National Packaging Covenant implemented

On 16 December 2005 amendments to the *Environmental Protection Regulation 1994* (Qld) came into force, which enact the renewed *National Packaging Covenant* that will apply from July 2005 until 30 June 2010. The *Environmental Protection Amendment Regulation (No. 2) 2005* alters the application of the re-use, recycle and energy recovery rules by changing the definition of "brand owner" to include the first person to sell an imported product in Australia plus retailers who supply (polyethylene) plastic bags to customers.

Under the amendments, the obligation to implement an action plan and keep statistics on re-use, recycling and energy recovery of consumer packaging materials will now not apply to businesses with a gross annual turnover of less than $2 million. Where a brand owner is required to have an action plan, it must commit to re-using (as a first preference), recycling or energy recovery of set percentages of consumer paper (80%), glass (60%), steel (65%), aluminium (75%) and plastics (35%), and must keep annual statistics on these and other matters for five years. The amendments also clarify that compliance with the *Australian Retailers Association Code of Practice for the Management of Plastic Bags* is sufficient, and means a plastic bag brand owners will not also have to prepare an action plan and keep annual statistics.

For a copy of the Amendment Regulation see: www.legislation.qld.gov.au/LEGISLTN/SLS/2005/05SL322.pdf.

WESTERN AUSTRALIA

Editor: Merinda Logie

NELA (WA Division) State Conference 2006

"From Environmental Incident to Eenforcement and Beyond"
Thursday 28 September 2006, Crawley, Western Australia

NELA(WA) is holding its annual state conference at the University Club of Western Australia, Crawley, on the afternoon and evening of Thursday, 28 September 2006. The theme of the conference is Environmental Prosecutions.

Speakers are:

- Danicia Dutry (Q&A Communications Group) – public communication/public relations
- Sonya Krishnan – (Enforcement Unit, Department of Environment and Conservation) – investigations by Enforcement Unit
- Simon Daddo – (Freehills) – solicitor – defending an environmental prosecution
- Neils Monaghan (State Solicitor's Office) –prosecution and court procedures
- Caroline Watkins (URS Asia Pacific) – risk minimisation

The after-dinner speaker will be Professor Don Bradshaw, Department of Zoology, University of Western Australia - *"Protecting Australia's Biological Diversity: Past imperfect, present tense and future conditional?"*

We expect between 80 to 100 delegates including NELA members, environmental consultants and scientists, government representatives and attendees from the property development and resources sectors.

The cost will be $195 for members and $250 for non-members which includes materials, lunch, attendance at the conference, post-conference drinks and conference dinner at the University Club.

Registration forms will be available shortly. In the meantime, the conference secretariat, Jackie Eigenmann, can be contacted at: jackie@marketfirst.com.au.

April Seminar - Great Southern Arc

A NELA (WA) seminar held on 20th April 2006 examined the largest private conservation project ever undertaken in Western Australia, the Great Southern Arc Project.

The CEO of Greening Australia, Dr Rob Lambeck, discussed the logistics and science behind rehabilitating an arc of land across south west Western Australia. Not only is the project on an extremely wide scale, it has earned the support of local farming communities by permitting farming to continue on certain parts of rehabilitated land, provided the areas are of lesser conservation significance. In some cases, the purchase by the Project of part of a farmers land has provided the farmer with the funds necessary to move towards more sustainable farming practices on the remainder of the land, aided by the scientific experts involved in the Project. Tony van Merwyk, the Environment partner at Freehills, also spoke and provided an overview of the legal issues that environmental NGOs face, their need for general legal advice in areas such as leasing and employment and the valuable role of pro bono legal advice in this regard.

May Seminar - Address by the Hon. Minister for the Environment

On May 23, the new WA Minister for the Environment, the Hon Mark McGowan MLA, spoke to NELA members at the offices of Clayton Utz in Perth as part of NELA's seminar series. With serendipitous timing, the seminar was scheduled on the same day that the Minister had made the major announcement that he was amalgamating the Departments of Environment and Conservation and Land Management. Formerly a lawyer, Minister McGowan comes to the portfolio after a term as Tourism Minister. The Minister will be required to make some potentially difficult decisions during in his tenure, including whether to grant environmental approval to the high profile Alcoa Wagerup refinery expansion and the Gorgon liquid natural gas project on Barrow Island.

In his speech, the Minister described the sense of challenge he felt coming to grips with the complexity of the environment portfolio in contrast with his previous responsibilities in tourism. Nonetheless, he conveyed an enthusiasm for the new role, which he has subsequently demonstrated by announcing significant reforms to the Environmental Protection Act including substantial penalty increases for environmental offences. Following the presentation, the Minister stayed for drinks, providing NELA members with an opportunity to chat and discuss issues with him on a one-on-one basis.

