LexisNexis

Australian
Environment
Review

2014 . Vol 29 No 10

Contents

Information contained in this newsletter is current as at December 2014

LexisNexis Butterworths

Australian
Environment
Review

Environmental activism via direct action: the case of *R v Moylan*

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On 7 January 2013, Jonathan Moylan disseminated a media release, falsely purporting that the ANZ bank had withdrawn its $1.2 billion loan facility to Whitehaven Coal Limited (**Whitehaven**) for the Maules Creek coal mine. Knowing that the information was false, Mr Moylan disseminated the release by sending an email to 306 recipients at 104 different organisations. Mr Moylan's actions were part of a wider campaign by the Front Line Action Group against coal mining in the NSW Leard State Forest and came following a decision made on 23 October 2012 by the NSW Planning Assessment Commission to approve the Maules Creek coal mine.[2] The Maules Creek mine proposal was subsequently approved by the Federal Environment Minister on 11 February 2013.[3]

Publication of the false media release had a significant impact on trading in Whitehaven shares. During the period between 12:18 pm and 12:41 pm on 7 January 2013, 141 individuals and entities traded 2,881,334 Whitehaven shares — more than 20 times the average daily volume — and the price of shares fell from $3.52 to $3.21, representing a reduction in the market capitalisation of Whitehaven by around $300 million.[4]

Mr Moylan was charged by the Australian Securities and Investments Commission for making false and misleading statements in breach of s 1041E(1) of the Corporations Act 2001 (Cth).[5] On 23 May 2014, Mr Moylan pleaded guilty to the offence and on 25 July 2014, he was sentenced by Davies J of the Supreme Court of NSW. Justice Davies imposed a sentence of imprisonment, for 1 year and 8 months, suspended with a condition of $1,000 security and good behaviour for 2 years.

Mr Moylan's case has reignited debate about the limits of legitimate activist action and the distinction between acceptable actions and criminal offences.

This article explores these distinctions and also queries whether development assessment processes in NSW are meeting the community need. It finds that Davies J's judgment in *R v Moylan* struck an appropriate balance in that, while his Honour was not insensitive to Mr Moylan's underlying motivations, imposition of the sentence will deter others to commit similar acts of market manipulation.

Environmental activism via direct action

Historically, environmental activists have used the law as a tool to advance their agenda. The court system is one mechanism that has long been available to protect and defend the environment. However, beginning roughly from the 1970s, environmental activists have increasingly expanded their tactical repertoire. The contemporary repertoire of environmentalism maintains a modest dedication to traditional forms of resistance, including legal proceedings. Yet simultaneously and increasingly, its proponents are bypassing the courts and utilising "direct action" to advance environmental agendas. Direct action tactics can involve relatively significant forms of instrumental law-breaking, such as destroying property or causing economic loss, and are commonly directed against either governments or corporations.

Often, direct action participants will target corporations that have been directly involved in an alleged environmentally damaging activity (primary target) or will target corporations or other bodies affiliated with the primary target (secondary target). For example, during the course of its campaign against Japanese whaling, the Sea Shepherd Conservation Society engaged in numerous direct actions against the primary target, Japanese whaling vessels. Specifically, the Society harassed Japanese whalers by ramming their vessels, throwing bottles of butyric acid onto their vessels, temporarily blinding whalers with laser devices, deploying devices to destroy propellers and even boarding moving whaling vessels.[6]

In 2008, US environmental activist Tim DeChristopher took direct action against secondary targets by attending an auction in Utah for the sale of oil and gas mining leases, attempting to prevent the sale of wilderness land for use by the fossil fuel industry. Protestors were not permitted in the auction room so DeChristopher entered as "Bidder No. 70"[7] and proceeded to outbid the other buyers. When he could not pay the $1.8 million winning

bid, he was arrested, charged with defrauding the US federal government and sentenced to 2 years' imprisonment.[8]

One common characteristic of direct action is that those responsible often publicise their activities. This indicates that, while the primary aim may be to disrupt allegedly environmentally damaging activities, a secondary aim is to dissuade others from engaging in such activities. This reflects Rawls' theory that the key aim of civil disobedience is not to effect change in and of itself, but to mobilise mass support as a catalyst for change.[9]

The spectrum of civil disobedience

The tactics employed by environmental activists and other social justice factions sit on a spectrum of civil disobedience — with peaceful, more traditional forms of protest at one end, and more extreme forms of direct actions tactics at the other. While the term "civil disobedience" is variously defined, for the purposes of this article, it is assumed that the term encompasses the entire spectrum, collectively defined as the principled breaking of the law in the process of politically motivated protest.

Within the spectrum of civil disobedience, there is a vast "grey area" between legal protest (the "white" end of the spectrum) and violent extremism (the "black" end of the spectrum). The "grey area phenomenon"[10] poses a significant challenge to policy makers and courts in attempts to distinguish between legitimate protest and illegitimate actions.

In the famous decision of *R v Jones*,[11] Lord Hoffman discussed the role of civil disobedience as follows:[12]

> My Lords, civil disobedience on conscientious grounds has a long and honourable history in this country … But there are conventions which are generally accepted by the law-breakers on one side and the law-enforcers on the other. The protesters behave with a sense of proportion and do not cause excessive damage or inconvenience. And they vouch the sincerity of their beliefs by accepting the penalties imposed by the law.

These comments reflect those of Lord Hoffman in *Sepet v Secretary of State for the Home Department*:[13]

> Civil disobedience is an honourable tradition which goes back to Antigone. It may be vindicated by history … but often what makes it honourable and demonstrates the strength of conviction is willingness to accept the punishment.
> …while the demonstrator or objector cannot be morally condemned, and may indeed be praised, for following the dictates of his conscience, it is not necessarily unjust for the state to punish him in the same way as any other person who breaks the law… He has his reasons and the state, in the interests of the citizens generally, has different reasons. Both might be right…

These comments suggest that the underlying motives for offending are not generally relevant to determination of an appropriate punishment. However, environmental activists commonly invoke justifications or defences for their actions in order to argue that their actions sit on the legitimate side of the civil disobedience spectrum, and to thereby lessen or avoid penalty.

Justifications for law-breaking

Necessity

In some instances, defendants have sought, albeit unsuccessfully, to justify their actions by arguing that their direct action tactics were necessary. For example, the "defence of necessity" was pleaded by DeChristopher in *United States v DeChristopher* but was rejected by the District Court judge. On appeal to the US Court of Appeals,[14] DeChristopher argued that by refusing him the option of pleading a defence of necessity, the trial judge had denied the jurors the opportunity to understand his motivation to act. The Appeal Court found that the trial judge was correct to refuse this defence, as the evidence was insufficient to support the elements of the defence. Specifically, the court found that DeChristopher had alternative legal means available to him, for example, injunctive relief, which he chose not to pursue.

While Mr Moylan did not, in the course of his sentence-hearing, attempt to justify his actions by arguing that they were necessary, he sought to justify his actions post-sentence by reference to their necessity. During an interview with an ABC journalist on 9 January 2014, Mr Moylan commented:[15]

> I have to say, you know, we've done everything. We've written letters, we've written submissions, we've gone to planning assessment commission meetings, we've considered legal action but that avenue has been, actually, taken away from us because of the process that's been set up by the Coalition State Government.

While justification on the basis of necessity may be seen as understandable in some cases, especially when compounded by the diminishing avenues through which dissent can be expressed, eg, as a result of the restrictive permit regimes governing public protests, an alternative view is that many activists simply interpret the legal system as a slow-moving mechanism that is largely inaccessible to everyday citizens. Therefore, while the justification of necessity relies in part on a discourse of civil disobedience, it also demonstrates an underlying motivation on the part of environmental protestors to circumvent legal processes in pursuit of immediate change.

Competing harms

Another justification defendants have sought to rely upon in defending their actions is the "choice of evils" or "competing harms" defence. This defence is essentially

an appeal to a higher morality, whereby the defendant argues that a failure to act would be immoral or would do more harm than good. The underlying perception is that current laws do not achieve a sufficient level of justice.

In *Sepet v Secretary of State for the Home Department*,[16] Lord Hoffman held:

> In deciding whether or not to impose punishment, the most important consideration would be whether it would do more harm than good. This means that the objector has no right not to be punished. It is a matter for the state (including the judges) to decide on utilitarian grounds.

Dr Nicole Rogers, a Senior Lecturer in the School of Law and Justice at Southern Cross University, NSW, suggests that Australian courts will not generally engage in the "competing harms" defence as it risks intrusion upon political matters. [17] In the UK, however, the defence was successfully used by 6 Greenpeace activists in a jury trial at Maidstone Crown Court in 2008.[18] These activists had caused £30,000 of damage to a coal-fired power station, arguing that they were legally justified because they were trying to prevent climate change causing greater damage to property around the world. In his summation, following an eight day trial, Caddick J instructed the jury that, in order for the activists' actions to be considered lawful, it had to be proved that the action was due to an immediate need to protect property belonging to another. The evidence before the court indicated that some of the property in immediate need of protection included parts of Kent at risk from rising sea levels, the Pacific Island state of Tuvalu and areas of Greenland. His Honour tasked the jury with examining the boundary line represented by the lawful excuse and to evaluate whether the defendants had crossed the line.

In Australia, similar arguments regarding climate change in the context of development appeals have (so far) been unsuccessful. A recent example is provided by *Hancock Coal Pty Ltd v Kelly & Ors and Department of Environment and Heritage Protection (No 4)*,[19] which involved an objector appeal brought in the Land Court of Queensland against approval of the Alpha Coal Mine on the basis that, among other matters, it would cause serious environmental harm to the global climate system as a result of the extraction and burning of black coal. While accepting of the climate evidence put before it, the court ultimately concluded that the issue of effective action on climate change was a matter of government policy and was not within the court's jurisdiction.[20]

The decision in *R v Moylan*

As the sentencing judge, Davies J's task essentially involved assigning Mr Moylan's case the correct position within the civil disobedience spectrum. After weighing all relevant factors, his Honour held that the objective seriousness of the offence was about halfway between the low and medium ranges of offending.[21] Mitigating factors included that:

- the hoax was readily admitted within a short period of time;
- Mr Moylan had not previously been convicted of a serious offence;
- the offence did not involve personal financial gain (a factor which his Honour considered meant that the maximum sentence would not be awarded);[22]
- a guilty plea; and
- there was a low risk of Mr Moylan re-offending.[23] His Honour commented that Mr Moylan was "not a criminal in the classic sense of one who needs rehabilitation, although I consider that there is some likelihood that he may continue to engage in what might be regarded as minor breaches of the law as acts of disobedience to further his beliefs and purposes".

In aggravation of the offence, Davies J took into account the fact that the market was manipulated and the securities market compromised, vast amounts of shares were unnecessarily traded and some investors lost money or their investment in Whitehaven entirely.[24]

The court considered that a sentence of imprisonment was appropriate, but that Mr Moylan should be released immediately on a recognisance. Justice Davies explained:

> Although you received no personal financial gain it was done in an attempt to achieve your own political purposes. The market was manipulated, people were misled and lost money and investments as a result.
> ....You did not commit this offence for personal gain nor did you receive any. You did it for motives that I accept were sincerely held by you even though your methods of achieving them were wrong. I do not consider that a sentence to be served in custody would serve any good purpose for you or the community.

Given the direct action tactics employed by Mr Moylan, the resulting harm caused to Whitehaven, its shareholders and the wider securities market, and considering the obvious need to deter others from committing similar offences, it seems readily apparent that some form of punishment was warranted. The sentence imposed by Davies J appears to have struck an appropriate balance in that his Honour was not insensitive to Mr Moylan's underlying motivations, but ultimately acted to protect the ongoing functions of the securities market, which provisions such as s 1041E(1) of the Corporations Act 2001 are designed to protect.

Consideration of development approval processes

While Mr Moylan's sentence was appropriate, the case raises broader issues regarding the adequacies of

development assessment processes in NSW. Namely, why did Mr Moylan feel that he had to resort to such extreme action in order to advance the Front Line Actions Group's cause?

The Maules Creek coal mine was granted project approval from the NSW government's Planning Assessment Commission on 23 October 2012 and obtained approval of the federal Environment Minister on 11 February 2013.The project was subject to environmental assessment processes set out under both State and Commonwealth laws and has been the subject of several unsuccessful court challenges in the Federal Court.[25] Public consultation was conducted prior to project approval and this included specific meetings held between the NSW Department of Planning and Environment and representatives of both the Northern Inland Council for the Environment Inc and the Maules Creek Community Council to discuss environmental offsets and impacts.[26] Ongoing community consultation is required under conditions of Project Approval.[27] Whitehaven also agreed to stop winter clearing in the Leard State Forest, despite having approval under its biodiversity management plan to do so, following a hearing instigated by the Maules Creek Community Council seeking injunctive relief in the Land and Environment Court. The project was approved in accordance with existing legal processes and requirements and no environmental non-compliances have thus far been demonstrated. Legal avenues of appeal for third party objectors, in the form of both judicial review proceedings and seeking injunctive relief, have been tried and exhausted.

