Australia, I found little evidence of litigation as well as the following:

* Property owners and those with a proprietary interest in the relevant area must concur in writing before a world heritage nomination proceeds;
* in most countries examined, world heritage did not exist over private property;
* properties are listed on a indicative inventory, before world heritage nomination consideration;
* World Heritage nominations must have community support;
* nominations occur only where properties are already protected and management plans are in place; and
* compensation is the right of those whose property rights are adversely affected by world heritage listing or management.

Australia's world heritage history is tainted with ad hoc decision making in a politically and emotionally charged hot-house. Hopefully the High Court decision can act as a catalyst for reform.

The High Court determined that the protection of property rights are "fundamental and basic rights", which should be afforded a "constitutional guarantee". Justice Kirby in support of this view referred to similar "protections against arbitrary and uncompensated deprivation of property" in the USA, India, Malaysia, Japan and South Africa. It is in this regard that the implications of the decision are likely to flow to other areas of Government

activity outside World Heritage, National Park, National Estate and other conservation initiatives. Native title and the Government's *Ten Point Wik* plan are the most notable. If property rights are to be extinguished or sterilised then just compensation may be payable to those adversely affected. To the extent that *Regional Forest Agreements* derogate or extinguish private property rights then just compensation may be payable to those affected. Although restoring investor confidence the court decision is likely to cause the Government to undertake soul-searching in a number of areas. An issue unresolved is the point at which property is "compulsorily acquired". In the Newcrest decision Justice Gummow said the Commonwealth acquired an "identifiable and measurable advantage" from the sterilisation of Newcrest's mining rights. In the USA although private property rights are protected under the 5th Amendment to the Constitution one Presidential Order provides:

> "...regulations imposed on private property that substantially affect its value or use, may constitute a taking (compulsory acquisition)" and that "...undue delays in decision-making during which private property use is interfered with carry the risk of being held to be takings".

Both the High Court and the Federal Government are yet to explore such protection measures but the Newcrest decision suggests Australia is moving in that direction.

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AUSTRALIAN CAPITAL TERRITORY

Inquiry into the Environmental Protection Bill 1997

As part of its inquiry into the *Environment Protection Bill* 1997, on the 11 August, 1997, the Legislative Assembly for the ACT Standing Committee on Planning and Environment hosted a public meeting to maximise the opportunity for public comment on the Bill and to encourage the public to submit written comments.

In mid-September the committee expects to report to the Legislative Assembly.

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NEW SOUTH WALES

Environmental Planning and Assessment (Amendment) Act 1997

This Act received the Royal Assent on 10 June 1997 but has yet to commence operation. The Act makes a number of amendments to the *Environmental Planning and Assessment Act* 1979 (EPA Act) and the *Land and Environment Court Act* 1979 (LEC Act).

This Act inserts sections 104B-104D into the *EPA Act.* These sections seek to remove the possibility that a development consent granted by the Minister will be declared invalid by the Court on the ground that any steps preliminary to the granting of the consent should have been taken by the Minister or any other body.

Section 104B provides that in relation to a development consent granted by the Minister for Urban Affairs and Planning either before or after the commencement of this section, the only two procedural requirements which are mandatory are:

* A requirement that a development application to carry out designated development and its accompanying documents be publicly exhibited for the minimum period of time.
* A requirement that a development application to carry out advertised development and its accompanying documents be publicly exhibited for the minimum period of time.

Even where these two steps have not been complied with, the Land and Environment Court may, instead of declaring the consent invalid, make an order suspending the operation of the consent in whole or in part and specify the terms compliance with which will validate the consent.

The terms may include the carrying out of steps again or in a different manner. The Act makes it a duty of the Court to consider making an order of suspension instead of declaring that the development consent is invalid.

In this situation, section 104C provides that the Minister may revoke the development consent whether or not the steps set down by the Court have been complied with. The Minister can then carry out those steps and regrant the development consent with such changes as the Minister thinks appropriate.

The Minister may then apply to the Court for an order that the terms set down by the Court have substantially been complied with and the Court may then make such an order and revoke the order of suspension.

Marine Parks Act 1997

This Act commenced operation on 1 August 1997. It provides for the establishment and management of marine parks in New South Wales coastal waters.

The Objects

The objects of this Act are as follows: