Recent Developments in Environmental Law in Tasmania

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Introduction

A number of significant legislative and policy developments ocurred in Tasmanian environmental law in recent times. This review is restricted to developments ocurring since 1989.

Administrative developments

The Australian Labor Party (ALP) Tasmanian Policy Statements for the May 1989 election included a wide-ranging agenda of environment and planning reform. Coupled with the commitments in the ALP-Green Accord, a clear intention to establish new and improved frameworks in environmental management was made out. Fundamental to the implementation of these changes was the creation of the new Department of Environment and Planning on 17 July 1989. This was part of arguably the most extensive revision of administrative arrangements the State had seen.

The new Department of Environment and Planning comprised the Survey, Mapping, Valuation, Property Services and Corporate Services Divisions, all from the former Department of Lands, Parks and Wildlife; the Local Government Office and Office of the Commissioner for Town and Country Planning, formerly with the Department of Premier and Cabinet; the Land Titles Office from the former Law Department; and the Environmental Management Division, formerly the Department of Environment.

The new Agency's functions covered two main areas - (i) planning, property and environmental management, and (ii) land information and services. The Divisions of Environmental Management, Planning and Property Services, together with the Office of Town and Country Planning and Office of Local Government, have responsibity for different aspects of planning, environmental and land management decision making. The Survey, Mapping, Valuation Divisions and the Land Titles Office are all involved in collection, interpretation and provision of information

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relating to land.The eight service delivery Divisions of the Department are supported by a Corporate Services Division and a Policy Division, which have been critical in securing the consolidation of the new Agency.

The potential benefits of greater integration and co-ordination of the activities of the individual Divisions within these two broad groups are significant, and increasingly are bearing fruit in terms of a more wholistic approach to resource management in the State.

Environmental and Planning reforms

In implementing its environment and planning reforms, the State Labor Government's expressed intention was to establish an integrated system to enable a consistent and co-ordinated approach to environment and planning issues at a State level, a simplification of the development approval process, and a rationalisation of the roles and responsibilities of State and Local Governments in the area. It also sought to strengthen opportunities for public participation in the environment and planning processes.

Most notably, the package of reforms established a framework for the sustainable development of the State. The objectives of the proposed system owe much to the language of the *Resource Management Act* 1991 (New Zealand). They focus on sustainable management, protection of biodiversity, public involvement and facilitation of economic development. The essential aspects of the new system are as follows.

Public Land Use Commission

Central to the new reform is the Public Land Use Commission. Legislation to establish the Public Land Use Commission, was enacted late in 1991 as a part of the *Public Land (Administration and Forests) Act* 1991 (hereafter, the "Resource Security" legislation). Whilst the Public Land Use Commission is not a decision making body - acting as it does on reference from Government and making recommendations - it does for the first time provide an open assessment process for the allocation and use of public land. In his second reading speech the Premier noted that Government and community should be fully advised on the environmental implications of public land use decisions, of the type which have caused such controversy in Tasmania in the past.[1]

1 The House of Assembly "Parliamentary Debates", 13 November, 1991, pp 5156-5164, especially pp 5156-7.

Section 5 of the Resource Security legislation establishes the Public Land Use Commission as part of the State's environmental management and planning system. The functions of the Commission are to enquire into and make recommendations on the use of public land when required by the Minister. The following matters are to be addressed by the Public Land Use Commission:

- to identify the nature and extent of the resources of the land;
- to identify the environmental, cultural, social, industrial, economic and other values of those resources;
- to identify the uses that are or could be made of those resources;
- to assess the full costs and benefits involved in each use, or combination of uses, of those resources;
- to consider any other aspects of the use of the land the Commission considers relevant.

Section 14 of the legislation requires that questions on the use of public land must be referred to the Commission by the Minister. The reference may also include land that is not public land but which is directly affected by land which is the the subject of the reference. The Act also allows the Public Land Use Commission to recommend to the Minister to refer a question on the use of any specified land to the Commission.

The Resource Security Legislation requires consultation in the course of an enquiry. This consultation takes three forms.

(1) Affected Agency Groups : The legislation makes provision for the establishment of Affected Agency Groups to help the Commission carry out its functions. Section 17 allows the Commission to select people who represent Government Departments and state authorities that (i) may have management and policy responsibilities in respect of the reference; or (ii) have indicated to the Commission a desire to be represented in the enquiry.