As such, civil disobedience tactics, employed with the ultimate aim of *changing* existing laws, appear to be the only remaining option for environmentalists who remain dissatisfied with approval of the mine (apart from identifying future non-compliances with environmental licences or approvals). As outlined above, this involves the mobilisation of mass support as a catalyst for change.

Laws surrounding development assessment processes, especially as they relate to environmental protection and the impacts of mining projects, have undergone numerous changes in recent years[28] as policy-makers respond to a developing understanding of environmental processes and long-term impacts of mining activities.

Environmental activists have a continuing role to play in shaping this area of the law. However, the difficulties inherent in polycentric decision-making processes of governments, which include balancing competing interests of the environment, food security, social impacts and the economy, must also be kept in mind. These tensions are particularly evident in the current coal seam gas extraction debate in NSW – while the NSW government has recently extended the moratorium on NSW petroleum exploration licence applications due largely to environmental concerns,[29] concerns have also been raised that, if gas is not extracted, NSW will face a resource crisis as early as 2016.[30]

While the history of civil disobedience and lawful protest in Australia indicates that environmental activism is tolerated within, if not a legitimate part of, our legal system, the extent to which judges will moderate sentences of those involved will lessen the closer such actions stray towards the more extreme "black" end of the spectrum. Proponents engaging in direct action also risk undermining any justification for their actions that is based on the ultimate attainment of a just or higher moral result — the ethical paradox that two wrongs do not make a right.

Conclusion

This article has explored how courts deal with difficult distinctions between more acceptable environmental actions and less acceptable forms of law-breaking. The distinctions are not clear-cut – rather, environmental activist tactics exist along a spectrum of civil disobedience. In Mr Moylan's case, it seems that Davies J struck an appropriate balance in sentencing Mr Moylan to a suspended sentence of imprisonment with good behaviour. His Honour's findings were soundly based in precedent in considering the nature of the tactics employed, the harm caused and the underlying justifications for Mr Moylan's actions.

Finally, this article has queried whether current development assessment processes provide adequate mechanisms for community involvement and environmental protection. It is concluded that, while environmental activists have a legitimate role to play in shaping this area of the law, it is important for activists to choose their tactics wisely in order to avoid causing undue damage in the advancement of their agendas.

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Footnotes

1. The author would like to thank Louise Gates, Commissioning Editor, for her significant contribution towards this article.
2. Project Approval No. 10_0138, available at: www.majorprojects.planning.nsw.gov.au.
3. Australian Government media release, "Conditions approvals granted for Maules Creek, Boggabri and Gloucester projects", 11 February 2013, available at: www.environment.gov.au.
4. Note that Whitehaven's share price subsequently stabilised.

5. *R v Moylan* [2014] NSWSC 944; BC201405847. Section 1041E(1) of the Corporations Act 2001 (Cth) carries a maximum penalty of 10 years in prison and a fine of up to $765,000 or both, for an individual.
6. Moffa A, "Two Competing Models of Activism, One Goal: A Case Study of Anti-Whaling Campaigns in the Southern Ocean" 37(1) *The Yale Journal of International Law*, 202 at 209.
7. DeChristopher later released a documentary style film of the same name.
8. A jury in the US District Court convicted DeChristopher of interfering with the provisions of Chapter 3A of the Federal Onshore Oil and Gas Leasing Reform Act, in violation of 30 U.S.C. § 195(a)(1), and making a false statement or representation in violation of 18 U.S.C. § 1001. The District Court sentenced DeChristopher to 24 months' imprisonment and three years' supervised release. On appeal the United States Court of Appeals, Tenth Circuit, overturned the District Court decision with respect to the conviction under of 30 U.S.C. § 195(a)(1).
9. Rawls J, *A Theory of Justice*, (1971) Belknap, Cambridge, cited in O'Brien E, "Justifications and limits in the politically motivated law-breaking of environmental activist groups, in Richards, Kelly and Tauri (Eds.) *Crime, Justice and Social Democracy: Proceedings of the 2nd International Conference*, (2013) Queensland University of Technology.
10. A term devised by French sociologist Xavier Raufer in 1991 to describe premeditated acts of defiance against established systems of governance falling short of terrorism.
11. *R v Jones (Margaret); Ayliffe v DPP; Swain v DPP* [2006] UKHL 16; [2007] 1 AC 136; [2006] 2 All ER 741; [2006] 2 WLR 772. This was a UK prosecution of several protestors opposed to the Iraq war.
12. Above, n 11, at [89].
13. [2003] UKHL 15.
14. *USA v DeChristopher*, No. 11-4151. 695 F.3d 1082 (2012), 14 September 2012, www.ca10.uscourts.gov.
15. Above, n 5, at [54].
16. *Sepet v Secretary of State for the Home Department* [2003] All ER (D) 306 (Mar); [2003] UKHL 15; [2003] 3 All ER 304; [2003] 1 WLR 856. This case questioned whether Turkish nationals should be granted refugee status on the basis that, if they returned to Turkey, they would be imprisoned for refusing to serve compulsory military service.
17. Bowman J, "Climate change, civil disobedience and the law", *Griffith Elects*, 16 April 2014, www.nofibs.com.au.
18. Vidal J, "Not Guilty: the Greenpeace activists who used climate change as a legal defence", *The Guardian*, 11 September 2008, www.theguardian.com.
19. *Hancock Coal Pty Ltd v Kelly (No 4)* [2014] QLC 012; BC201408206.
20. Above, n 19, at [216]. See also *Xstrata Coal Queensland Pty Ltd v Friends of the Earth — Brisbane Co-Op Ltd* [2012] QLC 013 and *Drake-Brockman v Minister for Planning* (2007) 158 LGERA 349; [2007] NSWLEC 490; BC200706494 for other examples.
21. Above, n 5, at [83].
22. Above, n 21, at [59].
23. Above, n 21, at [100].
24. Above, n 21, at [103].
25. See *Northern Inland Council for the Environment Inc v Minister for the Environment, Heritage and Water* [2013] FCA 993; BC201313388; *Northern Inland Council for the Environment Inc v Minister for the Environment* (2013) 218 FCR 491; 200 LGERA 25; [2013] FCA 1419; BC201315978; and *Northern Inland Council for the Environment Inc v Minister for the Environment* [2014] FCA 216; BC201401409.
26. Referred to in *Northern Inland Council for the Environment Inc v Minister for the Environment* (2013) 218 FCR 491; 200 LGERA 25; [2013] FCA 1419; BC201315978 at [22].
27. Project Approval No. 10_0138, Sch 5, conditions 1 and 7.
28. Take, for example, the inclusion of the "water trigger" in the Environment Protection and Biodiversity Conservation Act 1999 in June 2013 to provide that water resources are a matter of national environmental significance in relation to coal seam gas and large coal mining development.
29. The Hon Anthony Roberts MP, "Media Release: Freeze extended on petroleum licence applications", 25 September 2014.
30. See, for example, ABC News, "Will New South Wales run short of gas by 2016?", 23 April 2014, available at: www.abc.net.au.

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Environmental protest: an economics of regulation approach

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There is something about the environment that stirs the passions.

In July 2011, Greenpeace activists broke into a CSIRO experimental farm and destroyed a crop of genetically modified wheat.[1] In January 2013, Jonathan Moylan falsified an ANZ press release, indicating that the bank had withdrawn a loan facility from the Whitehaven Maules Creek open-cut coalmine and destroying over $300 million of share market value before the prank was uncovered.[2] In July 2014, an employee from the NSW Office of Environment and Heritage was shot and killed while serving a land clearing violation notice on a farmer.[3]

Ranging from trespass, to destruction of property, to (alleged) murder in each of these three instances, it is obvious that illegality and even criminality are involved. In each instance the individuals involved may have had a "good" justification for their actions. Genetically modified crops could have an adverse impact on the environment and human health. Coal mining contributes to carbon dioxide emissions. Environmental protection laws abrogate private property rights. At no point, however, is the illegality of these responses in any doubt — just that there might be some other justification for the initial action.

A more complex issue is the fossil fuel divestment campaign being run by the international environment activist group 350.org. This is a campaign that attempts to persuade institutional investors — particularly churches, universities and local governments — to divest their investment portfolios of fossil fuel stocks. The organisation is beginning to campaign against the financiers of fossil fuel producers. Following an anti-fossil fuel campaign, the Australian National University recently announced a decision to divest from resource stocks that do "social harm".[4] Here, no (apparent) crime is being committed — yet the decision has been attacked by both sides of national politics, the premier of South Australia, business and community groups, and both national daily newspapers.[5]

This article discusses these incidents in general terms, as part of a broader discussion regarding appropriate limits on the right to protest. Employing insights from literature on the "economics of regulation", it is argued that there is a legitimate role for government in restricting the actions of protesters, including environmentalists, despite their stated noble objectives.

An institutional theory of economic regulation

The economic theory of regulation is divided into three strands. The "public interest" theory, following the work of Arthur Cecil Pigou,[6] suggests that governments intervene in order to correct for various market failures. The "special interest" or "capture theory" of regulation, following the work of George Stigler,[7] suggests that industry seeks out regulation in order to create barriers to entry for new rivals and to maintain profitability.

In a series of papers, Andrei Shleifer (and various co-authors) developed an institutional theory that posits "efficient" regulation as emerging from societal trade-offs between the costs of private disorder and the costs of government dictatorship.[8] Disorder relates to the ability of private individuals to inflict harm on others, while dictatorship relates to the ability of government and its bureaucrats to inflict harm on citizens.

Depending on the relative costs of disorder and dictatorship, different regulatory approaches are more or less appropriate. For example, in some instances, private litigation is efficient, or public bodies to regulate and litigate may be efficient, and so on. In some — perhaps very few — instances, state ownership becomes efficient.

What is important to recognise is that government has a role to play in reducing private disorder when private solutions are unavailable, or too costly — subject, of course, to not imposing too high dictatorship costs itself.

Doing good by doing harm?

That is all very well in theory. The real question is this: What constitutes "private disorder" or even "dictatorship"? Lord Stern has famously described global warming (although he used the term "climate change") as being an externality,[9] while former Prime Minister Kevin Rudd described it as the greatest moral challenge of our time.[10] What, then, is "private disorder"? Those activities that might contribute to global warming, such as fossil fuel mining, or those activities designed to

disrupt fossil fuel extraction? Similarly, with the perceived instances of dictatorship, when is it appropriate to defy the state if private property rights are under threat?[11]

In a society governed by the rule of law, the right to protest is usually severely proscribed to exclude acts of violence. Arguably, that includes acts of coercion. While "saving the planet" or "preserving private property rights" might be noble endeavours, in a democracy, under the rule of law, there are strict limits on how protest can occur.

Restricting violence and coercion is a legitimate function of government. As the great liberal economist Ludwig von Mises indicated:

> One must be in a position to compel the person who will not respect the lives, health, personal freedom, or private property of others to acquiesce in the rules of life in society. This is the function that the liberal doctrine assigns to the state: the protection of property, liberty, and peace.[12]

That means that criminal behaviour is not acceptable in the pursuit of personal goals and objectives, no matter how "noble" those goals and objectives might be.

The politics of social disorder

Political activists often engage in forms of social disorder in order to achieve goals that they have failed to achieve via legitimate democratic processes. The fossil fuel divestment campaign, for example, has its origins in a 2012 *Rolling Stone* article written by global warming activist Bill McKibben. In that article, McKibben admits to political failure:

> A more efficient method, of course, would be to work through the political system, and environmentalists have tried that, too, with the same limited success.[13]

In a democratic society, being unable to convince politicians means that environmentalists have been unable to convince a majority (or even a significantly sizeable minority) of their fellow citizens of the need for significantly modified behaviour. Here I am following Ludwig von Mises's conception of the political system, where politicians must ultimately conform to public opinion:

> A statesman can succeed only insofar as his plans are adjusted to the climate of opinion of his time, that is to the ideas that have got hold of his fellows' minds. He can become a leader only if he is prepared to guide people along the paths they want to walk and toward the goal they want to attain. A statesman who antagonizes public opinion is doomed to failure. No matter whether he is an autocrat or an officer of a democracy, the politician must give the people what they wish to get, very much as a businessman must supply the customers with the things they wish to acquire.[14]

Campaigning and lobbying then to achieve those same goals through a non-democratic process becomes an exercise in coercion that invites a response from the state — a response that under the rule of law is quite legitimate.

