

Second Study Commission

Civil Law and Procedure

2014 QUESTIONNAIRE

57th Annual meeting of IAJ – Foz do Iguacu (Brazil)

Challenges for civil environmental law:

In Yalta we decided that in 2014 our second study commission will focus on challenges for environmental law. This questionnaire does not only approach the subject from the angle of civil or private law but also takes into account that in many jurisdictions enforcement of environmental law is part of the administrative law. Nevertheless in many jurisdictions administrative enforcement cases are brought before the civil courts. From that perspective it is appropriate to tackle in this questionnaire the challenges for environmental law both from the civil as well as from the administrative law angle.

General questions

- 1. Briefly set out the key environmental legislation and regulatory authorities in your jurisdiction both in the field of civil law as well as administrative law. Are there specialized courts (civil and/or administrative) that exclusively handle cases of environmental law?**

The Commonwealth (national) level

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) provides the national legal framework for regulation of flora, fauna, ecological communities and heritage places. The legislation covers nine matters of national environmental significance, being: world heritage properties; national heritage places; wetlands of international importance (often called 'Ramsar' wetlands after the international treaty under which such wetlands are listed); nationally threatened species and ecological communities; migratory species; Commonwealth marine areas; the Great

Barrier Reef Marine Park; nuclear actions (including uranium mining); and a water resource, in relation to coal seam gas development and large coal mining development (the Act was amended to insert the final matter of national environmental significance in June 2013).

The *Clean Energy Act 2011* (Cth) and associated legislation provided for the national carbon dioxide pricing scheme; however, much of this legislative scheme has, very recently, been repealed.

The Commonwealth Minister for Environment administers the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), the *Clean Energy Act 2011* (Cth) and associated legislation (to the extent that it is still in force), and other legislation regulating specific places (such as Antarctica and the Great Barrier Reef Marine Park), hazardous waste, ozone protection, renewable energy and water.

The Commonwealth government's environmental portfolio is made up of the Department of Environment (headed by the Minister for the Environment and Heritage); the Bureau of Meteorology; the Director of National Parks; the Great Barrier Reef Marine Park Authority; the Murray-Darling Basin Authority; the National Water Commission; and the Sydney Harbour Federation Trust.

See: <http://www.environment.gov.au/topics/about-us/legislation>;
<http://www.environment.gov.au/topics/about-us/departmental-structure>.

Disputes in respect of Commonwealth legislation are heard by the Administrative Appeals Tribunal (which is not a Court, and derives its functions and powers from the *Administrative Appeals Tribunal Act 1975* (Cth)) and the Federal Court of Australia with appeal to the Full Federal Court of Australia and, if leave is granted, to the High Court of Australia.

The state level

The states and territories each have their own legislation and regulatory bodies. The key pieces of legislation and administering regulatory bodies are set out below:

- Australian Capital Territory: the *Environment Protection Act 1997* (ACT) administered by the territory's Environment Protection Authority.
- New South Wales: the *Protection of the Environment Operations Act 1997* (NSW) administered by the state's Environment Protection Authority.
- Northern Territory: the *Waste Management and Pollution Control Act 1998* (NT) and *Environmental Assessment Act 1982* (NT) administered by the territory's Environment Protection Authority.
- Queensland: the *Environmental Protection Act 1994* (QLD) administered by the Department of Environment and Heritage Protection.
- South Australia: the *Environment Protection Act 1993* (SA) administered by the state's Environment Protection Authority.
- Tasmania: the *Environmental Management and Pollution Control Act 1994* (TAS) administered by the Environment Protection Authority.
- Victoria: the *Environment Protection Act 1970* (VIC) administered by the state's Environment Protection Authority.
- Western Australia: the *Environmental Protection Act 1986* (WA) administered by the state's Environmental Protection Authority and the Department of Environment Regulation.

In addition, the States and territories have specific legislation covering water and waste.

By way of example, in Victoria, the *Environment Protection Act 1970* (Vic) regulates management of the environment and is administered by the Victorian Environment Protection Authority. The Victorian environment portfolio comprises the Department of Environment and Primary Industries, the Environment Protection Authority and Sustainability Victoria. Disputes in respect of Victoria legislation are heard by the Victorian Civil and Administrative Appeals Tribunal (which is not a Court, and derives its functions and powers from the *Victorian Civil and*

Administrative Appeals Tribunal Act 1998 (Vic)) and the Supreme Court of Victoria with appeal to the Victorian Court of Appeal and, if leave is granted, to the High Court of Australia.

