RECENT DEVELOPMENTS

COMMONWEALTH

COMMISSION OF INQUIRY - SHOALWATER BAY QUEENSLAND*

The completion of the Commission of Inquiry into the Shoalwater Bay Area marks a significant milestone in the history of the *Environment Protection (Impact of Proposals) Act 1974* (Cth) (hereafter the EPIP Act). Compared with the number of proposals assessed very few inquiries have been commissioned under the EPIP Act. Since 1974, 25 proposals have been subject to a Public Environment Report (PER) and 132 proposals subject to an Environment Impact Statement (EIS). The Shoalwater Bay Inquiry is only the fourth inquiry under the EPIP Act, coming after: the Ulladulla Hinterland Broadcasting Transmission Station Environmental Inquiry, the Fraser Island Environmental Inquiry, and the Environmental Inquiry on Uranium Development in the Northern Territory.

Under the EPIP Act, the Environment Minister may direct that an inquiry be conducted regarding the environmental aspects of "any action or the making of any decision or recommendation" of the Australian government or its authorities, with exceptions relating to defence and national security. The House of Representatives Standing Committee on Environment and Conservation found, in 1978, that the EPIP Act was the most effective means yet developed for broad environmental management and community participation in matters involving the Australian government (chapter 5). The Committee recommended greater use of inquiries under the Act (para.133-134). The subsequent history of inquiries indicate that this recommendation has not been followed.

The EPIP Act and the Administrative Procedures give some guidance as to the circumstances in which a public inquiry should be ordered by the Minister. However, there is no guidance in the provisions as to what circumstances make it *desirable* for an inquiry to be directed, either as an addition to a PER or EIS, or as an alternative. Subsection 11(1) states:

> For the purposes of procedures approved under this Act or for achieving the object of this Act, the Minister may direct that an inquiry be conducted in respect of all or any of the environmental aspects of a matter referred to in any of the paragraphs of section 5, whether or not an environmental impact statement or public environmental report has, in accordance with procedures under this Act, been furnished to the Minister.

The Administrative Procedures give some indication of what the Minister must take into account in ordering an inquiry; clause 7.2 states that the Minister must take into account:

(a) the significance of all or any of the environmental aspects of the proposed action;

(b) any views expressed by the action Minister or the responsible authority (as the case may require); and

(c) whether all or any of the environmental aspects of the proposed action have been, are, or will be the subject of a public inquiry conducted otherwise than under the Act.

But these provisions do not create any legal obligation to hold an inquiry.

The Commission of Inquiry into the Shoalwater Bay Area rivalled the Fraser Island and Ranger Uranium inquiries in its breadth and complexity. The Shoalwater Bay Area occupies 454,000 ha of land and sea some 50 km north of Rockhampton. The Area is owned by the Commonwealth and is used by the Department of Defence as a military training area. The Queensland Department of Environment and Heritage is responsible for the management of the State Marine Park within the Area. Sand dunes within the Area have been of interest to mineral sand miners and the Clinton Lowland Joint Venture had lodged a Notice of Intention in relation to proposed exploration for mineral sands in a small portion of the Area. Prime Minister Keating announced in his "Environmental Statement" on 21 December 1992 that: "The Government has decided to conduct a full and open assessment of the environmental and economic values of all Commonwealth lands in the Shoalwater Bay area. The granting of

mining or mineral exploration leases will be put on hold pending the outcome of the assessment" (Keating, 1992, p.27).

The Commission was established on 10 May 1993 and was undertaken by Commissioners Mr John T. Woodward, Ms Jennifer M. Hughey and Dr Edward K. Christie. The Commission did not see its task as assessing the potential environmental effects of a specific proposal for mining exploration. Rather, the Commission understood its task as requiring it "to inquire into a number of uses and activities in the Area and to assess the environmental effects of those uses and activities with a view to determining which of the uses and activities . . . may be environmentally acceptable" (*Summary Report*, p.14). The uses and activities assessed included: defence training, mining, Aboriginal and conservation uses, water catchment use, tourism and recreation uses, and scientific and education uses. The Commission applied a multi-objective analysis process to its findings on the available information on the resources in the Area so as to help it establish a preferred scenario for the Area (*Summary Report*, p.26). To facilitate public participation in the Inquiry, the Commission published a booklet entitled the *Commission's Processes and Procedures* and the Commission released *Guidelines for Preparation of Submissions*. The Commission of Inquiry received hundreds of written submissions and took evidence from numerous witnesses during public hearings in Yeppoon and Brisbane. An *Interim Report* was released on 8 March 1994 and the *Final Report* and *Summary Report* were submitted to the Environment Minister on 31 May 1994.