(2) Reference Panels: Section 18 of the Resource Security legislation makes provision for the establishment of Reference Panels to assist the Commission. The panel is to be selected having regard to the nature of the reference and to include people with expertise in a wide range of environmental, conservation and industry matters including:

- soil conservation, land rehabilitation and protection;
- conservation of natural and cultural resources;

* conservation and management of water resources;
* industry and commerce;
* management and commercial use of forest resources;
* mineral exploration and mining development;
* tourism and the recreational use of public land;
* agriculture and conservation techniques used in developing land for primary production;
* aquaculture and fisheries management.

Section 19 allows the Commission to establish other reference bodies and to consult or seek advice from other groups and people to help carry out its functions.

(3) Public Comment: There is provision for public notification, consultation and comment at various stages of the consultation process.

Administrative Structures

The second component of the proposed integrated system was "umbrella" legislation establishing common objectives, structures and mechanisms for the system as a whole. A draft Bill[2], and draft legislation to replace the existing provisions of the Local Government Act relating to planning - the Planning Bill, 1991, were released in December 1991 for public comment.

The major structures proposed for the new system were an Environmental Management and Planning Commission, to be responsible for the administration of the system as a whole and to replace the Office of the Commissioner for Town and Country Planning, and a Ministerial Advisory Council. The Commission's focus was to be on environmental management as well as planning issues, and it was to comprise representatives from the planning, environmental management and Local Government areas. The Council was to provide a forum for industry and interest group participation in a similar range of issues.

State Policies

The Commission was to be responsible for the making and administration of new and powerful instruments provided by the legislation - State Policies and State of the Environment Reporting. State Policies were intended to meet a significant problem with the existing Tasmanian environment and planning framework, so as to provide the means by which State standards and requirements could be incorporated into legally enforceable instruments. They were

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2 *The Environmental Management and Planning Commission Bill,* 1991.

intended to take effect automatically as amendments to local planning schemes, and to have the force of law. They would be instrumental in achieving a simplification of the development approval process and a rationalisation of the roles and responsibilities of State and Local Governments.

Whilst such instruments are well known in other Australian jurisdictions, the Tasmanian variant was significant for the way in which both environment and planning measures could be dealt with by a single instrument, and the opportunities for integration thus presented. Like the Public Land Use Commission, a full and open public process for the making of State Policies was proposed.

State of the Environment Reporting

State of the Environment Reporting is an important means of measuring environmental progress. Perhaps because of a lack of resources, and perhaps because of a lack of motivation, environmental information in Tasmania is patchy at best, and legislative recognition for State of the Environment Reporting was proposed in order to begin redressing this situation.

Planning Reform

In the planning area specifically, the major emphasis of the new system was on "State level" planning, whilst moving out of simply "double-checking" on local planning. There was also an emphasis on requiring decision-makers to give effect to the objectives of the system as a whole, and to performance-based decision making criteria.

Inherent in the proposals was the basis for an improved development application assessment system. The approval system established by the Planning Bill 1991 was intended as the "base-level" development approval process, to be used to consolidate existing approval requirements. Whilst this intention was announced, further progress depended on the enactment of the new planning legislation, and the February 1992 election intervened.

The announced proposals proceeded from the premise that many of the development approval requirements which currently exist in separate pieces of legislation can be consolidated, and those which need to continue could be established through State Policies rather than through separate legislation. This meant that for those developments requiring assessment at a State level, approvals could be given in a co-ordinated way, and with the opportunity to approach a "one stop shop" system.

As noted, the "base-level" approval was the planning approval under the draft Planning Bill 1991. Because this is centred at the Local Government level, it provided a clear opportunity for State and Local Government role rationalisation, for State approvals to be properly co-ordinated with local ones, and for Local Government to

be given clear criteria by which to make assessment decisions.

This system was intended to be supported by legislation providing for major development approval processes. Whilst the standard approval system is based at the local level, there is a need for a "State level" approval system for "called in" projects. The detailed work which was done on this issue found expression in the system envisaged for the ANM light-weight coated paper proposal, and outlined in guidelines established for the assessment of a Northern pulp mill. Again, there was an emphasis on public involvement, and an improved information base to support decision making.

Environment Protection

In July 1991, a paper outlining new environment protection legislation was released.[3] It announced an intention to move away from simple point-source emission controls, and a reassessment of the methods of control employed to achieve environmental outcomes. This approach was generally well received, and industry sought further advice on the details about how the transitional arrangements, and the new system, would work. In response, a further discussion paper, on the detailed regulations and standards which might apply under the new legislation, was released in December 1991.[4]

The papers emphasised the need for market based measures for environmental protection, and this approach was endorsed by the Tasmanian Economic Partnership - a consultative body involving industry, unions, interest groups and Government. Industry in particular urged that rather than rely on "command and control" models, economic incentives for the achievement of environmental goals should be encouraged. Work remains to be done on the refining of these principles, and the identifications of opportunities for their use in Tasmania.