A particularly problematic form of coercion is the so-called "secondary boycott". Secondary boycotts occur when an individual (or group of individuals) influences a third party in the expectation that it would impact upon a particular firm or industry. While secondary boycotts are generally illegal under Australian consumer protection laws, environmental groups are currently exempt from that prohibition.[15] The Abbott government has indicated a willingness to remove the exemption for environmental groups under broad competition law reform.[16] There are some who argue that this would constitute a violation of the implied right to free speech under Australia's Constitution (ie, the dictatorship cost is too high). However, this is not clear cut — extending the prohibition on secondary boycotts would not prevent environmentalists from speaking about environmental problems; it would merely constrain them from advocating a particular course of action. Arguably, this is a lesser restriction on free speech than incitement to violence — for example, where the speech, in addition to the action, is prohibited.[17]

As an alternative or additional mechanism for regulating the actions of environmental groups, governments could consider making existing offences easier to enforce. For example, environmental groups that make statements that could be considered to be false or misleading in a material respect and influence persons in their financial decisions could fall foul of provisions such as s 1041E of the Corporations Act 2001 (Cth). Under this section, any false and misleading statements that result in investors either applying for financial products, or acquiring financial products, or disposing of financial products, or impacting the pricing of financial products is prohibited. This is the very law that convicted Jonathan Moylan. The divestment movement argues that fossil fuel stocks are over-valued — in particular, that there is a carbon bubble — yet has provided no evidence to support that claim.[18] It advocates a policy of divestment — that is, the disposal of financial products. Similarly, the Australian National University has claimed that seven specific resource companies cause "social harm" and has divested from those investments as a result, yet no evidence has been put forward to support that claim.

Professor Ian Ramsay of the Melbourne University Law School, however, is of the view that it would be difficult to enforce s 1041E of the Corporations Act with respect to, for example, the divestment movement.[19] In addition to having to demonstrate that the divestment campaign statements are, in fact, false and misleading, it is also necessary to demonstrate "that they know or

ought reasonably to know the statements are materially false or misleading".[20] Professor Ramsey seems to suggest that the latter requirement may constitute a high hurdle in any prosecution.

Failing aggressive enforcement of s 1041E by the Australian Securities and Investments Commission, the legislature should provide clarification as to what individuals reasonably ought to know when making public statements. This could lead to the imposition of more "appropriate" limits on the rights to protest that do not have far-reaching economic effects — that is, a more appropriate trade-off between the costs of disorder and dictatorship.

Conclusion

This article has argued that it is legitimate to place limits to political protest and activism in a democracy under the rule of law. Regulation (and government intervention generally) emerges from the trade-off between the costs of social disorder and the costs of dictatorship. Subject to minimising the costs of dictatorship, the government plays a legitimate role in suppressing social disorder.

While environmentalists may have noble intentions in embarking on environmental campaigns, that does not permit them to engage in acts of coercion or violence if and when their (otherwise) legitimate political activities fail to persuade their fellow citizens to pursue a given path. Coercion — such as secondary boycotts — results in significant disorder and social harm and the state has a legitimate role to play in prohibiting that harm. Of course, intervention of this sort always implies some dictatorship costs. The challenge facing every society is to find the appropriate trade-off between disorder and dictatorship. In this instance, that trade-off is between the right to conduct your business and the right to protest.

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Footnotes

1. J Nairn (reporter) "Greenpeace sabotages CSIRO wheat trial" *Lateline* (transcript) Australian Broadcasting Corporation, 14 July 2011, available www.abc.net.au.
2. AAP "Activist Jonathan Moylan avoids prison over mining hoax" *The Australian* 25 July 2014, available at www.theaustralian.com.au.
3. T Nolan (reporter) "Land clearing stoush flares with shooting death of environmental officer" *The World Today* Australian Broadcasting Corporation, 30 July 2014, available at www.abc.net.au.
4. The Fossil Free ANU organisation is a student group at the ANU and is part of the ANU Environment Collective. It is unclear if it has any formal links to 350.org, but its website does make this claim: "We've joined a growing global movement to get institutions and cities to divest." See the Fossil Free ANU website at www.fossilfreeanu.wordpress.com.
5. The *Australian Financial Review* summarised the responses to the ANU divestment decision: see M Han "What political and business leaders say about ANU's ban" *Australian Financial Review* 14 October 2014, available at www.afr.com. The same paper also editorialised against the ANU decision: "Editorial: Santos is not a socially irresponsible company" *Australian Financial Review* 6 October 2014, available at www.afr.com. *The Australian* editorialised against the ANU decision: "When supposedly smart people do dumb things" *The Australian* 17 October 2014, available at www.theaustralian.com.au.
6. See the *Encyclopaedia Britannica* entry on Arthur Cecil Pigou, available at www.britannica.com.
7. Royal Swedish Academy of Sciences "This year's prize in economics is awarded for research on market processes and the causes and effects of public regulation" press release, 20 October 1982, available at www.nobelprize.org.
8. Some of these papers are reproduced in A Shleifer *The Failure of Judges and the Rise of Regulators* MIT Press 2012.
9. Externalities occur when the social benefits and social costs of an activity diverge from the private benefits and privates costs of that activity. A negative externality occurs when the social costs of an activity exceed the social benefits of the activity in equilibrium, while a positive externality occurs when the social benefits of the activity exceed the private benefits of the activity in equilibrium. A popular example of a negative externality is pollution and a popular example of a positive externality is education. It is important to recognise, however, that a negative (positive) externality exists when the social cost (benefit) exceeds the social benefit (cost) in equilibrium, not when the social cost (benefit) exceeds zero.
10. K Rudd "Address to the 64th session of the General Assembly of the United Nations" 23 September 2009, available at www.smh.com.au.
11. Note that I am not subscribing to the legal-centric view that property rights only exist if and when the state recognises them and grants them.
12. L von Mises *Liberalism: The Classical Tradition* Liberty Fund 2005 (originally published 1927).
13. B McKibben "Global warming's terrifying new math: three simple numbers that add up to global catastrophe — and that make clear who the real enemy is" *Rolling Stone* 2 August 2012.
14. L von Mises *Theory and History: An Interpretation of Social and Economic Evolution* Ludwig von Mises Institute 2007 (originally published 1957). See also B Caplan "Mises' democracy–dictatorship equivalence theorem: a critique" (2008) 21 *Review of Austrian Economics* 45–59.

15. See the Competition and Consumer Act 2010 (Cth). Section 45D prohibits secondary boycotts, but s 45DD provides exemptions for environmental protection and consumer protection.
16. A Lauder (reporter) "Coalition review may ban environmental boycotts" *The World Today* Australian Broadcasting Corporation, 3 April 2014, available at www.abc.net.au.
17. See the Criminal Code Act 1995 (Cth). Section 11.4 criminalises incitement where an individual "urges the commission of an offence" and intends that the offence actually occurs.
18. The idea behind "bubbles" is that asset prices deviate substantially from their "true value" for extended periods of time, and then collapse. Andrei Shleifer has proposed a basic model explaining how bubbles could occur: A large number of investors must follow a positive feedback trading strategy. Here investors base their expectations of future price rises on the fact that prices have risen already. The problem with the carbon bubble argument is that there is no evidence to support the notion that fossil fuel prices or the stock prices of fossil fuel producers are subject to investors following positive feedback trading strategies. See A Shleifer *Inefficient Markets: An Introduction to Behavioural Finance* Oxford University Press 2000. See also my own critique: S Davidson *A Critique of the Coal Divestment Campaign* Minerals Council of Australia 2014, available at www.minerals.org.au.
19. J Freed and N Khadem "Swapping picket lines for pinstripes: meet the new face of anti-coal activism" *Sydney Morning Herald* 24 June 2014, available at www.smh.com.au.
20. Above, n 19.

Australian
Environment
Review

Third-party rights to challenge decisions of the Victorian EPA

Emma Peppler *VICTORIAN BAR*

Victoria's main environmental approvals Act is the Environment Protection Act 1970 (Vic) (EP Act). It is administered by the Victorian Environment Protection Authority (EPA).

The EP Act provides for some third-party rights to challenge decisions of the EPA that provide "permission to pollute".

Rather than being a traditional merits or judicial review, the available grounds for third-party challenges are proscribed in accordance with the provisions of the EP Act.

The meaning of the provisions has been hotly debated in Victoria. The key section, s 33B, has been the subject of recent decisions that provide valuable commentary: in particular, the 2009 Supreme Court decision in *Thirteenth Beach Coast Watch Inc v Environment Protection Authority*,[1] and the 2012 Victorian Civil and Administrative Tribunal (VCAT) decision in *Dual Gas Pty Ltd v Environment Protection Authority*.[2] The approach in *Dual Gas* of looking first to whether a party can establish standing, using quite a broad test of "interest", and then looking to whether sufficient grounds are made out under the particular terms of s 33B, is useful.

However while the broad scope to argue standing of third parties was confirmed in *Dual Gas*, there are other cases that suggest a more confined approach. Further, the actual grounds upon which a review may be based remain heavily proscribed, and likely difficult for a third party to establish on the facts.

Environment groups or individuals who wish to challenge the environmental standards imposed through decisions of the EPA would be well advised to thoroughly do their homework, and seek legal advice, before setting out.

Instruments under the Environment Protection Act

There are three main types of instrument that the EPA can issue under the EP Act, and in relation to which a third party may seek to be involved: works approvals, licences and pollution abatement notices.

Works approvals

In lay terms, a works approval is required to do works leading up to an activity that will require a licence — usually an activity which will create waste or emit pollution to air, land or water.

Section 19A of the EP Act provides the trigger for a works approval.

Section 19B of the Act then sets out the process for works approval applications. When the EPA receives an application, it must refer the application to certain government agencies and also publish notice of the application in the newspaper. Any person interested in the application may comment within 21 days. If public comments have been received, a "s 20B conference" with the submitters can be held (s 19B(6)).

Section 20B of the EP Act provides that the EPA may invite interested persons to a conference, and that the EPA will take into consideration the discussions and resolutions of any conference, and the recommendations of the person presiding over the conference.

Licences

Section 20(1) of the EP Act is the licence trigger.

Section 20(4) of the EP Act provides for applications for licences to be made. If a works approval was obtained and the works satisfactorily completed, the EPA shall issue a licence subject to conditions which are not inconsistent with the conditions specified in the original works approval (s 20(7)).

Where there is an application for a licence and a works approval was required but not obtained, and works have been substantially completed, then the EPA will provide notice along similar lines to that required initially for a works approval application, including provision for written comments for interested persons, and the possibility of a s 20B conference (see s 20(8)).

Pollution abatement notices

Pollution abatement notices (PANs) are a slightly different type of instrument in that they are issued by the EPA as a response to pollution, to seek to curb it and remediate it.

PANs may be served by the EPA, on occupiers or responsible persons, where the EPA is satisfied that a process or activity or use of any premises has caused or is likely to cause pollution; has caused or is likely to cause a failure to comply with certain documents (regulations, orders declaring policy, requirements in policy,

conditions and so on); or has created or is likely to create an environmental hazard (among other things) (s 31A). PANs may require certain specified actions to remedy the pollution.

Rights of review in relation to works approvals, licences and PANs

VCAT has jurisdiction to review decisions of the EPA with respect to works approvals, licences and PANs (among other things), as provided for in Pt IV of the EP Act, entitled "Reviews by Tribunal" (s 32).

VCAT only has the powers granted to it by Acts — here, by the EP Act — so parties seeking to invoke the jurisdiction of the tribunal must ensure that they bring themselves within the relevant provisions. The key provisions are considered as follows.

Third-party review rights in relation to works approvals and licences

Section 33B is the key provision for applications for review of works approvals and licences by third parties.

Section 33B(1) provides that if the EPA issues a works approval or licence,[3] then a person "whose interests are affected by the decision (other than the applicant or licence holder)" may apply to VCAT, within 21 days after the decision is made, for review of the decision.

Section 33B(2) provides that an application for review in relation to a Works Approval is to be based on either or both of the following grounds:

> (a) that if the works are completed in accordance with the works approval, the use of the works will result in —
>
> (i) a discharge, emission or deposit of waste to the environment; or
>
> (ii) the reprocessing, treatment, storage, containment, disposal or handling of waste; or
>
> (iii) the reprocessing, treatment, storage, containment, disposal or handling of substances which are a danger or a potential danger to the quality of the environment or any segment of the environment —
>
> which will unreasonably and adversely affect the interests, whether wholly or partly of that person;
>
> (b) that if the works are completed in accordance with the works approval, the use of the works will result in —
>
> (i) a discharge, emission or deposit of waste to the environment; or
>
> (ii) the reprocessing, treatment, storage, containment, disposal or handling of waste; or
>
> (iii) the reprocessing, treatment, storage, containment, disposal or handling of substances which are a danger or a potential danger to the quality of the environment or any segment of the environment —
>
> in the area which will be inconsistent with any relevant Order declared under section 16, 16A or 17A for the area, or if no relevant Orders have been declared under any of those sections for that area, would cause pollution or an environmental hazard.

Section 33B(2A) provides largely the same review rights for licences as that set out for works approvals.

The orders being referred to in s 33B(2)(b) include state environment protection policies (SEPPs) in relation to various segments of the environment (such as water or air).

As mentioned above, s 33B in effect provides for a two-step test.

First, an applicant must demonstrate that their "interests are affected" pursuant to s 33B(1) — they must demonstrate standing.

Second, they must demonstrate, using the tests set out under s 33B(2) or s 33B(2A), that the use of the works approved under the works approval (if works are completed in accordance with the works approval) or the licence provisions will result in a discharge or handling that will unreasonably and adversely affect the interests of the applicant, or that there will be an inconsistency with any relevant order — or, if there is no order, will cause pollution or an environmental hazard.