June Seminar - Windfarms in Western Australia

On Wednesday 12 July, NELA(WA) Branch held the next seminar in its 2006 series entitled "Windfarms in Western Australia".

Sponsored by Allens Arthur Robinson, the seminar explored three different facets of windfarm projects. Robyn Glindemann, a Senior Associate at AAR and a National Vice-President of NELA, outlined current windfarm regulation in Australia, highlighting the different approaches taken by the States to assessing the environmental impacts of windfarms, and considered the merits of the proposed Federal Government guidelines on windfarms. Robyn also provided some background on the Federal Environment Minister's controversial decision in relation to the Bald Hills windfarm in Victoria.

The second speaker was Charles Martelli, General Manager Energy Marketing for Griffin Energy. Griffin Energy is a joint venture partner in the Emu Downs Windfarm near Geraldton, one of Western Australia's largest windfarms. Charles gave some background on the development of the Emu Downs Project and highlighted some of the practical issues that arose in relation to the development. Charles' presentation was accompanied by some spectacular photos of the construction of the Emu Downs project, highlighting the size of the individual turbines that make up the windfarm.

The final speaker was Adam Lippiatt, also a senior associate at AAR. Adam looked at the economics associated with a windfarm project focussing on the different types of energy products that a windfarm produces such as Renewable Energy Certificates under the Commonwealth MRET scheme. Adam also considered the impact of the current State and Federal renewable energy policies on the future of windfarm development in Australia.

Some lively discussion followed the speakers' presentations as attendees teased out some of the issues raised and debated the pros and cons of windfarms in general.

Western Australia's State of the Environment Report

On 1 June this year, the Chairman of Western Australia's Environmental Protection Authority released the State's third State of the Environment Report for public comment. The draft Report, together with a useful summary document can be downloaded from the dedicated State of the Environment Website at www.soe.wa.gov.au.

The Report identifies and ranks 40 of the most important environmental issues facing Western Australia with eight issues classified as 'very high priority'. The eight issues are:

- Climate change;
- Population and consumption – WA has one of the highest per capita rates of resource consumption in the world;
- Greenhouse gas emissions;
- Introduced animals;
- Phytophthora dieback – a soil-borne disease that prevents plants from absorbing water causing them to die slowly;
- Weeds;
- Land salinisation; and
- Salinisation of inland waters.

The EPA's suggested responses to these issues largely involves implementation of a number of policies, strategies and programs that have either already been drafted and are yet to be finalised or have been proposed by the State. Among some of the new proposals, the EPA recommended:

- establishment of a carbon-trading market and long-term targets to reduce emissions in the context of a national agreement;
- developing a strategic policy and governance framework for agricultural deep drainage to combat the salinisation of inland waters; and
- developing a whole of government policy to reduce the speed of Phytophthora dieback.

The EPA also made findings and recommendations in relation to:

- Particulate emissions and photochemical smog;
- Soil erosion and acidification – the EPA has suggested the development of a new State soil protection policy;
- The loss and degradation of the State's wetlands, fringing and instream vegetation and acidification and eutrophication of waters;
- Cleaning of native vegetation; the EPA has recommended implementation of a 'no net loss' policy in relation to preservation of biodiversity;
- Degradation of marine habitats and introduced pests; and
- The impact of human settlement in terms of transport and water and energy use, and the protection of natural and Aboriginal heritage places.

The Report also makes a number of recommendations in relation to the impact of the State's principal industry sectors on the environment, including the mining and petroleum sectors, agriculture, fisheries and forestry/wood production industries.

The draft Report will be open for comment until 29 September 2006, with the final Report to be released late in 2007 or early 2008.

New State Environmental Agency

A new Department of Environment and Conservation has been created in a major shake-up of the environment portfolio. The former Department of Environment and the Department of Conservation and Land Management have merged to form the new agency.

The Hon. Minister for the Environment Mr McGowan said the move would help ensure that environmental issues could be more adequately addressed in the face of the State's booming economy and growing population, which were placing significant pressure on the environment.

Mr McGowan said the new department will have a combined budget of $270million and more than 1800 staff around the State from Kununurra to Esperance.

Keiran McNamara, the former Executive Director of CALM, is the Director General of the new agency.