Appeals

The environment and planning initiatives were to be supported by changes to appeal structures. In July 1991 a detailed discussion paper[5] was released proposing a consolidated Appeal Tribunal to replace the Planning Appeal Board, the Environment Protection Appeal Board and a number of other resource

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3 Department of Environment and Planning, Policy Division "Review of the Environment Protection Act: Issues for Public Discussion", The Department, Hobart, 1991.

4 Department of Environment and Planning, Policy Division, "Review of the Environment Protection Act: Future Directions for Regulations and Standards - A Discussion Paper", The Department, Hobart, 1991.

5 Department of Environment and Planning, Policy Division "Appeals and Enforcement: Issues for Public Discussion", The Department, Hobart, 1991.

jurisdictions. Other jurisdictions were proposed to be conferred on the Tribunal too, so it encompassed fisheries, mining and heritage legislation. In this way, an all embracing resource appeal tribunal, which was "flexible and friendly" in its operations, would be established.

Infrastructure Contributions

It was envisaged that the final component of the integrated system would involve "headworks" charges legislation, to enable Local and State Governments to recover contributions from developers towards the cost of infrastructure provided for subdivisions and other developments.

Work was done on identifying the costs of that infrastructure provision in selected municipalities throughout the State, and a background report provided to the Department by consultants, through Commonwealth funding sources, identifying the costs of infrastructure, was made publicly available in June 1992. Responsibility for further progress lies with a Working Group involving State and Local Government, industry and some interest groups.

At present, subdivision approvals operate independently of planning approvals. As one component of the consolidated development approval process, it was envisaged that a separate approval system for subdivision should be abolished, with subdivisions being subject to the same approval process and appeal rights as any other form of development.

Coastal Protection

Perhaps the most significant demonstration of the potential of the proposed new environment and planning system was comprised in the development of a Coastal Policy for the State. In common with other States, the level of public concern over coastal degradation and the impact of increasing development in coastal zones led to a commitment to a State Policy, to provide a framework for better management of coastal land and water.

A project team based in the Planning Division of the Department prepared a public discussion paper, which was released in October 1991.[6] That paper recognised that increasing population had increased pressures on the coast for residential development, for recreational and tourist facilities, and for more commercial and industrial development. At the same time, the coastal environment had become an increasingly important natural asset to Tasmanians.

The paper identified three principal responsibilities in the

6 Department of Environment and Planning, Planning Division "Tasmania's Coast - Footprints in the Sand: A Discussion Paper", The Department, Hobart, 1991.

development of a Coastal Policy:

(1) protection of the diversity of the natural and cultural coastal environment for future generations;

(2) fostering of sensitive development of appropriate parts of the coast;

(3) ensuring the responsible, ecologically sustainable and equitable use and enjoyment of coastal resources.

The discussion paper proposed the establishment of a focused coastal management system for Tasmania, with a national perspective. At State level, the proposal was for an integrated State Coastal Policy, to provide a framework for coastal management across Government Agencies. The Policy was intended to be integrated with the proposed new environment and planning legislation as well as other legislation wherever possible. The system would be managed by an improvement of the existing arrangement for multiple Agency co-ordination, with the establishment of a coastal forum supported by regional advisory groups. Management would be achieved through the development of coastal management plans.

Incorporation of these objectives into a State Policy under the environment and planning framework outlined above was a key aim. In the coastal area in particular, the benefits of an integrated "whole of Government" approach supported by broad community participation, were set to be realised.

The Protection of the World Heritage

For some time there was some uncertainty as to whether it is possible to undertake development activities in world heritage areas.The *World Heritage Properties Conservation Act* does not contain any blanket prohibitions on logging in the World Heritage areas. Section 10 of the Act, however, makes it unlawful for a trading or foreign corporation to carry out a series of activities on any World Heritage Property without the consent of the Minister.

Any doubts surrounding the possibility that World Heritage areas can be logged have been effectively removed by theTasmanian Resource Security legislation. Under this legislation all lands within the World Heritage Area that is State Forest ceases to be State Forest.[7] Similarly, any land within the World Heritage Area that is a timber reserve ceases to be a timber reserve[8] . Section 140 of the Act revokes all forestry rights in respect of World Heritage Areas.