The meaning of s 33B has been the subject of consideration in two key Supreme Court decisions (one in 2003 and one in 2009) and a number of recent VCAT decisions.

The 2003 decision of *Clean Ocean Foundation Inc v Environment Protection Authority*[4] related to unique facts whereby the Supreme Court considered that VCAT should not have summarily struck out an application for review made in relation to a works approval, and remitted the proceeding back to the tribunal. It is not clear what happened after the Supreme Court decision, as there is no further report of a VCAT decision.

The 2009 decision of *Thirteenth Beach Coast Watch Inc v Environment Protection Authority*[5] has provided much by way of thought-provoking material and precedent. In this decision, an environment group sought review of a decision of the EPA to issue a works approval for the construction of a bio-solids thermal drying facility to process sewerage sludge. The court dismissed an appeal from VCAT's order affirming the decision of the EPA.

The relatively recent decision in *Dual Gas Pty Ltd v Environment Protection Authority*[6] considered *Thirteenth Beach* and provides a detailed and useful examination of its effect, as well as the meaning of s 33B more broadly — hence, the cases are considered together as follows.

In *Dual Gas*, the EPA's decision to issue a works approval for a new power station was challenged under s 33B by four objectors: Environment Victoria Inc (EV), Doctors for the Environment Australia Inc (DEA),

Locals into Victoria's Environment Inc (LIVE) and an individual concerned about climate change (Mr Shield).[7] Oversimplified, the proceeding revolved around whether the power station was a force for "good" or "evil". The station proposed to gassify brown coal in the Latrobe Valley, and then burn it, as opposed to the more traditional method of just burning the coal. Such a method would produce more greenhouse gas emissions than burning natural gas, but less than simply burning the coal directly.

The power station proponent challenged the standing of the objectors to bring the appeal.

VCAT approached the task before it in the two steps mentioned above: first, by assessing whether the parties had standing under s 33B(1); and second, by assessing the limited grounds of review under s 33B(2).[8]

This two-step approach in fact followed an earlier distinction drawn by Cavanough J in *Thirteenth Beach* between standing to appeal and grounds to appeal.[9]

In relation to the first test, of standing, the tribunal asked whether a person's "interests were affected" within the meaning of s 33B(1). The tribunal referred to s 5 of the Victorian Civil and Administrative Tribunal Act 1998 (Vic) (VCAT Act), which states that if an enabling enactment provides that a person whose interests are affected by a decision may apply to the tribunal for review, "interests" means interests of any kind and is not limited to proprietary, economic or financial interests. The tribunal considered that there was a clear legislative intent that this wider and more liberal test for standing applied to s 33B(1), with a very wide meaning given to interests used in that provision being interests of any kind, direct or indirect — though a degree of genuine connection, a material connection or interest needs to be demonstrated, putting the party beyond the category of the general public.[10] Each case turns on its own particular circumstances.[11] The tribunal stated that the common law cases dealing with "special interest" were not applicable, and that s 5 of the VCAT Act was broader.[12]

The tribunal held that each of EV, DEA and Mr Shield had standing. However, it held that LIVE did not, essentially on the basis that it was a group more focused on an inner urban area, and had not been as involved in the application for the power station.

The tribunal in *Dual Gas* considered that *Thirteenth Beach* had not set out a definitive view on this particular point of how to assess interest under s 33B(1).

It thus disagreed with the approach in the 2010 decision in *Linaker v Greater Geelong City Council*,[13] in which a differently constituted tribunal appeared to adopt a narrower view of "interests" for both s 33B(1) and s 33B(2)(a) (purportedly following *Thirteenth Beach*), and summarily dismissed an application for review of the EPA's decision to issue a works approval for a wastewater treatment plant. In *Linaker*, the tribunal held that the third-party applicant had not made out standing under s 33B(1), or grounds under s 33B(2)(a) or s 33B(2)(b).

Both *Linaker* and *Dual Gas* were decisions of Deputy Presidents of VCAT. The decisions have not been considered by the Supreme Court. Currently, therefore, there remains some scope for debate about what "interests" must be affected for a party to have standing.

In relation to the second step of considering the actual grounds, and focusing first upon s 33B(1)(a) rather than s 33B(1)(b), VCAT in *Dual Gas* drew a distinction between the s 33B(1) use of the word "interests" and the s 33B(2)(a) use of the word "interests". While it was prepared to hold the broader view of interest in relation to s 33B(1) (against *Linaker*), in relation to s 33B(2)(a) the tribunal stated that *Thirteenth Beach* was direct, clear and binding authority for the view that a narrow interpretation should be given to the word "interests" in s 33B(2)(a).

So, what did Cavanough J consider to be a relevant "interest" in *Thirteenth Beach*? In that case, the court held that s 33B(2)(a) should be interpreted as referring to the financial, physical or other like personal interests of the particular applicant as an individual or as a corporation, with only interests of that kind being intelligibly capable of being "unreasonably and adversely affected" by the "use" of proposed works. His Honour stated that one would not normally speak of an intellectual, philosophical or emotional interest in the protection of the environment as being something capable of being unreasonably and adversely affected by the use of proposed works, even works to which the person or corporation was opposed on environmental grounds. He stated further that it would be at least odd to refer to such use as being apt to unreasonably and adversely affect the objects or concerns of the person or corporation; and further, that the provisions of s 33B(2) as a whole indicate very strongly that intellectual, philosophical or emotional concerns about the protection of the environment cannot constitute "interests" for the purposes of s 33B(2)(a). In his Honour's view, parliament had made exhaustive provision in paragraph (b) of s 33B(2) as to the grounds able to be relied upon by a party with no personal stake in the outcome.[14]

In *Dual Gas*, only Mr Shield raised a s 33B(2)(a) ground. The tribunal held that this ground should be struck out.

The restrictive nature of s 33B(2)(a) therefore appears to be fairly settled, with Supreme Court precedent to the effect that it is financial or physical type interest that must be unreasonably and adversely affected.

There is a contrast between s 33B(2)(a) and s 33B(2)(b). Third parties are much more likely to succeed arguing

grounds under s 33B(2)(b) in the absence of a tangible direct interest. However, s 33B(2)(b) too is not without difficulty.

Despite three objectors in *Dual Gas* having standing on s 33B(2)(b), they failed to make out their applications on the limited grounds available. The argument turned upon the meaning of the SEPP in question in that particular case, but also upon what is required for an approval to be "inconsistent" with the SEPP.

VCAT held that inconsistency would not necessarily require a finding of direct antipathy, particularly where the SEPP was qualitative.

However the tribunal also held that it was entitled to assume that conditions of the approval would be met.

Further, VCAT held that the words "will result in" and "will be inconsistent with" required the tribunal to be satisfied on the balance of probabilities that the use of the works *would* lead to the inconsistency — that is, in order for the objectors to succeed, a positive finding was required. Therefore, a ground under s 33B(2)(b) will not be established through a demonstration of no more than a risk or possibility that there *may* be an inconsistency.[15]

Also in relation to an inconsistency argument, third parties should be aware that the standards of SEPPs must be taken as they are found — arguments that the standards themselves are insufficient or inadequate will not be accepted by the tribunal.[16]

And, so, there are hurdles to be aware of in any application based on s 33B(2)(b).

Another recent case demonstrates the dangers associated with bringing third-party applications for review. In *Kelly-Turner v EPA*,[17] an individual third party sought review of an EPA decision to issue a works approval for a liquid coal tar pitch storage facility. In this matter, the application for review was struck out, and the applicant was ordered to pay costs of $39,000 to the works approval holder. Costs do not automatically follow the event at VCAT and, given that the applicant was not legally represented, this result is perhaps surprising. The tribunal held that the applicant had not sufficiently established an interest. VCAT referred to *Linaker* and *Thirteenth Beach* — but not *Dual Gas*, as the decision was published shortly after it.

Finally, the decision of *Innova Soil Technology v Hobsons Bay CC*[18] was an application for review of an EPA decision to issue a works approval for a contaminated soil processing facility. The third-party applicant for review was a commercial competitor with a works approval for a similar facility. VCAT (partially constituted by the same tribunal as in *Dual Gas*) noted that the issue of standing was raised only indirectly, but that there was the wide interpretation provided by *Dual Gas*, and also that the applicant here had economic and financial interests affected by the approval of a competitor facility.[19] However, in this case also, the grounds under s 33B(2)(a) and (b) were found by the tribunal not to be made out.

The sum of the above-mentioned decisions has not been positive for third-party challengers, with some minor battles won but nil wins overall.

Third-party review rights in relation to PANs

Section 35 provides for reviews in respect of PANs, stating that a person whose interests are affected by a requirement specified in a PAN or a notice of amendment served on that person under s 31A may, within 21 days, apply to VCAT for review.

On its face, the wording of this provision is not entirely clear. Does it provide for a right of review to third parties whose interests may be affected (and to whom a copy of the PAN may well be sent), or is it restricted to the party upon which the PAN is served, which is to take action under the PAN?

This question was considered in the tribunal decision of *Geelong Environment Council Inc v EPA*.[20] Despite recognising that the interpretation contended for by the third parties was open, VCAT (expressing that it had no doubt of the correctness of its view) held that this right of review only applies to persons upon which a PAN has been served.[21]

No ability for private prosecutions

The EP Act expressly excludes any right for members of the public to bring prosecutions in relation to matters under the EP Act. Section 59(2) provides that proceedings for an offence against the EP Act may only be taken by a person appointed by the EPA.

It is unclear whether this provision would prevent a private application for an injunction being brought to in effect enforce a provision of the EP Act, where standing could otherwise be established. (See, for example, the relatively recent Victorian Court of Appeal and Supreme Court decisions of *MyEnvironment Inc v VicForests*[22] and *Environment East Gippsland Inc v VicForests*.[23] In both cases, standing was established. Whereas in *MyEnvironment* an injunction was not granted, in *Environment East Gippsland* the court granted an injunction to prevent unlawful logging.)

Conclusion

The circumstances in which a third party might involve itself in a challenge to decisions under the EP Act are heavily proscribed. From the perspective of third parties, the EP Act may well appear difficult and potentially dangerous to navigate, with the prospects of success not high based on past cases. Certainly, any challenge would benefit from the assistance of lawyers[24] to understand and consider the relevant provisions of the Act.[25]

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Footnotes

1. *Thirteenth Beach Coast Watch Inc v Environment Protection Authority* (2009) 29 VR 1; [2009] VSC 53; BC200900889.
2. *Dual Gas Pty Ltd v Environment Protection Authority* [2012] VCAT 308.
3. With the licence being issued subject to the public process to which s 20(8) applies — that is, the application is advertised, with consequent submission rights. Also note that there are additional circumstances to which s 33B(1) applies, which, for the sake of simplicity, are not considered here.
4. *Clean Ocean Foundation Inc v Environment Protection Authority* (2003) 20 VAR 227; [2003] VSC 335; BC200305431.
5. Above, n 1.
6. Above, n 2.
7. The works approval applicant also lodged their own conditions review application, to which EV was joined as a party. This fact is potentially important for future applications for review by works approval applicants in which third parties might seek to be involved. See the criteria VCAT considered: above, n 2, at [59].
8. Above, n 2, at [115], and note that the tribunal did state that the grounds were "relatively limited".
9. Above, n 2, at [121].
10. Above, n 2, at [129].
11. Above, n 2, at [132].
12. Above, n 2, at [117] and following.
13. *Linaker v Greater Geelong City Council* (2010) 177 LGERA 380; [2010] VCAT 1806.
14. Above, n 2, at [142].
15. Above, n 2, at [184]–[186]; Above, n 1, at [40]; Above, n 13, at [32].
16. Above, n 2, at [41].
17. *Kelly-Turner v EPA* [2013] VCAT 259 (following *Turner v EPA* [2012] VCAT 282).
18. *Innova Soil Technology v Hobsons Bay CC* [2013] VCAT 658.
19. Above, n 18, at [32].
20. *Geelong Environment Council Inc v EPA* [2002] VCAT 356.
21. See, in particular, above, n 20, at [11].
22. *MyEnvironment Inc v VicForests* (2013) 198 LGERA 396; 306 ALR 624; [2013] VSCA 356; BC201315551.
23. *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1; [2010] VSC 335; BC201005649.
24. It should not go without acknowledgment that many lawyers and members of counsel have provided their assistance, often pro bono, in relation to third-party challenges to EPA decisions.
25. For further detailed consideration and useful history of the provisions and cases in relation to third-party appeals under the EP Act prior to 2004 (including references to cases and insights you won't find in an Austlii search), see "Third party appeals against works approvals: a personal journey", paper delivered by the then Justice Stuart Morris to a seminar hosted by the Victorian Planning and Environmental Law Association and the National Environmental Law Association, Melbourne, 20 April 2004, available at www.vcat.vic.gov.au.

Australian
Environment
Review

The Workplaces (Protection from Protesters) Act 2014 — an end to peaceful protests in Tasmania?