See: <http://www.epa.vic.gov.au/about-us/who-we-are>;
<http://www.epa.vic.gov.au/about-us/legislation/acts-administered-by-epa>.

The state of New South Wales has a specialized court, the Land and Environment Court of New South Wales, which deals exclusively with environmental law and was established on 1 September 1980 pursuant to the *Land and Environment Court Act 1979* (NSW). The Court was the first specialist environmental superior court in the world. Its jurisdiction includes merits review, judicial review, civil enforcement, criminal prosecution, criminal appeals and civil claims about planning, environmental, land, mining and other legislation.

See: <http://www.lec.lawlink.nsw.gov.au/lec/about.html>.

2. a. To what extent are environmental requirements enforced by regulators in your jurisdiction.

Environmental requirements are enforced by regulators at the Commonwealth and state level.

b. What enforcement powers do environmental regulators have in connection with the violation of environmental regulation?

At the Commonwealth level, the Department of Environment has a range of mechanisms to address non-compliance with the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), including:

- civil or criminal penalties for contravention of the Act;

- remediation orders and determinations to repair or mitigate environmental damage resulting from a contravention of the Act; and
- enforceable undertakings to negotiate civil penalties and to ensure future compliance.

State regulators also have wide enforcement powers. By way of example, the Victorian Environmental Protection Authority uses the following mechanisms in respect to violations of environmental regulations:

- injunctions;
- sanctions, including: warnings, prosecution, penalties and revocation of licences or permits;
- remedial notices, which require the receipt to undertake works or activities as detailed in the notice, pollution abatement notices, minor works pollution abatement notices, clean up notices and directions to immediately stop an activity, address an incident to undertake an activity to prevent imminent damage to life, limb or the environment;
- fines for failure to comply with a notice or direction; and
- enforceable undertakings.

3. Is there an integrated permitting regime or are there separate environmental regimes for different types of emissions? Can companies apply for a single environmental permit for all activities on a site or do they have to apply for separate permits?

Australia does not have a fully integrated permitting system. Different pieces of legislation cover different aspects of the environment and, accordingly, companies may be required to apply for different permits and licences in respect of planning, environment and heritage.

At the Commonwealth level, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) requires that a person obtain a permit for certain activities, including:

- the import or export of plants and animals;
- activities which affect any species or ecological community within a Commonwealth area; and
- research, commercial activities, filming and photography in a Commonwealth park or reserve.

Specific permits are required for activities in the Antarctic and sub-Antarctic and the Great Barrier Reef Marine Park.

See: <http://www.environment.gov.au/topics/about-us/legislation/environment-protection-and-biodiversity-conservation-act-1999/epbc-act>.

In Victoria, licences are required for all scheduled premises, as defined under the relevant regulations, and cover the operation of the site, set operating conditions, waste discharge limits and waste acceptance conditions.

See: <http://www.epa.vic.gov.au/our-work/licences-and-approvals>.

4. What rights are there to appeal against the decision of an environmental regulator not to grant an environmental permit or in respect of the conditions contained in an environmental permit?

There are a number of rights of appeal against decision not to grant an environmental permit or in respect of conditions placed on the permit under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). The following options are available:

- Internal review, meaning reconsideration of the decision by the Minister: see ss 74C(3)(c), 78, 78A;

- Merits review by the Administrative Appeals Tribunal in respect of certain decisions, including decisions to issue or refuse a permit or in respect of conditions imposed on a permits: see s 303GJ. Merits review is confined to decisions made by a delegate of the Minister and is not available in respect of decisions by the Minister: see s 303GJ(2).
- Judicial review by the Federal Court of Australia, which is limited to consideration of whether there has been an error of law or a breach of procedural fairness.

In Victoria, a person aggrieved by the grant of a works approval or certain licences may appeal to the Victoria Civil and Administrative Tribunal.

5. a. What types of liabilities can arise where there is a breach of environmental laws and/or permits?

Non-compliance with the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) can result in civil or criminal penalties, remediation orders and determinations to repair or mitigate environmental damage resulting from a contravention of the Act; and enforceable undertakings.

Non-compliance with the *Environment Protection Act 1970* (Vic) can result in sanctions, including: warnings, prosecution, penalties and revocation of licences or permits, remedial notices, directions to cease or undertake certain activities, fines and enforceable undertakings.

b. Can an operator be liable for environmental damage notwithstanding that the polluting activity is operated within permit limits?