Significantly, s.140(3) provides that a person is not entitled to any compensation as a result of the revocation of a forestry right in a World Heritage Area. However, s. 140(4) gives to the State Treasurer

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7 S136.
8 S137

a discretion to approve the payment of compensation to a person in respect of any infrastructural development carried out by that person in a World Heritage Area if, in the opinion of the Treasurer, it is equitable to do so.

Access to timber resources

Timber harvesting in Tasmania, particularly on crown land has always been a very sensitive issue in the State with environmental groups often opposing such activity. The Resource Security legislation addresses this issue by classifying land in the State for purposes of forestry operations. Section 66 of the Resource Security legislation empowers the Forestry Commission to cause a classification of the forest lands in the State to be made for the purpose of determining which of such lands are suitable to be dedicated as (a) State forest or (b) forest reserves.

The Act allows the revocation of any land dedicated as State forest. There are two ways in which this can occur. First, the dedication of any land as State forest may be revoked by the Governor following a certification from the Forestry Commission. The Commission can only issue the certificate when the on the draft recommendation has been approved by each House of Parliament. The second way in which a State forest dedication can be revoked is on the recommendation of the Public Land Use Commission.

Land dedicated as State forest may be classified as follows:

Forest reserve: Section 20 of the *Forestry Act* 1920 (as amended by s. 74 of the Resource Security legislation allows the Governor to dedicate any area of land within State forest as a forest reserve by proclamation. A forest reserve may be dedicated for any of the following purposes, namely: (i) public recreational use; (ii) the preservation or protection of features of the land of aesthetic, scientific or other value; (iii) the preservation or protection of a species of flora or fauna.

Multiple Use Forest: Section 17 of the Forestry Act 1920 , as amended by s. 71 of the Resource security legislation creates a Register of multiple use forest land. The Governor may, by proclamation, declare that Crown land is to be entered in the register. This register is to be maintained by the Forestry Commission. Any land entered on the Multiple Use Forest Register is available for forestry operations. Land entered in the register may be deleted from the register following a proclamation by the Governor to that effect. The Act makes detailed provisions regarding the procedure for deleting any land from the register.

Deferred Forest land: Section 17A of the *Forestry Act* as amended by s. 71 of the Resource Security legislation makes provision for the creation of a Register of Deferred Forest Land. The timber production status of land on this register is undecided. The Forestry Commission is responsible for the preparation of guidelines for the

use of any land in the register of Deferred Forest Land.

Protection of endangered Species

The Resource Security legislation makes some amendments to the *National Parks and Wildlife Act 1970* dealing with the protection of rare and endangered species on private forests. The new Part V (A) deals with conservation covenants.The Minister is authorised to enter into conservation covenants with private land owners for the purpose of protecting a rare or endangered species of flora or fauna.The covenant may include requirements regarding the management of the land and the payment of compensation. The landowner may apply to the Minister for compensation if he or she suffers any financial loss as a result of becoming an affected landowner.The amendment makes detailed provisions regarding the assessment of compensation.

Pollution Exemptions

Part IV of the *Tasmanian Environment Protection Act 1973* requires a licence to operate certain industries that discharge a lot of pollutants into the environment. Over nearly 20 years, exemptions have been issued from the major controls under the Act 1973. By May 1989, some 47 industry and Local Government operators of premises licensed under the Act had been granted a Ministerial Exemption, where discharges or emissions from the premises did not comply with the prescribed Regulations.

Following the 1989 election, the Government announced that no new Ministerial Exemptions would be issued under the *Environment Protection Act*, and all existing Ministerial Exemptions were to be eliminated by 30 June 1994.

In order to meet the second of these aims, licensed premises holding a Ministerial Exemption were required to undertake a Performance Improvement Programme, and this requirement was supported by a system of environmental exemption surcharges introduced as part of the 1990-91 Budget. An incentive structure for these charges was adopted, which penalised those operators not prepared to upgrade environmental performance.

The result was substantial industry improvement - reducing exemption numbers from 22 to 11 by February 1992. Progress with Local Government exemptions has been harder to achieve, but significant State support has been provided through funding programs for the Derwent and Tamar Rivers sewerage system and a commitment to improvement is now more evident.

Information relating to Ministerial Exemptions was released to the public in the form of Ministerial Exemption Fact Sheets, released in August 1991.

Judicial Developments.