Greg Barns *BARRISTER*

Tasmania has been, since the emergence of the Franklin Dam protests in the early 1980s, Australia's most volatile jurisdiction in terms of environmental protests. There has been, for more than three decades, continued conflict between conservationists, the timber industry and government over the issue of how best to utilise Tasmania's extraordinarily diverse and unique forest areas.

This conflict has resulted in anti-forestry protesters entering areas such as workplaces and forest coupes that are being logged. Conflicts such as these have resulted in charges being laid against some protestors under the Criminal Code 1924 (Tas) or the Police Offences Act 1935 (Tas).

It is against this background that the Liberal Party in Tasmania campaigned in the state election held in March 2014 for a law that would specifically address protests in which those participating entered workplaces linked to forestry and, to a lesser degree, mining (mining was generally off the radar for protests until recent years, when proposals to develop an area of Tasmania known to many as the Tarkine emerged).

Workplaces (Protection from Protesters) Act 2014

The Workplaces (Protection from Protesters) Bill 2014 (Tas) (the Bill) was introduced into the Parliament of Tasmania by the Resources Minister, Paul Harriss, on 24 June 2014 and was passed by the lower house soon after. The Bill was amended in the Legislative Council, the upper house composed mainly of independent MPs, and received Royal Assent on 17 December 2014.

The Act is viewed by critics (including the Australian Lawyers Alliance, for which this writer is a spokesperson) as undermining the right to protest and the right to freedom of expression.

The definitions of "business premises" and "business access area" are broad and include workplaces, other than a handful of places exempted such as hospitals, schools and charitable organisations. A "business access area" can include a long stretch of road if that is the only way of entering business premises or where business is being undertaken.

Section 4 of the Act defines "protester" and "engaging in a protest activity". Clause 4(2) states that "a protest activity is an activity that":

> (a) takes place on business premises, a business access area in relation to business premises; and
> (b) is —
> (i) in furtherance of; or
> (ii) for the purposes of promoting awareness of or support for —
> an opinion, or belief, in respect of a political, environmental, social, cultural or economic issue.

This broad definition captures not only environmental protests, but also those relating to human rights, Aboriginal heritage and labour rights.

Under s 4(3) "a person is engaging in a protest activity if the person participates, other than as a bystander, in a demonstration, a parade, an event, or a collective activity, that is a protest activity".

Section 6 creates a number of offences to prevent protestors entering business premises or areas surrounding business premises, or from undertaking protest activity in areas where a business activity is being undertaken.

Section 6(1) provides that it is unlawful for a person to "enter business premises, or a part of business premises" if:

> (a) entering the business premises or the part, or remaining on the premises or part after entry, prevents, hinders or obstructs the carrying out of a business activity on the premises by a business occupier in relation to the premises; and
> (b) the protester knows, or ought reasonably to be expected to know, that his or her entry or remaining is likely to prevent, hinder or obstruct the carrying out of a business activity on the premises by a business occupier in relation to the premises.

Section 6(2) states that a "protester must not do an act on business premises, or on a business access area in relation to business premises" if:

(a) the act prevents, hinders or obstructs the carrying out of a business activity on the premises by a business occupier in relation to the premises; and
(b) the protester knows, or ought reasonably to be expected to know, that the act is likely to prevent, hinder or obstruct the carrying out of a business activity on the premises by a business occupier in relation to the premises.

Section 6(3) states that a "protester must not do an act that prevents, hinders, or obstructs access, by a business occupier in relation to the premises, to an entrance to, or to an exit from":

(a) business premises; or
(b) a business access area in relation to business premises –

if the protester knows, or ought reasonably to be expected to know, that the act is likely to prevent, hinder or obstruct such access.

Section 11 gives the police power to "direct a person who is on business premises to leave the premises without delay, if the police officer reasonably believes that the person has committed, is committing, or is about to commit, an offence". Section 8 of the Act makes it an offence to breach such a direction. The s 11 power is dangerous in that it allows police to harass individuals who might have attended a protest previously and been charged with an offence but who, on this occasion, are simply taking a passive role.

The Act also contains a bizarre provision, s 7, which provides a defence to persons who pass a business premises or area if they do so "at a reasonable speed, once on any day".

Under s 15 of the Act, a "police officer may issue and serve on a person an infringement notice if the police officer reasonably believes that the person is committing, or has committed, an offence against" s 6 or s 8. The notice can levy a fine, in the case of a body corporate, of up to $1,400 for an offence and, in the case of an individual, $280.

Until it was amended (see the discussion below), the Bill had removed judicial discretion in relation to sentencing for certain offences. Under the government's original proposal, if a person is found guilty of an offence under s 6 or s 8, they must be convicted. A second-time offender under the previous provisions must be jailed for at least three months and a first-time offender must be fined not less than $5000: s 19.

There are also provisions relating to payment of compensation for losses incurred by businesses.

The Legislative Council amended the Bill by amending the penalties provisions. These amendments, moved and voted on during 5 and 6 November 2014, have the effect of restoring judicial discretion in relation to sentencing so that the mandatory term of imprisonment for second offences is no longer in the Act. The courts can now impose a community service order or probation if a fine or term of imprisonment would be unjust.

Despite these amendments, the breadth and scope of the Act remain troubling for the reasons set out below.

An end to peaceful protests in Tasmania?

The Act, even as amended, will effectively criminalise peaceful protests in Tasmania. It will ensure that a young person who, in an act of youthful passion and enthusiasm for his or her cause, scales the fence of a forestry company, possibly faces a serious criminal conviction. Or an octogenarian who has been campaigning for the physical environment for years, and who stands in the middle of the road to prevent a log truck getting out of a forest, is suddenly turned into a criminal offender.

The Tasmanian government's attempts to stifle freedom of speech might fall foul of the implied right to freedom of speech in political matters. In *Attorney-General (SA) v Corporation of the City of Adelaide*,[1] French CJ said that the issue of whether or not freedom is infringed by a law involves application of a test adopted by the court in *Lange v Australian Broadcasting Corporation*[2] and modified in *Coleman v Power*.[3] This test involves two questions:

1. Does the law, in its terms, operation or effect, effectively burden freedom of communication about government or political matters?
2. If the law effectively burdens that freedom, is the law nevertheless reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government, and the procedure prescribed by s 128 of the Constitution for submitting a proposed amendment of the Constitution to the informed decision of the people?[4]

One would think that the answer to the first question in relation to the Act is "yes". It is in relation to the second question that there is room for debate. The High Court appears to approach the second question as involving discussion around proportionality: see *Monis v The Queen*.[5]

The Tasmanian government says that it has advice indicating that the Act will be immune to constitutional challenge. However, given the breadth and scope of the infringement on the freedom of political communication in the Act, that view might well be optimistic.

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Footnotes

1. *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1; 192 LGERA 185; [2013] HCA 3; BC201300754.
2. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; 145 ALR 96; 71 ALJR 818; BC9702860.
3. *Coleman v Power* (2004) 220 CLR 1; 209 ALR 182; [2004] HCA 39; BC200405576.
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Australian
Environment
Review

Falling behind: consequences of Australia's new approach to climate policy

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Australia has a long history of climate policy leadership on both sides of politics. It was a Coalition government that in 1998 established the world's first government agency dedicated to reducing greenhouse gas emissions, the Australian Greenhouse Office (AGO).[1] In 2003, a Labor government in New South Wales established the world's first emissions trading scheme (ETS).[2] As recently as 2007, both the Coalition and Labor governments went to federal elections promising to introduce a national-level ETS. This history of climate policy culminated in 2012 with the introduction of a national ETS, the Carbon Pricing Mechanism (CPM).[3]

However, after only two years of operation, the new Coalition government has abolished the CPM, becoming the first government in the world to repeal a carbon price. As a result, Australia no longer has a legislated limit on greenhouse gas emissions or a proven mechanism to incentivise emission reductions. This policy approach is in contrast to the regulatory trend internationally, with other jurisdictions moving to implement emissions trading schemes and other carbon pricing policies. In a short space of time, Australia has moved from being a world leader in climate policy to a country that runs the serious risk of falling behind the rest of the world in the race to transition to a low carbon economy.

Current climate policy in Australia

Australia's climate policy is currently in a state of flux. On 17 July 2014, the Clean Energy Legislation (Carbon Tax Repeal) Act 2014 (Cth) (Repeal Act) repealed the Clean Energy Act 2011 (Cth) and a number of associated Acts to unwind the CPM and remove the legislated target on reducing greenhouse gas emissions.

Repealing the CPM

According to the government, the CPM was "unequivocally a tax that punishes households for using electricity" as it was unnecessarily driving up electricity prices.[4] In repealing the CPM, the government's goal was to reduce power prices and lower the cost of living for Australian households. Nevertheless, there are serious doubts that the repeal of the CPM will significantly lower electricity prices or reduce the cost of living for Australian consumers.

Key components of the Repeal Act are amendments to the Competition and Consumer Act 2010 (Cth) (Consumer Act), which give further powers to the Australian Competition and Consumer Commission to prosecute companies that fail to fully pass on cost savings associated with the repeal of the "carbon tax". Section 60C of the Consumer Act now states that "an entity must not engage in price exploitation in relation to the carbon tax repeal". According to the new section, "an entity engages in price exploitation" if it makes a "regulated supply" and the price charged to consumers "does not pass through all the entity's cost savings … that are directly or indirectly attributable to the carbon tax repeal". This section applies to electricity retailers, who are defined as any "entity who produces electricity in Australia".[5]

The passage of the Repeal Act through the Senate was subject to intense negotiations between the Coalition government and the Palmer United Party. The final agreed text was subject to last-minute amendments, which delayed the final vote by a week.[6] As a result, there is uncertainty as to how these provisions will apply in practice and the extent to which failures to refund costs will be prosecuted.

Implementing Direct Action

Although it has repealed the CPM, the government has continuously reemphasised its commitment to the goal of reducing Australia's greenhouse gas emissions by 5% from 2000 levels by 2020.[7] To achieve this goal, the government has pursued an alternative policy approach called "Direct Action". On 24 November 2014, it successfully passed the approach into law through the Carbon Farming Initiative Amendment Act 2014 (Cth) (CFI Amendment Act), with the House of Representatives agreeing to several amendments that were adopted by the Senate in October.

Following assent (expected in early December 2014), the CFI Amendment Act will amend the Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth) (CFI Act) to establish the $2.55 billion Emissions Reduction Fund (ERF), which is the centrepiece of the government's

Direct Action plan and its principal policy instrument to meet the target of reducing Australia's greenhouse gas emissions by 5% below 2000 levels by 2020.

The ERF is designed to act as a mechanism to incentivise emissions reductions by having the Commonwealth government, through the Clean Energy Regulator (CER), purchase the lowest cost abatement by entering into forward emission reduction purchase contracts through a reverse auction process. Companies that offset carbon emissions through sequestration or other approved methodologies will be able to bid into this auction and enter into contracts with the government.

Originally, the ERF did not intend to immediately introduce any cap on overall emissions. Instead, it contemplated applying baselines to certain major emitters in an attempt to safeguard emission reductions purchased through the ERF.[8] This "safeguard mechanism" was not to be legislated until 2015 and would use individual baselines for each major emitter based on their highest annual emissions over the previous five years.[9]

However, Senator Nick Xenophon proposed a suite of amendments to the Carbon Farming Initiative Amendment Bill 2014 (Cth) during its debate in the parliament. These amendments significantly strengthened the ERF. Key elements of the amendments included:

- a Strategic Reserve Fund of $500 million for the purchase of international Kyoto units;
- a more robust safeguard mechanism that requires the surrender of carbon units if baselines are exceeded and a civil penalty for noncompliance; and
- extended durations for carbon abatement contracts and project crediting periods.[10]

Major economists and commentators raised doubts about the ability for the ERF, as originally designed, to achieve the 5% target without increased funding. According to research by Reputex, the ERF as designed would only purchase 67 million tonnes of greenhouse abatement, leaving Australia 354 million tonnes short of its 2020 target.[11] This would constitute a significant shortfall and almost certainly force the government to seek to purchase units in the international carbon market to meet its target. However, according to Reputex research, the amendments proposed by Senator Xenophon would improve the effectiveness of the ERF by 250% and make Australia's 5% emission reduction target achievable by 2020.[12] All of the Senator's amendments were ultimately included in the CFI Amendment Act as passed, except for the Strategic Reserve Fund.

The Carbon Farming Initiative Amendment Act 2014

With the passage of the CFI Amendment Act, the key aspects of the CFI Act and the ERF as they currently stand are set out below, although many of the more detailed aspects of the scheme continue to evolve and change.

Eligible carbon abatement projects

For a project to qualify as one that can bid to sell Australian carbon credit units (ACCUs) to the CER, that project must result in carbon abatement that can be used to meet Australia's climate change targets under international agreements. In addition, the project must be declared by the CER (upon application by the project proponent) to be an "eligible offsets project". This means that:

- the project must be carried out in Australia;
- the project must be consistent with one of the approved methodology determinations;
- the project proponent must pass the "fit and proper person" test; and
- the project must meet three "additionality" requirements.