The day-to-day services of the former DoE and CALM will continue to be delivered under the direction of Acting Deputy Directors General Kim Taylor (Environment) and Jim Sharp (Parks and Conservation), who would report direct to Mr McNamara. The Environmental Protection Authority will continue in its present form with Chairman Wally Cox appointed for a further three-year term by State Cabinet yesterday.

The new department would service the EPA as well as the Swan River Trust, Waste Management Board, Keep Australia Beautiful Council, Conservation Commission of WA and the Marine Parks and Reserves Authority.

The Government is also preparing plans to merge the Conservation Commission and Marine Parks and Reserves Authority to create a new Biodiversity Commission, in line with a 2005 election commitment.

Proposed Amendments to the Environment Protection Act 1986

In July 2006 the Department of Environment and Conservation (**DEC**) released a public discussion paper outlining a number of proposed changes to the *Environmental Protection Act 1986* (EP Act). The deadline for submissions is 18 August 2006.

The proposed changes are aimed at improving the workability and enforceability of the EP Act and notably include:

- The introduction of civil penalties (fines) for contravention of the EP Act as an alternative to criminal prosecution. Civil penalties will aid enforcement as the pursuit of a civil penalty rather than a criminal conviction:
  - Allows alleged contraventions to be assessed 'on the balance of probabilities' rather than against the significantly more onerous standard of 'beyond reasonable doubt';
  - Avoids certain procedural protections available to a defendant in a criminal trial, such as privilege against self-incrimination.
- The introduction of a system that would allow the DEC's CEO and a neutral third party to negotiate with the alleged offender on a range on civil penalties in lieu of criminal or civil prosecution through the Courts. The intention is not to replace the role of the courts but to provide a more flexible and efficient alternative where the offender's behaviour does not warrant either criminal prosecution or court imposed civil penalties. The choice of whether to pursue a criminal or civil prosecution will rest with DEC's CEO and where a civil penalty is paid no criminal conviction will be recorded.
- An increase in the maximum penalties for certain environmental offences in order to achieve greater consistency with other jurisdictions. The new maximum penalties will be as high as $5,000,000 for a corporation and $1,000,000 for an individual. It is also proposed to introduce minimum penalties for Tier 1 offences (the most serious category) equal to 10% of the maximum fine.

- The narrowing of the "due diligence" defence. Currently a defendant need only make out that they took reasonably precautions and exercised due diligence to prevent the offence and *as soon as was reasonably practicably notified the DEC CEO*. Under the proposed amendment the "due diligence" defence will only exist where the offence *was due to causes over which the defendant had no control*.

NELA (WA) is preparing a submission on the proposal, which will be circulated to members prior to lodgement.

New Dangerous Goods laws a step closer

The WA Department of Consumer and Employment Protection is currently considering public submissions it received relating to its four sets of draft regulations under the new *Dangerous Goods Safety Act* 2004. Once the regulations are finalised, the new Act will enter into force, replacing the current *Explosives and Dangerous Goods Act* 1961 and *Dangerous Goods Transport Act* 1998. The new Act brings with it a considerable change to the regulatory environment for dangerous goods and explosives.

The new Act differs significantly from the existing regime in a number of key respects:

- the Act creates a general duty of care to minimise risk from dangerous goods to people, property and the environment;
- the Act narrows the scope for exemptions;
- the Chief Dangerous Goods Officer can require audits of premises at the owner's or manager's expense; and
- officers of a corporation will be personally liable for offences against the Act, and the onus of proof will fall on the officers.

New duty of care

The Act imposes a new general duty of care on all persons involved with the storage, handling and transportation of dangerous goods to "take all reasonably practicable measures to minimise the risk to people, property and the environment". The maximum penalty for breaching this statutory duty of care is A$100,000 for an individual and A$500,000 for a corporation.

This new duty expands the scope of the Act to include the protection of the environment. The reference to "handling" is also significant, because the existing regime excludes certain industrial facilities on the grounds that they are not "storage" facilities. Because of the broadness of the definition of "handling", the new duty is likely to bring these facilities within the scope of the Act.

Regulations and codes of practice

In addition to regulations, the new Act also provides for the Minister responsible for the administration of the Act to approve codes of practice, which will serve as guidelines for industry, but will not have the force of regulations. Under some circumstances, compliance with approved codes of practice may provide a defence against prosecution.

Exemptions from regulations

Part 4 places greater restrictions on the grant of exemptions than the present regime. However, the Act will allow both the Minister and the Chief Dangerous Goods Officer to grant exemptions. Ministerial exemptions must be tabled before Parliament, and Parliament may disallow them. The Chief Officer may only grant exemptions in circumstances where compliance is not reasonably practicable, there is no increased risk to people, property or the environment and the exemption does not pose unnecessary administrative or enforcement difficulties.