Apart from minor prosecutions under the Environment Protection act and other related legislation,the only judicial development of significance during the period in review is the Mining Warden's decision relating to two objections by the wilderness Society to exploration licences by two mining companies.[9] In each of these cases which were dealt together by the Warden of Mines, the issue was whether the Wilderness Society has standing under the *Mining Act* 1929 to object to the grant of exploration licences to the applicant companies. The relevant provision of the Mining Act provides as follows:

> A person who claims an estate or interest in any land within the area in respect of which an advertisement undr subsection (2) has been published may, as prescribed, object to the granting of the application to which the advertisement relates.[10]

In the celebrated case of *Stow* v. *Mineral Holdings* (Aust) Pty.Ltd. Aikin J. defined "estate or interest in any land" to mean estate or interest of a proprietory nature in land and exclude "nterests in which the person concerned has no greater claim than any other member of the public..."[11]

Applying the *ratio* in the Stow case, the Warden struck out the objection by the Wilderness Society. According to the Warden, "nothing has been advanced on the part of the objector to show that he has an estate or interest in the subject land as defined in the Stow's case."[12]

What this decision confirms is that until there is legislative change to the *Mining Act,* it is impossible for environmental groups to be accorded standing to object to expolration licence applications in Tasmania.

Inter-Governmental Agreement on the Environment

At the Special Premiers' Conference held in October 1990, leaders agreed to prepare an Inter-Governmental Agreement on the Environment (IGAE). This was reaffirmed at the July 1991 Special Premiers' Conference.

A draft IGAE was prepared by a Commonwealth-State-Local Government Working Group, chaired by Mr John Ramsay, Secretary, the Tasmania Department of Environment and Planning. Tasmania was represented on the Working Group by officers from the Department of Premier and Cabinet and the Department of

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9 Objection Numbers 1/1992 and 2/1992. Coram M.R. Hill, Warden, Central Mining District, 31 July, 1992.

10 S 15(C) (4).

11 (1977) 14 A.L.R. 397.

12 p.7 of decision.

Environment and Planning.

All State Premiers and Chief Ministers, together with the President of the Australian Local Government Association, agreed on the final version of the IGAE at their meeting in Adelaide on 22 November 1991. Leaders then approached the Prime Minister seeking Commonwealth acceptance of the IGAE.

Following the change of national leadership, the new Prime Minister endorsed the IGAE on 17 January 1992, subject to resolution of some outstanding issues. The majority of these proposed changes were withdrawn, and Commonwealth adoption of the IGAE was announced in the Economic Statement delivered on 26 February 1992.

The States' and Territories' commitment to the IGAE arises from two demands. The first of these is the preservation of State responsibilities in environmental matters, in light of likely developments in the international arena. The United Nations Conference on the Environment and Development (UNCED) held in Brazil in June 1992 resulted in four international agreements dealing with:

(1) a declaration of environmental principles ("the Earth Charter");

(2) a convention designed to protect biological diversity;

(3) a convention on climate change;

(4) a detailed plan of action ("Agenda 21").

Together these instruments impose significant international obligations, which - following the decision of the High Court in the Franklin Dam case - provide a significant foundation for Commonwealth activity in the environment area. Because of the all embracing nature of biological diversity and climate change, the whole range of State activity in resource management was perceived at risk of Commonwealth supervening action.

The second major issue driving the IGAE from a State perspective was the need to improve environmental decision making processes, to avoid duplicatory Commonwealth and State processes which previously hindered developments such as the Wesley Vale pulp mill, and to set consistent environmental standards nationally.

Key features of the Agreement are:

(1) Agreement by the States and the Commonwealth to rationalise and streamline resource assessment, land use decisions and approval processes, so that the Commonwealth or the State will accept and rely on the outcome of the others' processes. This will overcome duplication, and ensure that responsibilities of all levels of Government are met through a single process. There is also agreement on a uniform national approach to environmental impact assessment.

(2) A detailed framework for consultation in relation to

international agreements, and for the financial effects of entering into those agreements to be clearly considered and dealt with.

(3) A National Environment Protection Authority comprised of Commonwealth and State Ministers, to set national environmental standards. Decisions of the Authority will be taken by a two thirds majority of the members of the Ministerial Council.

(4) An opportunity for joint Commonwealth-State assessment of National Estate values, for the purposes of listing by the Heritage Commission.

(5) A process for consultation in relation to declaration of World Heritage areas, and a commitment for the Commonwealth to use best endeavours to obtain State agreement for any proposed listing.

The potential ramifications for a State such as Tasmania with its resource-based industries are obvious, and significant.