Examples of eligible project types covered by existing methods include:

- sequestration offsets projects, including forestry and soil biosequestration, for which a 5% "risk of reversal buffer" will apply (along with a 20% discount for shorter-term projects); and
- emissions avoidance projects — for example, agricultural emissions avoidance projects (such as projects to avoid or limit emissions from livestock or savanna burning) or landfill legacy emissions avoidance projects.

A much wider range of methods is currently undergoing consultation and is expected to be introduced in the coming months — see below for further details.

Fit and proper person test

Project proponents participating in the scheme must meet the fit and proper person test:

- the CER will determine fitness and propriety, having regard to matters that are to be specified in legislative rules;
- an individual will not be a fit and proper person if he or she is an insolvent under administration; and
- a body corporate will not be a fit and proper person if it is subject to external administration.

Additionality

This requires satisfaction of three elements:

- the "newness requirement";

- the "regulatory additionality requirement"; and
- the "government program requirement".

To comply with the **newness requirement**, the project must not have begun to be implemented before it has been declared to be an eligible offsets project. The CFI Amendment Act provides examples of when a project will have begun to be implemented:

- it has been the subject of a final investment decision;
- a tangible asset (other than land) has been acquired or leased for use wholly or mainly for the purposes of the project;
- construction work has commenced; or
- in the case of a sequestration offsets project — soil preparation, seeding, planting or fertilisation has been undertaken, or irrigation or drainage systems have been installed.

However, the undertaking of a feasibility study, planning or designing the project, obtaining advice, regulatory approvals or consents in relation to the project, conducting negotiations in relation to the project, or sampling to establish a baseline for the project will not constitute implementation.

There is one exception to the newness requirement. If the project proponent notifies the CER before the commencement of the CFI Amendment Act that it intends to make an application to have the project declared an "eligible offsets project", and the project proponent actually makes such application by 1 July 2015, the project proponent can then commence implementation of the project after the date the notification is given to the CER (and before the project is declared to be an eligible offsets project).

According to the **regulatory additionality requi.rement**, the project must not be required to be carried out under any law.

To meet the **government program requirement**, the project must be unlikely to be carried out under another government (federal, state or territory) program or scheme. This requirement is not intended to prevent a project proponent from obtaining funding or in-kind support from multiple sources where this is necessary for the viability of the project. For example, the government anticipates that environmental planting projects could receive assistance from the Green Army, and that fire management projects may involve rangers who are supported under Indigenous ranger programs. According to the explanatory memorandum, the CER will issue guidance that lists government programs that typically provide sufficient funding for emissions reductions activities, such as the New South Wales Energy Savings Scheme.

Existing and new/proposed methodology determinations

The offsets project declaration must specify the methodology determination for the project, which is used to calculate the number of ACCUs to be issued for the project for a reporting period.

The Minister may make or vary methodology determinations, but the Minister must request advice from the Emissions Reduction Assurance Committee (the successor to the Domestic Offsets Integrity Committee) before doing so, and must have regard to that advice. The Committee is required to consult on any proposal to make or vary a methodology determination. In addition, in making or varying a methodology determination, the Minister must have regard to:

- the offsets integrity standards, which include that the carbon abatement is unlikely to occur in the ordinary course of events and must be measureable and verifiable; and
- whether there are likely to be any adverse environmental, economic or social impacts as a result of the kind of project to which the determination applies.

Any person can request the Committee to review a methodology determination.

As noted above, in addition to the existing CFI methodology determinations, a number of draft determinations have been released for public consultation, including:

- landfill gas — projects that reduce emissions by combusting methane from landfill gas using a flare, boiler or internal combustion engine;
- alternative waste treatment — projects that would treat eligible organic waste at an alternative waste treatment (AWT) facility, rather than disposing of it in landfill;
- coal mining — projects that destroy the methane component of coal mine waste gas by operating one or more methane destruction devices;
- wastewater treatment — projects that treat eligible domestic, commercial or industrial wastewater in an anaerobic digester, with the resulting biogas sent to a combustion device where a large proportion of the methane is destroyed;
- commercial building energy efficiency — projects that reduce emissions by undertaking energy efficiency upgrades in existing commercial buildings, using the National Australian Built Environment Rating System to inform additionality assessments and quantify abatement;
- industrial fuel and energy efficiency — a broad range of electricity and fuel efficiency activities,

including lighting upgrades, heating, ventilation and cooling system upgrades;
- facilities — projects that reduce emissions per unit of output at facilities that report emissions under the National Greenhouse and Energy Reporting Scheme;
- transport — projects that reduce the emissions intensity of transport, across road, rail, air, sea and mobile equipment; and
- aggregated small energy users — aggregated improvements in energy efficiency for households and small businesses.

The Senate also adopted an amendment proposed by the Palmer United Party that the Committee may order the CER not to consider an application for declaration of an eligible offsets project for a specified duration (no longer than 12 months) if there is reasonable evidence that the methodology determination relating to that application does not comply with an offsets integrity standard. The Minister must not make a methodology determination if the Committee has advised the Minister that the determination does not comply with an offsets integrity standard.

How the purchasing process will work

According to the CFI Amendment Act, the government purchase process may be by reverse auction, tender or "any other" process, which may include out-of-auction contracts for major projects, provided that the CER has regard to the principles for conducting the process. These include:

- purchasing carbon abatement at the least cost;
- maximising the amount of carbon abatement that the Commonwealth can purchase;
- ensuring that administrative costs are reasonable;
- ensuring the integrity of the process;
- encouraging competition; and
- providing for fair and ethical treatment of all participants.

The purchase price of ACCUs under a carbon abatement contract will not be disclosed (although the government has indicated that it may disclose its "benchmark" price for the first auction only). Following each purchasing process, the CER must publish only the weighted average price for eligible carbon credit units purchased and any other information it considers appropriate. For each financial year, the CER must publish:

- the total amount of carbon abatement purchased;
- the total amount payable for such abatement;
- the total number of ACCUs transferred to the Commonwealth; and
- the total amount paid by the Commonwealth.

It is expected that the first auction will take place in the first quarter of 2015.

Carbon abatement contracts

Following the release of the exposure draft Carbon Abatement Contract and discussion paper in July, a working Carbon Abatement Contract Code of Common Terms was released on 8 December 2014. It remains a final working version which will be subject to final negotiation with successful bidders. Significantly, it provides some flexibility in that sellers are only obligated to deliver 80% of committed ACCUs before liquated damages could become effective.

Crediting periods

In most cases, eligible offsets projects will only have one crediting period (although, as a transitional measure, existing CFI projects will generally be entitled to a second crediting period). Unless a different crediting period is specified in the applicable methodology determination, this crediting period will be seven years for emissions avoidance offsets projects and 25 years for sequestration offsets and savanna burning projects. The purpose of a single crediting period is to ensure that the ERF funds new projects on a rolling basis.

The Committee is required to review the duration of the crediting period under each methodology determination at least 12 months before the expiry of the first actual crediting period under that determination, having regard to the requirement that each methodology should result in carbon abatement that is unlikely to occur in the ordinary course. If the outcome of this review is that the crediting period allowed under the determination should be extended, then the Minister may amend the determination accordingly. This will enable projects to continue to generate ACCUs. However, they will not be able to sell those additional ACCUs to the CER if the term of the carbon abatement contract is less than the extended crediting period.

Project proponents may nominate the start of the crediting period for their project, which must be within 18 months of project declaration. This is designed to enable project proponents to align the start of their crediting period with the start of their project, given that there could be a significant period between project declaration and commencement (particularly for large or complex projects).

Reporting, auditing and issuance of ACCUs

A reporting period is generally a subset of the applicable crediting period. Project proponents must provide an offsets report to the CER for every reporting

period, which will be between six months (or less if prescribed by legislative rules) and two years (for emissions avoidance offsets projects) or five years (for sequestration offsets projects).

However, if the ACCUs are to be forward-purchased by the ERF, the carbon abatement contract is likely to provide for the delivery of ACCUs at least once every two years, in which case offsets reports will need to be provided on a periodic basis that is consistent with such scheduled deliveries.

An offsets report will only need to be accompanied by a separate audit report if the legislative rules so require, or if the CER has notified the project proponent that its offsets report must be audited (and such a notification must only be given if the CER is satisfied that this is appropriate having regard to effective risk management).

After the end of the reporting period, and upon application to the CER (which must be accompanied by the offsets project report, audited if required), the CER will issue to the project proponent a certificate of entitlement. This certificate specifies the number of ACCUs that represent the carbon abatement from the project for the reporting period. The CER must then issue this number of ACCUs to the project proponent. The ACCUs will be issued into the project proponent's account with the Australian National Registry of Emissions Units. In order to be issued with the ACCUs, the project proponent must pass the fit and proper person test, as noted above. Offsets reports and applications for certificates of entitlement may be made in respect of parts of a project, so that ACCUs can be issued separately for those different parts.

Safeguard mechanism

In its April 2014 White Paper on the ERF, the government foreshadowed that it would consult on the development of an "emissions safeguard mechanism" for introduction on 1 July 2015. The purpose of this mechanism was described as being to ensure that emissions reductions paid for through the ERF are not displaced by a significant rise in emissions elsewhere in the economy.

As set out in the White Paper, the safeguard mechanism is to apply to direct emissions from facilities that emit 100kt CO_2-epa or more of direct emissions, and is to operate where the relevant facility's absolute emissions exceed a baseline that is set at the highest level of reported emissions for the facility over the years 2009–10 to 2013–14. However, the White Paper did not specify either the consequences of exceeding the baseline or how new investments or significant expansions would be accommodated.

As a result of the amendments made in the Senate, the National Greenhouse and Energy Reporting Act 2007 (Cth) (NGERA) now provides for the establishment of a safeguard mechanism with effect from 1 July 2016. Under this mechanism, an entity that has operational control over a designated large facility (a "responsible emitter") will be required to pay a civil penalty where the direct (scope 1) emissions from that facility exceed a baseline level of emissions. The civil penalty for exceeding the emissions baseline will be prescribed by regulations that will be enforceable through court action by the CER.

The period in respect of which this assessment is made may be either a financial year or, if determined by the CER in accordance with rules to be made by the Minister (the "safeguard rules"), two or more consecutive financial years. The latter option will potentially allow emissions to be averaged over a number of years — for example, so as to address spikes in emissions cycles.

The safeguard rules will specify both:

- the level of direct emissions that will result in a facility being characterised as a designated large facility and therefore regulated by the safeguard mechanism; and
- the manner for establishing facility baselines and are intended to be made by 1 October 2015.

Under this mechanism, responsible emitters will be required to register with the CER and to report the relevant facility's emissions for a financial year by the following 31 October. For the purposes of the safeguard mechanism, the concept of operational control has been extended beyond corporations to other persons, such as individuals, local councils and trusts. As a result, to the extent that any of these kinds of entities have operational control over a designated large facility, they will be subject to the safeguard mechanism and the associated reporting requirements.

A responsible emitter will also be able to surrender ACCUs (or such other carbon units as may be specified in the safeguard rules) to offset any above-baseline emissions from the facility, with such surrender being required to be made by the 1 March that follows the assessment period. The CER may seek an injunction to actually require a responsible emitter to surrender such number of ACCUs as is required to offset those above-baseline emissions.

Many of the significant features of the safeguard mechanism are left to be prescribed by the safeguard rules. However, the legislative framework for the mechanism does raise the possibility of a market developing

for the purchase of ACCUs to cover the above-baseline emissions of designated large facilities, thereby providing a source of demand for those ACCUs other than the ERF.

Whether such a market eventuates will depend upon how rigorously the facility emissions baselines are set. If the baselines are very generous, as the government currently appears to intend, then the demand for ACCUs for this purpose will be extremely limited.

Nonetheless, there appears to be scope, at least in the future, to impose increasingly stringent emissions baselines, which would assist not only in restraining Australia's greenhouse gas emissions but also in fostering demand for ACCUs and investment in carbon abatement projects. In addition, while the government currently has no intention of doing so, the ability of the Minister to prescribe other carbon units that may be used to offset above-baseline emissions, provided that those carbon units represent abatement that is able to be used to meet Australia's international climate change targets, leaves open the possibility of above-baseline emitters being able to surrender potentially cheaper international carbon units to meet their emissions obligations. This would be very close to a baseline and credit trading scheme that, dare it be said, has an element of a carbon tax in it.

Future legislative rules

While the CFI Amendment Act sets out the overarching design features of the ERF, much of the detail in relation to individual elements has been left to legislative rules, which are yet to be drafted, including the following matters:

- the fit and proper person test;
- auction rules;
- the duration of proposed carbon abatement contracts;
- the safeguard rules; and
- rules in relation to certain types of emissions avoidance projects.

The international regulatory response

The current government, both now and while in opposition, has argued that Australia should not adopt any emissions regulations while other countries fail to do the same. The government's rationale is that the CPM placed a disproportionate burden on the Australian economy and that the failure of major trading partners to implement similar schemes meant that Australian business was at a competitive disadvantage.