Investigation and enforcement

Dangerous Goods Officers ("DGOs") will retain the powers of Inspectors under the new Act, but in an expansion of the Government's investigative power, the Chief Officer will have the power to require audits of sites where dangerous goods are stored, handled or transported, *at the expense of the site owner or manager*. A person affected by an audit can seek a review of the Chief Officer's decision at the State Administrative Tribunal.

Remediation notices

An another significant expansion of power, a DGO will be empowered to issue a "remediation notice" in circumstances where the DGO reasonably suspects that a contravention of the Act has occurred or is about to take place, a "dangerous goods incident" has occurred, a "dangerous situation" has arisen, or safety management documents have been improperly or inadequately prepared. In contrast, under the existing law, only the Minister may give equivalent directions, and then only in response to a report of the Chief Inspector (as the Chief Officer is known under the existing law).

A remediation notice will compel the person to whom it is addressed to take "reasonably necessary" measures to remedy the matter and ensure the safe storage, handling or transport of the dangerous goods. In the event of non-compliance with a remediation notice, the DGO may take the necessary measures to comply with the notice and the State is entitled to recover the costs from the non-compliant party.

Infringement notices and prosecutions

Under new provisions in Part 7 of the Act, officers of a corporation will be personally liable for offences committed by the corporation, and may be charged even if the corporation itself is not charged. If the corporation is proven to have committed an offence, a company officer who has been charged is deemed to have committed the offence unless the offence was committed without the officer's consent or cooperation, and the officer took all measures that could reasonably have been expected under the circumstances to prevent the offence.

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Review of the Assessment of Site Contamination NEPM

The National Environment Protection Council (NEPC) is a national council of Commonwealth, State and Territory Ministers. The *National Environmental Protection Council Act 1994* establishes the NEPC and outlines its role in making National Environment Protection Measures (NEPM'S). NEPMs are designed to improve national consistency in environment protection outcomes.

The 'Assessment of Site Contamination NEPM' was made in 1999 with the purpose of establishing a nationally consistent approach to the assessment of site contamination to ensure sound environmental management practice by the community which includes regulators, site assessors, environmental auditors, Landowners, developers and industry.

The NEPC is currently undertaking a review of the 'Assessment of Site Contamination NEPM' and recently accepted public submissions on a discussion paper for the review.

For a copy of the Review of the Assessment of Site Contamination NEPM Discussion Paper or further information on the review please visit **www.ephc.gov.au**, or contact **NEPC Service Corporation**, Level 5, 81 Flinders St ADELAIDE, SA 5000. Telephone: (08) 8224 0912; facsimile: (08) 8224 0912; email: exec@ephc.gov.au

State Water Plan: Draft Water Policy Framework Discussion Paper

A key objective of the Government's 2003 State Water Strategy - the creation of a State Water Plan - is expected to be finalised and released by March 2007. The Plan will consist of three components:

- Water Policy Framework;
- Water Planning Framework; and
- Water balances around the State.

The Water Policy Framework, currently under development, proposes a 'vision' for water resource management in WA, which will drive reform of the planning, governance and legislative structures. The Government has sought comment on the Draft Water Policy Framework Discussion Paper, which canvasses some possible changes to the current water resource management approach with a focus on improving water resource security for users, the community and the environment.

Written submissions closed on 16 June 2006. The discussion paper itself can be accessed at: http://www.statewaterstrategy.wa.gov.au/index.cfm?event=swpFramework

Kimberley Water Source Project: Independent Review

Increasing demands on WA's scarce water resources, combined with climate change, have generated strong interest in developing alternative water sources for the State. The lead-up to the February 2005 State election returned public attention to the possibility of transporting water from the Kimberley region to Perth. In late 2004, the State Government commissioned a panel of four experts to investigate and report on the technical and financial viability of ocean, canal or pipeline transportation.

In May 2006, the panel published its report. The main finding was that none of the three proposed options could support Perth's growing water needs in a cost-effective way. The panel found that using the Kimberley as a source would increase the average household water bill by 100 to 400 percent, and concluded that the Government should continue to focus on other alternatives such as desalination. The panel's final report is available for download from the State Water Strategy website: http://www.statewaterstrategy.wa.gov.au/index.cfm?event=kimberleyProject

The Gorgon project - unique site, unique decision

The WA EPA has controversially recommended that the high profile Gorgon Liquid Natural Gas project should not go ahead. The project still has the support of the State and Commonwealth governments, however it still faces further hurdles, which highlight the complexities of Western Australia's environmental approvals system.