Yes, an operator can be liable for environmental damage notwithstanding that the polluting activity is operated within permit limits. Pollution is regulated by state-based legislation and is thus separate from the permit system at the Commonwealth level.

At the state level, taking Victoria as an example, it is an indictable offence to pollute any waters (*Environment Protection Act 1970* (Vic) s 39), the atmosphere (*Environment Protection Act 1970* (Vic) ss 41, 43), and the land (*Environment Protection Act 1970* (Vic) s 45). Further, a landowner can be liable for a contravention on its land by someone else if it knew or was reckless or negligent about the contravention, was in a position to influence the contravention and failure to take all reasonable steps to prevent it: *Environment Protection Act 1970* (Vic) ss 496B and 496C.

6. Are groups or class actions available for pursuing environmental claims, and are penal or exemplary damages available?

Groups and class actions are available for pursuing environmental claims provided that the group or members of the class action have standing to bring the claim. For example, in *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492 the North Coast Environment Council, an incorporated body, was held to have standing by reason of special interest to bring an application for judicial review of a decision because it was the peak environmental organization in that region, it had been recognized by the Commonwealth and State governments including through funding, and it had been involved in projects and made submissions in relation to matters of environmental concern.

Exemplary damages are available to plaintiffs in civil actions: *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118.

7. Do regulators keep public registers of environmental information? What is the procedure for a third party to search those registers?

At the Commonwealth level there are the following public registers (available online):

- A list of all permits issued for access to biological resources (native flora and fauna) in Commonwealth areas. The list provides a copy of the permit, the name of the permit holder, the type of the permit (commercial or non-commercial), the date of issue and date of expiry. It is updated monthly.
- Lists under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) including:
 - heritage lists (for example, the Commonwealth Heritage List which sets out natural, indigenous and historic heritage places owned or controlled by the Australian Government by State and Territory);
 - lists of species and ecological communities (for example, threatened ecological communities, threatened fauna, threatened flora, marine species, migratory species, recovery plans);
 - a list of wetlands; and
 - lists relating to wildlife trade (including live imports).
- A searchable database maintained by the Department of Environment, which includes:
 - a list of all referrals received by the department (meaning all actions referred to the department for a decision as to whether approval is required under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth));
 - a list of all public notifications relating to referrals, which includes decisions made as to whether or not approval is granted and if so, on what conditions.
 - invitations to comment under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth); and
 - exemption notices;
 - strategic assessment notices (which relate to a policy, program or plan).

See: <http://www.environment.gov.au/topics/heritage/heritage-places/commonwealth-heritage-list>;
<http://www.environment.gov.au/legislation/environment-protection-and->

[biodiversity-conservation-act/about-epbc-act/epbc-act-lists;](http://www.environment.gov.au/topics/about-us/legislation/environment-protection-and-biodiversity-conservation-act-1999/public)
[http://www.environment.gov.au/topics/about-us/legislation/environment-](http://www.environment.gov.au/topics/about-us/legislation/environment-protection-and-biodiversity-conservation-act-1999/public)
[protection-and-biodiversity-conservation-act-1999/public;](http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=public_notifications;limit=7;text_search=decision+on+a)
[http://www.environment.gov.au/cgi-](http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=public_notifications;limit=7;text_search=decision+on+a)
[bin/epbc/epbc_ap.pl?name=public_notifications;limit=7;text_search=decision+on+a](http://www.environment.gov.au/resource/list-permits-issued7)
[approval;](http://www.environment.gov.au/resource/list-permits-issued7)
<http://www.environment.gov.au/resource/list-permits-issued7>

The Victoria Environmental Protection Agency publishes online the Priority Sites Register which is a list of all sites for which the Agency requires active management to clean up, monitor or prevent pollution of land and/or groundwater.

See: [http://www.epa.vic.gov.au/our-](http://www.epa.vic.gov.au/our-work/publications/publication/2011/november/735-2)
[work/publications/publication/2011/november/735-2](http://www.epa.vic.gov.au/our-work/publications/publication/2011/november/735-2)

8. Briefly describe any proposals of new policy/national plans/regulation/ or reform?

The Commonwealth government very recently repealed the legislation establishing a carbon dioxide pricing scheme. It intends to reach its emissions reduction target (of 5% below 2000 levels by 2020) through its “Direct Action Plan”, which will establish an Emissions Reduction Fund.