This reasoning is out of step with current global developments and is based on a misrepresentation of the emerging policy trend, where major emitters are increasingly implementing policies that regulate and limit greenhouse gas emissions. In the past three years, economies in both the developed and developing world have implemented laws that require emitters to cap, reduce or eliminate their greenhouse gas emissions. Countries as varied as Chile, South Africa, Mexico, Kazakhstan, India and South Korea have all recently passed laws that limit greenhouse gas emissions through price signals and caps. This evolving global network of regulatory limits that control and regulate greenhouse gas emissions now covers a large proportion of global emissions.

An emerging consensus among major emitters

China, the United States and the European Union (EU) account for more than 55% of global emissions. Historically, significant discord existed between these parties on climate change policy. However, over the past 12 months, an emerging consensus has developed between these major emitters.

In 2013, the United States and China established the US-China Climate Change Working Group to increase cooperation in reducing greenhouse gas emissions and developing clean technology. In 2014, both parties agreed to work together to reduce the production of hydrofluorocarbons, which are a particularly potent greenhouse gas.[13] During the most recent meeting of the Working Group in July 2014, high level officials from China and the United States chaired a policy dialogue with the aim of coordinating efforts to achieve an ambitious climate change agreement at the crucial climate change negotiations in Paris in 2015.[14]

In June 2014, the United Kingdom and China signed a climate change agreement in which they accepted the "threat of dangerous climate change as one of the greatest global challenges" and the need "to put in place policies to limit or reduce emissions and promote low carbon development".[15] As part of the joint statement, both parties recognised the need to achieve a "global framework for ambitious climate change action". Of particular importance, both parties described next year's Paris Climate Conference as "pivotal" and called for increased effort to achieve a protocol, another legal instrument or agreed outcome with legal force in Paris.

This follows a joint-statement issued by the EU and China in which both parties "underlined their commitment to making significant cuts to greenhouse gas emissions through credible and verifiable domestic action".[16] In May 2014, the EU and China launched a three-year cooperation on carbon emissions trading schemes. The initiative includes a commitment by the EU to invest €5 million for capacity building of China's new emissions trading schemes, as well as sending experts to assist China in developing a national ETS which integrates the existing pilot schemes.[17]

While these agreements don't create binding emission reduction obligations on any country, they do demonstrate a growing consensus among major emitters that a limit on greenhouse emissions is necessary and that an ETS is the most effective way of achieving emissions reductions.

Emissions trading schemes among major emitters

In addition to this growing consensus, each of these major emitters is taking action domestically to tackle climate change.

The EU has a long history of limiting total greenhouse gas emissions in its jurisdiction, with the world's largest ETS. The EU ETS covers 45% of the EU's greenhouse gas emissions and regulates over 11,000 facilities across 31 countries.[18] It is estimated that during its initial phases from 2005 to 2009, the EU ETS reduced EU emissions by over 480 million tonnes, which is greater than Australia's total annual greenhouse gas emissions during the same period.[19]

The EU has recently taken steps to address issues with the operation of its ETS caused by an over-allocation of emission allowances that resulted in a dramatic fall in the EU carbon price. In 2014, the EU reached an agreement to backload emission allowances by delaying the auctioning of 400 million allowances that year.[20] On 23 October 2014, EU leaders agreed to increase their 2030 greenhouse gas reduction target to 40% compared to 1990 levels. This represents the most ambitious reduction target in the world and demonstrates a renewed commitment on behalf of the EU to regulate greenhouse gas emissions through an effective ETS, even at an increased cost to industry.

The world's largest emitter, China, is pursuing an aggressive approach to investment in and support for clean energy and the implementation of provincial and regional emissions trading schemes. China may soon overtake the EU as the world's largest carbon market. Currently seven provincial and regional schemes cover an estimated one billion metric tons of carbon dioxide.[21] Major industrial centres such as Tianjin, Shanghai, Chongqing and Guangzhou all have operational schemes that set caps on emissions and forced liable entities to pay for emission permits. This is in direct contrast to Australia, where industry currently operates without any restriction on greenhouse gas emissions. China is also expected to announce a consolidation of its pilot schemes into a national ETS as part of its next five-year plan, due to be announced by the end of 2014.[22]

As a result of this aggressive approach, China has seen a remarkable fall in emissions intensity across its economy. According to Professor Ross Garnaut, this "decisive fall in the trajectory of Chinese emissions growth since 2011 within a new model of economic development has brought within reach the possibility of holding human-induced increases in temperature to 2 degree Celsius".[23]

In addition, China has also recently decided to introduce import limits on coal. Starting from 2015, China will ban the import of coal with high ash and sulphur content.[24] According to Wood MacKenzie, 80% of the 54 million tonnes of thermal coal exported by Australia to China would not meet these new limits and would be potentially banned.[25]

Perhaps the strongest indication of a growing policy trend towards limiting greenhouse gas emissions comes from recent developments in the United States. In June 2014, the Environmental Protection Agency (EPA) announced a new rule that would require each state to ensure that existing power stations reduce greenhouse gas emissions by 30% against 2005 levels by 2030. Currently, coal fired power plants are responsible for 40% of the US greenhouse gas emissions, so the proposed rule has the potential to significantly reduce total emissions. In his speech announcing the plan, President Obama recognised that in contrast to limitations on other harmful chemicals, such as sulphur and mercury, "there are no national limits on the amount of carbon pollution that existing plants can pump into the air we breathe", and that this is "not safe, and it doesn't make sense".[26] Interestingly, both the EPA's announcement and Obama's public statements have indicated that the preferred approach of the federal government is for states to use market-based approaches to meeting this target, including emissions trading schemes.

The new EPA rule in relation to the reduction of greenhouse gas emissions is in addition to rules announced in 2014 that placed emissions standards on new coal fired power stations, which effectively prevent their construction without carbon capture storage technology. The EPA has also implemented national emission standards on certain hazardous chemicals from power stations that are projected to lead to 60 GW of coal fired generation being retired by 2020.

These federal developments in the United States are complemented by action at the state and regional levels. The Californian ETS commenced in 2013 and places a direct cap on the emissions in the world's eighth-largest economy. In the north-east, the Regional Greenhouse Gas Initiative is expected to undergo a reform process that has the potential to expand the operation and coverage of the scheme.

The commitment of major emitters to implement increasingly strict limits on greenhouse gas emissions through market-based approaches shows a clear trend among major economies to regulate greenhouse gas emissions. In the words of Professor Ross Garnaut, this demonstrates that Australia is "out of step" with international standards.[27]

This emerging carbon-pricing trend has broad-based support, as demonstrated at the recent Climate Summit in New York. On the day of the Summit, 400,000 people marched through the streets of New York calling for carbon pricing. In addition, 73 countries, 11 states and provinces, 11 cities and more than 1000 businesses signed a policy statement calling for a price on carbon.[28] Significant signatories included major emitting countries such as China, South Africa and Indonesia, as well as major emitting corporations such as BHP Billiton, Vale and Royal Dutch Shell.

The strength of these emerging trends has the potential to contribute to a successful outcome at the upcoming Paris Climate Change Conference in 2015. In addition, they increase the likelihood of more ambitious emission reduction pledges from participating states. Such an outcome would put significant pressure on the Australian government to increase its emissions reduction target of 5%. Any increase would feed back into the cost of implementing the ERF and support the use of mechanisms that directly limit greenhouse gas emissions, such as a renewed ETS.

The response of capital

These policies are having a direct impact on the willingness of capital to invest in assets that are increasingly being seen as affected by such polices and thus not sound investments. This is because the economics of investing in high greenhouse gas industries are changing. A number of factors are influencing this change.

The longevity of carbon-intensive assets is being questioned due to the growing belief that they will be phased out by new low carbon technologies. The key example of this is the growth of renewables. The aim of government energy policy is to lower costs to make economies run more competitively. Technology trends mean that renewables are rapidly closing the gap on conventional power in terms of cost and reliability, directly threatening the long-term viability of carbon-intensive baseload generation. Recognising this trend, governments in Asia, Europe and the Americas are hastening this transition by implementing policies to incentivise renewable development and research. This race to transition to a low carbon economy will further shorten the asset lifespan of carbon-intensive investments.

The current Australian government has withdrawn Australia from this race. The Coalition's attempts to repeal the Clean Energy Finance Corporation and the Australian Renewable Energy Agency, and the uncertainty around the Renewable Energy Target, have paralysed the renewable energy market in Australia. As a result, renewable energy investment in Australia has fallen by 70% in the past year.[29] In comparison, global growth has boomed by close to 10%.[30]

Another emerging trend globally is an increasing movement towards divestment in carbon-intensive assets. Just recently, the Australian National University announced that it would divest its $16 million holding in seven Australian resources companies. The move was labelled as "stupid" by the Prime Minister and led to the government calling for the Vice-Chancellor to reconsider his decision.[31] By the end of 2014, super funds HESTA, Local Government Super and Anglican National Super had all announced portfolio-wide decisions to quit or curtail their fossil fuel investments, particularly in coal.[32] In 2014, Deutsche Bank, RBS and HSBC all refused to provide loans for the Abbot Point Coal Port in the Great Barrier Reef Marine Park due to environmental concerns.[33]

On the international level, the $860 million Rockefeller family's charity fund announced that it would divest from fossil fuel companies over the next 10 years.[34] This follows an announcement by Norway's sovereign wealth fund, the world's largest, that it would review its position of carbon-intensive divestments before the end of the year.[35] Private investors have also increasingly shifted capital into low carbon investments. The most notable example is Warren Buffet's recent commitment to increase investment in wind and solar energy to $30 billion.[36]

As a result of this trend, Australia's carbon-intensive economy will increasingly be seen as a risk, especially as key export partners decarbonise.

Comment

Australia's changed position on carbon pricing has been driven largely by domestic politics and arguably short-term political ideology, rather than being based on sound science and economics. While there remains a commitment to a 5% emissions reduction target, it is unclear to what extent the ERF will be successful as a stand-alone measure in meeting such a target given the uncertainty over safeguard levels, the limited committed funding and the availability of viable projects.

The ERF alone and this modest target are unlikely to drive a transition to a low carbon economy. In contrast, other countries are achieving great success in decarbonising their economies and exploiting the new economic opportunities that this presents. Eventually, Australia will have no choice but to follow suit or its economy will fall behind. As most other Australian political parties support a mechanism to price carbon, it will inevitably

be re-introduced. In the meantime, international and Australian capital will continue to shift away from carbon-intensive industries and economies.

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Footnotes

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Radical thinking: personal carbon trading

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Brief summary of the idea

Carbon emissions from energy use in the residential sector and from private transport make up a significant proportion of total emissions in developed countries. Personal carbon trading (PCT) is a radical approach to reducing emissions from these uses of energy by individuals and households. Unlike most current policy — which regulates energy producers and/or manufacturers of equipment (such as vehicles) and appliances (such as white goods and light bulbs) — PCT focuses on individual energy users and locates rights and responsibilities with them. PCT is an umbrella term that describes various downstream carbon cap-and-trade policies that have different detailed rules and system boundaries,[1] but all of which aim to limit carbon emissions within a society by limiting the amount of carbon that individuals are entitled to emit (for free) and by engaging individuals in the process of emission reduction. One version of PCT, known as tradable energy quotas,[2] covers all national emissions and applies to the business sector and organisations, as well as individuals, but this article focuses on PCT for individuals only. The most commonly explored version of PCT covers household energy use and personal transport. Together, these account for more than one-quarter of Australia's total energy use[3] and a similar proportion of its carbon emissions from energy use.

How PCT would operate

All personal carbon trading schemes proposed so far (eg, by researchers or campaigners) share common features: the scheme is mandatory, with no opt-outs; individuals periodically receive a carbon quota for free; for every activity that involves carbon use within the scope of the scheme, allowances are surrendered; allowances are tradable in a new personal carbon market; and allowances are reduced over time in line with national carbon reduction commitments. This implementation of a reducing cap on collective emissions is the key feature that delivers carbon savings.

For a scheme covering household and personal transport, every time a person paid an energy bill, filled up the car with fuel or bought a plane ticket, they would have to surrender carbon units from their account or pay the additional cost of buying carbon units at the market price. By allowing trading, people who live low carbon lives, who invest in household efficiency and renewable energy, who travel less, and who lead lives with a lower energy input would have a surplus to sell. Those who travel a lot, or who live in large or inefficient homes, would need to buy additional carbon units. A market price for carbon would emerge and higher carbon lifestyles would cost more than they currently do. The equal shares would not require that everyone emits equally — instead, people would have choice and could adapt to a lower carbon society at a slower pace by buying additional units.

PCT is not envisaged as replacing most current energy and carbon reduction policies. Rather, it would be an enabling policy which would be likely to encourage individuals to make the most of existing schemes, such as product and building standards, energy labels, taxation and financial incentives, as well as low carbon transport modes. In the short term, savings would be made through greater investment in energy efficiency and renewable energy options, changing household behaviours to reduce energy use, switching to lower carbon transport choices such as buses and bicycles, and reducing "optional" travel by, say, taking holidays closer to home. In the longer term, making decisions that allow a much lower carbon lifestyle — such as living closer to work, living on a public transport route, or downsizing from an under-occupied home — would become part of the necessary response.