The Commission recommended to prohibit mineral exploration and sand mining in the Area. Although the Commission noted that "the impacts of the initial stages of mineral sand exploration are likely to be small, localised and temporary," it concluded that "the consequences of mining and subsequent rehabilitation would result in an adverse impact on landform, biodiversity, integrity, wilderness, representative, research, geomorphological and other heritage values over at least several decades . . ." (*Summary Report*, pp.33-34). The Commission noted that the mining impacts "would be far more substantial in area and degree than those from current military training activities" (*Summary Report*, p.34). Consequently, the Commission proposed that the Area become a conservation zone under the management of the Department of Defence with responsibility for the marine section to be shared by the Great Barrier Reef Marine Park Authority and Queensland's Department of Environment and Heritage.

Like a number of other Commonwealth environmental inquiries, the Shoalwater Bay Inquiry does not appear to have significantly advanced the settlement of dispute over conflicting resource uses. Other inquiries to suffer in this way were the Commission of Inquiry into the Lemonthyme and Southern Forests and the Resource Assessment Commission's Kakadu Conservation Zone Inquiry. Companies holding mining leases over part of the Shoalwater Bay Area have challenged the Inquiry's findings and have mooted that they will lodge substantial claims for compensation if the Australian government does not allow mining exploration in the Area (Chamberlin, 1994).

A major concern of some participants in the Shoalwater Bay Inquiry was the way the EPIP Act was used for sponsoring a broad, resource assessment type inquiry. The Australian Mining Industry Council and the Queensland Mining Council made submissions to the Commission complaining that it wrongly assumed the role of a Resource Assessment Commission (RAC) rather than undertaking a focused inquiry under the EPIP Act to make findings and recommendations about the "environmental impacts" of certain proposed decisions, in this case a permit for mining explorations. They argued that the Commission's role was not to recommend "the most appropriate uses for the Area" through a multi-objective analysis of selected resource use scenarios. With the disappearance of the RAC in 1993, it may be that the Australian government is trying to off-load some inquiry work onto other public inquiry processes such as that provided by the EPIP Act.

However, although the Shoalwater Bay Inquiry is certainly much more comprehensive than the Ulladulla Hinterland Broadcasting Transmission Station Environmental Inquiry, its approach is arguably comparable to the first inquiries under the EPIP Act. Although the Ranger Uranium Inquiry was concerned with the mining and milling of uranium ore from a specific site, it examined a number of wider issues associated

with the use of uranium in the nuclear power industry, such as the possibility of terrorist use of the plutonium produced in reactors and the increased risks of nuclear war following from the availability of plutonium for atom bombs. Similarly, the Fraser Island Inquiry examined all aspects of the land-use and development of Fraser Island as part of the assessment of the environmental effects of sand mining.

If the EPIP Act is to be serve as an effective vehicle for further public environmental inquiries and undertake work that would previously have been assigned to the RAC, the Act could be amended to better reflect its role in facilitating resource use policy rather than simply assessment of the "Impact of Proposals." Given the need to improve the consensus building capacity of public inquiries, consideration could be given to amending the EPIP Act and its Administrative Procedures to provide for more informal round table and mediation procedures as an addition or alternative to conventional inquiry methods. These are not novel suggestions. In 1979, the House of Representatives Standing Committee on Environment and Conservation recommended that, in considering the formality and extent of public hearing procedures, the EPIP Act be amended to allow the Minister to direct round table discussions on proposals before the Act (pp.45-50). Round tables were an important part of the public inquiry procedure of the New South Wales State Pollution Control Commission during the 1970s. Mediation is used in environmental assessment and inquiry processes under the *Canadian Environmental Assessment Act* 1992. Round tables and mediation procedures may reduce the length and cost of public inquiries and contribute to more legitimate policy advice.