The Commonwealth government is currently in the process of implementing the “One-Stop Shop policy” which aims to streamline environmental assessment and approval processes by removing duplication between the Commonwealth government and the states and territories. The policy will be implemented through approved bilateral agreements under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and will result in the Commonwealth returning environmental approval powers to the States.

See: <http://www.environment.gov.au/resource/fact-sheet-1-what-one-stop-shop>.

9. a. Are there any national targets or legal requirements for reducing greenhouse gas emissions, increasing the use of renewable energy and/or increasing energy efficiency? Is there a national strategy on climate change, renewable energy and/or energy efficiency?

The previous Commonwealth government implemented a carbon dioxide pricing scheme. The scheme imposed a fixed price on carbon dioxide which was intended to move to a floating price, and established the Climate Change Authority.

The current Commonwealth government repealed the legislation and plans to abolish the Climate Change Authority. It intends to implement a “Direct Action Plan”, the centerpiece of which is the establishment of the Emissions Reduction Fund. The current Commonwealth government has a target of emissions of 5% below 2000 levels by 2020.

b. Is your jurisdiction party to the United Nations Framework Convention on Climate Change (UNFCCC) and/or the Kyoto Protocol? How have the requirements under those international agreements been implemented?

On 3 December 2007 then Prime Minister Kevin Rudd signed the instrument of ratification of the Kyoto Protocol. The Commonwealth government subsequently implemented a carbon dioxide pricing scheme but, as noted above, the current Commonwealth government is in the process of dismantling that scheme.

10. Do the usual rules of causation and statute of limitation apply in toxic tort cases?

Under Australian law, the usual rules of tort, including causation, apply to toxic torts. Although Australian courts are cognizant of the difficulties facing toxic tort litigants in proving causation: see, for example, *Muller v Queensland Electricity Commission* (unreported, Queensland Supreme Court 8 June 1999).

State-based legislation prescribes the limitation period for actions founded in tort. In Victoria, a person generally has six years from the date on which an action founded in tort accrued to bring the action: *Limitation of Actions Act 1958* (Vic) s 5(1)(a). However, if the action includes a claim of damages for personal injuries (“consisting of a disease or disorder contracted by any person”), a person has three years from the date on which they first knew they suffered those personal injuries and that those personal injuries were caused by the act or omission of some person years to bring the action: *Limitation of Actions Act 1958* (Vic) s 5(1A).

11. Can an individual bring legal action against a polluter, owner or occupier?

An individual may be able to bring a common law action for trespass, nuisance or negligence, or breach of contract.

At common law, individuals who can establish standing have rights to enforce certain provisions of environmental laws. Traditionally, the individual must have a proprietary, economic or commercial interest, however, courts have recognized the concept of a “special interest”: see *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 per Gibbs J; *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492.

Australian governments have prescribed particular definitions of standing for particular legislation. At the Commonwealth level, an individual who is “a person aggrieved” by administrative decisions or conduct may bring an action under the *Administrative Decisions (Judicial Review) Act 1997* (Cth) for review of that decision or conduct. Under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) the meaning of a “person aggrieved” has been extended such that a person is taken to be aggrieved if they are an Australian citizen or resident and at any time in the two years preceding the decision, failure or conduct, they engaged in a series of activities in Australia for the protection or conservation of, or research into, the environment: s 487(2); see *Booth v Bosworth* (2001) 114 FCR 39. Similarly, an organization or association is taken to be a person aggrieved if it is incorporated

or established in Australia, at any time in the two years preceding the decision, failure or conduct, it engaged in a series of activities in Australia for the protection or conservation of, or research into, the environment, and at the time of the decision, failure or conduct, its objects or purposes included the protection or conservation of, or research into, the environment: s 487(3).

The Victoria *Environment Protection Act 1970* (Vic) enables a person whose interests are affected by a decision under the Act to apply to the Victorian Civil and Administrative Tribunal for review: s 33B(1). Interests has been interpreted by the Court as covering financial, physical or other like personal interests of the particular individuals and not extending to intellectual, philosophical or emotional interests in the protection of the environment: *Thirteenth Beach Coast Watch Inc v Environment Protection Authority* (2009) 29 VR 1 at [12] per Cavanough J.

12. a. In what circumstances can a buyer inherit pre-acquisition environmental liability in an asset sale or sale of a company (share sale)?