The Gorgon Joint Venturers have proposed locating the Gorgon Liquefied Natural Gas development on Barrow Island, a Class 'A' nature reserve. However, the future of the $11 billion project is in question after the EPA recently recommended that the Gorgon project should not be permitted to proceed.

The EPA's recommendation has attracted criticism from industry groups who claim it could deter investors from establishing projects in Western Australia. The Premier, Alan Carpenter, has publicly asserted that the Government will work with the Gorgon Joint Venturers to come to a satisfactory resolution. The Federal Environment Minister, Ian Campbell, has also made public statements in support of the project. However, the emphatic nature of the EPA's recommendation raises the spectre of a legal challenge to any decision to approve the project.

There have been previous occasions on which the EPA has recommended against a proposal and the State Government has approved it, but none involving sites of environmental sensitivity comparable to Barrow Island.

Barrow Island

Barrow Island is a Class 'A' nature reserve, meaning that any development on the island needs to be approved by an Act of the Western Australian Parliament (the *Barrow Island Act* was enacted in 2003). The waters around the island are part of the *Montebello/Barrow Island Marine Conservation Reserves* and in certain areas drilling for petroleum is prohibited. Barrow island and its surrounding waters are habitat for a number of species that are protected under the State *Wildlife Conservation Act* 1950 (WA) and listed as threatened under the *Federal Environmental Protection and Biodiversity Conservation Act* 1999 (Cth) ("EPBC Act"). In addition, a particular species, the rare Flatback turtle, is the subject of an international Memorandum of Understanding to which Australia is a signatory. The island and its surrounding waters are also on the Register of National Estate under the *Australian Heritage Council Act* 2003 (Cth).

The EPA's report and recommendations

While it is unusual for the EPA to recommend against the approval of a project, it is not unprecedented. What was unprecedented about the EPA's report is that it also stated that *"if, however, the Government was to decide that the proposal may proceed for other than environmental reasons, a set of strict conditions and governance arrangements would be required"* and included a draft framework for environmental conditions.

The EPA's recommendation raises the possibility that a decision to approve the project may be subject to judicial review.

The scope of the Ministers' decision

In Western Australia, the *Environmental Protection Act* 1986 (WA) ("EP Act") requires that, in order to approve a project for implementation, the Minister for the Environment, after receiving the EPA's report, must confer with any other Ministers who are likely to be concerned in the outcome of the proposal (such as the Minister for State Development (the Premier), the Minister for Energy, and the Minister for Planning and Infrastructure) and together they must agree on whether the proposal should be approved under what conditions. If the Ministers cannot agree, the decision is referred to the Governor (effectively the Cabinet).

The object of the EP Act is *"the protection of the environment"*, having regard to certain principles, including the *precautionary principle, the principle of intergenerational equity*, and the principle of the *conservation of biological diversity and ecological integrity.* Given that the EPA has found that the Gorgon project is environmentally unacceptable, a decision to approve the Project raises the question whether such a decision is within the scope of the Ministers' powers under the Act.

The requirement that the Minister for the Environment consult with other Ministers suggests that non-environmental factors may be taken into account. As the decision may end up with the Governor, this also suggests that other factors may be considered. However, unlike the EPBC Act, the Ministers (or Governor) are not expressly empowered to look at economic and social factors. While the courts have clearly established that the EPA can only consider environmental factors when assessing a proposal, they have not yet considered the scope of the Ministers' decision. This is new territory.

Appeals against the recommendations

A second ambiguity arises from the appeals process itself. The EP Act allows for appeals to the Minister for the Environment against the EPA's recommendations. Eleven appeals were lodged.

On a strict reading of the EP Act, the Minister's power to respond to appeals is problematic. He can dismiss an appeal. He can remit the proposal to the EPA for further consideration. However, he is not granted a clear power to accept an appeal (and reject the EPA's recommendations). Instead, he is granted the power to "vary" the EPA's recommendations by "changing" the implementation conditions.

Although the EPA has provided a draft framework of conditions that may be applied should the project go ahead, it has implied that even these conditions will not be sufficient to render the Gorgon project environmentally acceptable. Strictly speaking, it has not provided any implementation conditions to be "varied". This ambiguity may present further hurdles to the Joint Venturers.

Conclusion

The unorthodox approach taken by the EPA in this instance, coupled with the ambiguities in the EP Act, has created a great deal of complexity both for the proponents and for the Government in approving the project. We await with interest to see how this complexity will be resolved.

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