Academic research

The concept of capping emissions from individuals has been explored in the context of developed countries — particularly the United Kingdom, where it originated. Recent reviews summarised much of the academic research on this topic,[4] which includes contributions grounded in social and political sciences and economics, as well as energy policy, geography and philosophy. The research has advanced thinking on the pros and cons of different policy design options, provided evidence on the public acceptability of PCT using a variety of methodologies, looked at costs and technologies, analysed the distributional impacts of PCT, investigated the experience of people involved in voluntary PCT-like schemes,

considered options for enforcement and control, and explored the philosophical arguments about the fairness of equal rights to emit. There is a rich variety of evidence and debate, which continues to expand.

PCT has also been considered as a means to reduce Australian transport and carbon emissions.[5] Emissions from the transport sector are significant, have proved unresponsive to policy to date, and are forecast to rise under "business-as-usual" scenarios. While PCT would face considerable barriers to being adopted as a policy, it would connect individuals to the implications of transport choices in a way that top-down carbon taxation would not, and might lead to some fundamental beliefs about mobility in modern societies and the role of government being challenged.

Some of the most interesting current research is underway in Australia. Norfolk Island, 1500 kilometres off the coast of Australia, is undertaking "the first real test of personal carbon trading in the world" for the Norfolk Island Carbon/Health Evaluation Study, known as NICHE. The trial is in its early stages, but already 350 people are registered for it and there is an electronic carbon accounting system, feedback on carbon emissions and rewards for participation.[6]

Political, public and commercial interest

PCT has attracted high-level political interest in the United Kingdom, particularly during 2006–08. The interest of the Secretary of State for the Environment led to a program of research work being commissioned by the Department for Environment, Food and Rural Affairs (Defra). On the basis of its commissioned research, Defra concluded that PCT was ahead of its time and that the government should remain engaged in the debate around PCT, but that further work should be taken forward by academics and research organisations and not the government itself.[7] There is currently much less political interest than previously in the United Kingdom and PCT is not considered as a mitigation policy option. PCT would be more likely to be considered seriously if other policies were seen to be failing at a time when there is a political pressure to act more radically on climate change. Political pressure for PCT could arise from the public (bottom up) or from the international arena (top down), or both.

However, as recent Australian experience shows, climate mitigation concerns are generally secondary to economic growth concerns, and even relatively unambitious policies to mitigate climate change can be highly contentious.

PCT has proved an attractive idea to some: voluntary groups in the United Kingdom and the United States have experimented with capping individuals' emissions and personal carbon trading. Their experiences, which were largely positive, have been documented.[8]

There has also been some interest from the commercial sector. For example, Coca-Cola and the UK Carbon Trust have collaborated in publishing research on personal carbon trading. They expanded the boundaries of personal carbon to include the embodied carbon in food and drink and in leisure activities.[9] In 2008, WSP, an international engineering and environmental consultancy company, launched PACT, a personal carbon allowance tracking scheme. The voluntary carbon allowance scheme has helped around 4000 employees to cut their carbon footprints by an average of 10%. Employees use an online tool to calculate their own carbon footprint and are able to compare with others in their company. They set a reduction goal and will be rewarded if they achieve it. Low carbon lifestyle tips are supplied via various communication channels, including Facebook, newsletters and posters. Scheme members also receive discounts on low carbon goods and services, and are advised on how to take advantage of existing national schemes, such as free home insulation.[10] The combination of personalised information and feedback, goal setting linked to incentives, being part of a learning community, practical tips and low carbon discounts results in significant carbon savings.

Why PCT might work

A PCT scheme would cover emissions under an individual's direct personal control, such as household energy use (mainly electricity and gas), private transport and aviation. As such, it provides an overarching approach and could be framed as a carbon budgeting process that gives individuals ownership and control over their emissions and that allows individuals to make their own preferred carbon saving trade-offs and decide themselves where and when to save carbon.

PCT is unique because it combines a number of mechanisms to drive behaviour change: economic, psychological and social:[11]

- **Economic** — The price of carbon provides the economic incentive for reducing emissions. This price would be determined by the market of traded allowances. The mechanism penalises high-emitters while rewarding low-emitters.
- **Psychological** — The intrinsic psychological mechanism is driven through a combination of the carbon price, the scale of the individual allowance, and the awareness and visibility of the carbon emissions related to each individual's actions. Experimental work indicated that people may be inclined to respond to PCT partly based on the absolute size of the allowance and whether they are in credit or debit, rather than responding with pure economic rationality.[12]

- **Social** — The social mechanism relies on the insights that decisions, even about individually allocated resources, are subject to social forces,[13] and that energy conservation arising from normative concern — as opposed to hedonistic or cost reasons — is more robust against changes and therefore more durable.[14] The carbon "budget" allocated to individuals suggests an acceptable and fair personal carbon footprint.

All of these mechanisms need to considered when trying to understand the potential impacts of PCT. In addition, the interaction between the mechanisms is likely to be contingent upon a range of other factors and supporting policies.

Legal issues

PCT would create new rights and responsibilities for individuals and a new carbon market, as well as other governing institutions that manage processes such as carbon allocation, registration, surrendering procedures and an enforcement regime. All of these aspects would have to be covered under either existing or new legal frameworks. Enforcement of the scheme, for example, requires the identification of some set of actors that are legally responsible for a specified outcome, with sanctions in the event of their failure to do so. Despite PCT being generally conceived as a legally enforceable system, there has been little research into legal aspects of PCT.[15]

Conclusions

The urgent need for increased action to reduce carbon emissions from developed countries is unarguable. Personal carbon trading has the potential to tackle a significant proportion of emissions in these countries. It can provide an over-arching approach to carbon emissions reduction in the residential and transport sectors and accesses psychological, social and economic mechanisms to engage individuals and help them reduce their carbon emissions. It explicitly involves citizens in meeting the carbon reduction targets their governments have signed up to.

Presently, PCT is unlikely to be adopted by any governments. The idea is not yet fully developed into an implementable policy and, more importantly, governments are not taking radical action on mitigating climate change. However, once the impact of climate change becomes more tangible to individuals and governments, and if existing mitigation technologies and policies fail to deliver emissions reduction, interest in PCT might rise. Continuing to explore and develop this idea means that it will be an available option, if and when radical action to reduce carbon emissions is taken.

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Footnotes

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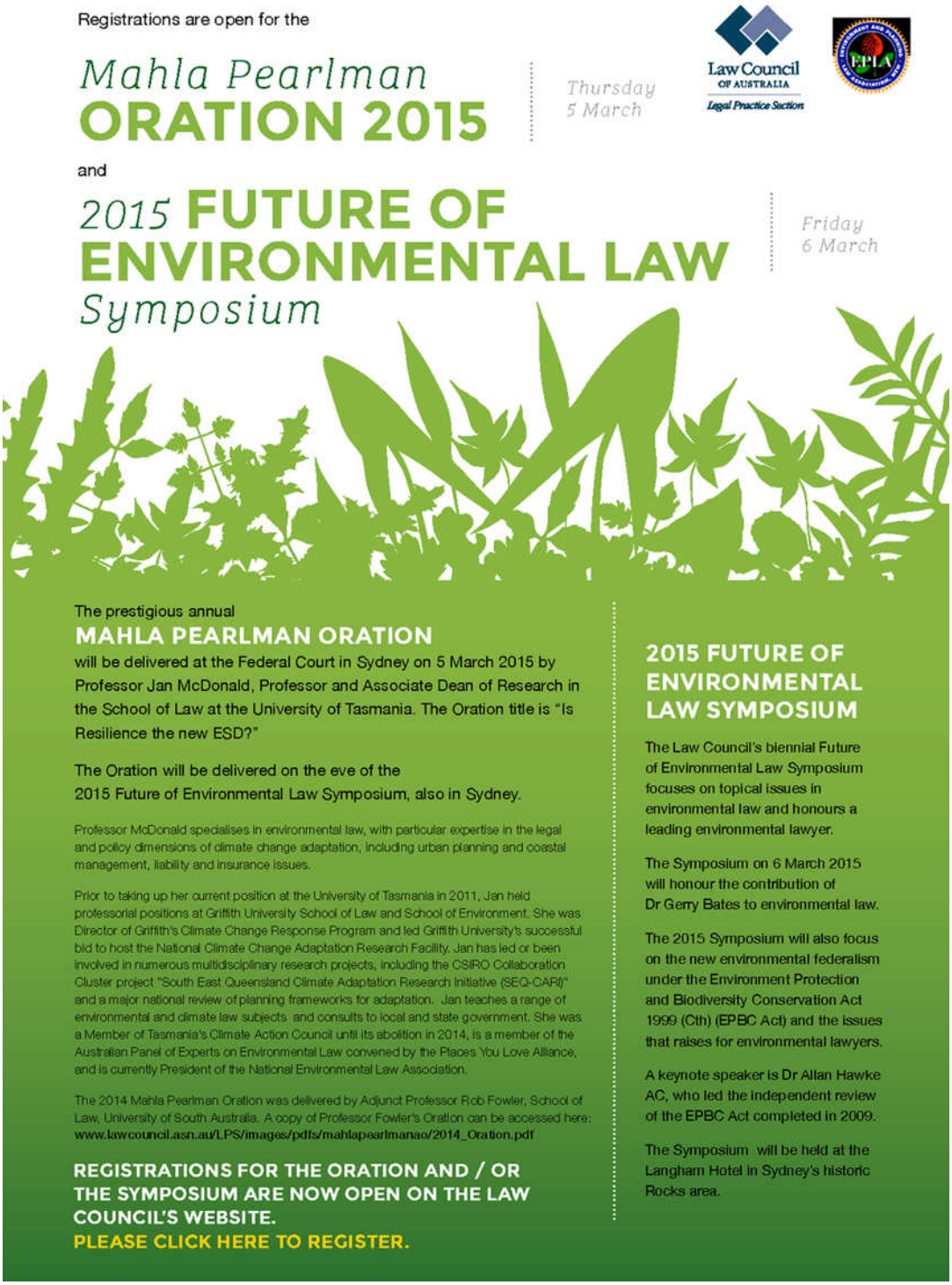
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Mahla Pearlman
ORATION 2015
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6 March
The prestigious annual
MAHLA PEARLMAN ORATION
will be delivered at the Federal Court in Sydney on 5 March 2015 by Professor Jan McDonald, Professor and Associate Dean of Research in the School of Law at the University of Tasmania. The Oration title is "Is Resilience the new ESD?"
The Oration will be delivered on the eve of the 2015 Future of Environmental Law Symposium, also in Sydney.
Professor McDonald specialises in environmental law, with particular expertise in the legal and policy dimensions of climate change adaptation, including urban planning and coastal management, liability and insurance issues.
Prior to taking up her current position at the University of Tasmania in 2011, Jan held professorial positions at Griffith University School of Law and School of Environment. She was Director of Griffith's Climate Change Response Program and led Griffith University's successful bid to host the National Climate Change Adaptation Research Facility. Jan has led or been involved in numerous multidisciplinary research projects, including the CSIRO Collaboration Cluster project "South East Queensland Climate Adaptation Research Initiative (SEQ-CARI)" and a major national review of planning frameworks for adaptation. Jan teaches a range of environmental and climate law subjects and consults to local and state government. She was a Member of Tasmania's Climate Action Council until its abolition in 2014, is a member of the Australian Panel of Experts on Environmental Law convened by the Places You Love Alliance, and is currently President of the National Environmental Law Association.
The 2014 Mahla Pearlman Oration was delivered by Adjunct Professor Rob Fowler, School of Law, University of South Australia. A copy of Professor Fowler's Oration can be accessed here: www.lawcouncil.asn.au/LPS/images/pdfs/mahlapearlmanao/2014_Oration.pdf
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2015 FUTURE OF ENVIRONMENTAL LAW SYMPOSIUM
The Law Council's biennial Future of Environmental Law Symposium focuses on topical issues in environmental law and honours a leading environmental lawyer.
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The 2015 Symposium will also focus on the new environmental federalism under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act) and the issues that raises for environmental lawyers.
A keynote speaker is Dr Allan Hawke AC, who led the independent review of the EPBC Act completed in 2009.
The Symposium will be held at the Langham Hotel in Sydney's historic Rocks area.

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PUBLISHING EDITOR: Katherine Pearson, katherine.pearson@lexisnexis.com.au
SUBSCRIPTION INCLUDES: 10 issues per year EDITOR DIRECT: PO Box 976 Civic Square ACT 2608
TELEPHONE: (02) 9422 2222 FACSIMILE: (02) 9422 2404 DX 29590 Chatswood www.lexisnexis.com.au
ISSN 1035-137X Print Post Approved PP 255003/06151 Cite as (2014) 29(10) *AE*