In respect of an asset sale, environmental liability generally attaches to the responsible person or entity and, accordingly, the buyer of assets does not acquire the seller's environmental liabilities. One exception is contaminated land in respect of which both the entity that caused the contamination and, in certain circumstances, the occupier or owner may be liable.

In respect of a share sale, a buyer acquires the company with all of its assets and liabilities, including pre-acquisition environmental liabilities. The buyer and seller can alter this position contractually through indemnities and warranties.

b. In what circumstances can a seller retain environmental liability after an asset sale or a share sale?

In respect of an asset sale, as noted above, environmental liability attaches to the responsible person or entity and, accordingly, the seller generally retains environmental liability for pre-acquisition liabilities.

In respect of a share sale, the seller disposes of all assets and liabilities, including environmental liabilities, and accordingly, environmental liabilities go with the company. It is common in Australia for parties to provide indemnities in relation to specific environmental issues to protect the buyer of a company from pre-acquisition liabilities. There are a number of exceptions, namely that a seller retains liability for contaminated land where it caused the contamination, and, in most cases, retains any pre-sale criminal liability.

c. Does a seller have to disclose environmental information to the buyer in an asset sale/a share sale?

Yes, consumer protection legislation prohibits misleading or deceptive conduct: *Australian Consumer Law* s 18.

When a company issues shares in itself to the public it is required to issue a prospectus, which contains “all information ... that investors and their professional advisors would reasonably require to make an informed assessment”: s 710 of the *Corporations Act 2001* (Cth).

13. What is the environmental liability of a company after it dissolved?

In Australia a company is treated as dissolved when it is deregistered. A dissolved company cannot commence proceedings, proceedings against it cannot be continued and proceedings against it commenced after it has been dissolved are liable to be struck out as an abuse of the Court’s process. Debts and liabilities

cannot be enforced against a deregistered company. Officers of the company, whoever, remain liable for conduct before the company was deregistered and a number of pieces of environmental legislation make directors and managers personally liable for their company's breach of environmental laws: see, for example, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 494 and 495.

The Court has jurisdiction to make an order that the regulator, ASIC, reinstate registration if a person aggrieved by the deregistration make an application and the Court is satisfied that it is just that the company's registration be reinstated: *Corporations Act 2001* (Cth) s 601AH. A person may become aggrieved by the deregistration as a result of events occurring after it: *Pilarinos v ASIC* (2006) 24 ACLC 775; [2006] VSC 301 at [49]. A person aggrieved includes a regulatory body seeking to impose penalties.

Case law

14. Could you please briefly indicate whether in your jurisdiction landmark judgments have been rendered by the (supreme or highest) courts (please just one example per issue) in which -

a. the principle known as "the polluter pays" is accepted

The principle that "the polluter pays" is widely accepted by Australian courts: see, for example, *Environment Protection Authority v Waste Recycling and Processing Corp* [2006] NSWLEC 419; (2006) 148 LGERA 299 at [230]-[232] per Preston CJ.

b. class actions have been successful in cases of infringement of environmental law and in which compensations has been awarded to the persons who sustained the damage.

Between 1994 and 1996 Papua New Guinean landowners brought a claim in Australia against BHP Billiton Ltd whose Ok Tedi mine was depositing tailings waste

into the Ok Tedi and Fly River systems in Papua New Guinea. There were a series of proceedings before the Supreme Court of Victoria. The 1996 settlement included compensation to landowners.

Australia's largest class action was commenced on 8 July 2014. Residents and businesses affected by the Brisbane floods are bringing an action against the operators of the Wivenhoe Dam, which released water during the Brisbane floods, and seeking compensation for economic damage.

The hearing of Victoria's largest class action recently concluded and subsequently settled before judgment was delivered. Persons affected by the Kilmore East fire during Victoria's 2009 bushfires brought a class action against a power distributor and asset manager after a finding by Victoria's Bushfires Royal Commission into the 2009 bushfires that the Kilmore East fire was caused by an old power line. The settlement included compensation to persons who suffered damage as a result of the fire.

c. in cross border cases problems of identification of the applicable law have been solved.

There are cases in Australia which consider the applicable law in respect of incidents occurring across state borders. For example, the case of *Brownlie v State Pollution Control Commission* (1992) 76 LGRA 419 concerned a water pollution incident arising from insecticide sprayed on to land in Queensland that was then washed into a river in New South Wales. The Court held that, although the acts or omissions causing the pollution took place in Queensland, the consequences (the pollution) occurred in New South Wales and that being so an offence was committed under New South Wales legislation.