Benjamin J. Richardson
Centre for Resource and Environmental Studies
Australian National University

* This note is adapted from a consultancy report prepared for the Commonwealth Environment Protection Agency. The report, entitled *Environmental Impact Assessment Public Inquiry Processes*, was co-authored with Professor Ben Boer, Mr Henry Prokuda, Ms Jo Ann Beckwith and Ms Donna Craig.

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HERITAGE CONSERVATION REBATE

Taxation Laws Amendment Bill (No. 4) 1993 was passed by the House of Representatives and Senate on 24 March 1994, and will come into operation on 1 July, 1994.

It will incorporate into the federal tax legislation sections which aim to provide "an incentive for owners of heritage listed properties to invest in the conservation of those properties in the interests of the nation's heritage" (Explanatory Memorandum).

The incentive is provided by way of a rebate of twenty cents (20¢) in the dollar for approved expenditure of at least $5,000 on heritage conservation works (s159UQ). "Heritage conservation works" are defined to mean works for the purpose of conservation, maintenance, preservation, restoration, reconstruction or adaptation of a building or other structure that is of cultural significance and is listed on a

recognised heritage register (to be declared in writing by the Minister).

Administration of the Scheme
The scheme will be administered by the Department of Communications and the Arts.

Eligibility
The rebate will be available to taxpayers who, either alone or with others, have a freehold interest or hold a Crown lease over land on which a heritage building or structure is situated (sections 159UQ - 159UT).

Provisional Certificate
A taxpayer who wishes to obtain a rebate must first apply for a provisional certificate, which will constitute approval to proceed with the proposed work and will specify a limit on the amount of expenditure that will qualify for the rebate (s159UG - s159UL).

The Minister for Communications and the Arts ("the Minister") will be required to specify in writing the procedures which will be followed in issuing provisional certificates, as well as the criteria by which proposed heritage conservation works will be judged before a certificate is issued (s159UF).

Such criteria or procedures may require the Minister to take into account specified heritage conservation criteria as well as recommendations of recognised heritage bodies. They must also ensure that the amount specified as qualifying expenditure in any one provisional certificate is at least $5,000, but that the total of the amounts specified in provisional certificates in a financial year does not exceed the maximum approval limit for that year. The proposed limit is $9.5 million per year, which is expected to have a revenue cost of $2 million per year (Explanatory Memorandum). This effectively means that applications for rebates will be competitive.

As a result, it is likely that not all applications will be approved even if they fall within the criteria and some taxpayers may get approval for part only of the expenditure that they will incur.

The application for a provisional certificate must comply with the prescribed heritage conservation criteria and procedures, warrant that all necessary building and other approvals have been obtained and be accompanied by the prescribed fee (yet to be prescribed). After the closing date for applications for each financial year (which will be gazetted at least 21 days before the specified date) applicants will be advised as to the success or otherwise of their applications. Only expenditure incurred while the provisional certificate is in force will be eligible for the rebate (s159UM). Provisional certificates will generally remain in force for 2 years unless the taxpayer disposes of his, her or its interest in the property, is dissolved or dies. Provision is made for seeking a 3 month extension in certain circumstances.

Final Certificate
When the approved conservation work of at least $5,000 has been completed to the standard specified in the provisional certificate, the taxpayer may apply for a final certificate (s159UM). Such application can only be made while the provisional certificate is still in force. The issue of a final certificate will result in the taxpayer being entitled to the rebate which will be granted only in the year of income in which the application for the final certificate was made. Taxpayers should therefore carefully consider the timing of their applications.

Tax Rebate
The rebate, once granted, is 20% of the amount of eligible expenditure specified in the final certificate. The amount of eligible expenditure will be equal to the money actually spent on the works which does not exceed the amount originally approved in the provisional certificate.

If expenditure incurred by a taxpayer in carrying out heritage conservation work covered by a provisional certificate is deductible under some other provision of the Income Tax Assessment Act 1936 (eg s53 repairs or Div 10D income producing buildings) then only the amount spent in excess of that specified in the provisional certificate will be deductible. If a final certificate is not applied for or is not issued then any amount which would have otherwise been deductible can be allowed in full.

The sum of the rebates allowable to a taxpayer cannot exceed the amount of tax otherwise payable by the taxpayer (excluding the Medicare Levy) (s160AD).

Observations
It will be interesting to see how the heritage conservation rebate will operate in practice. Unquestionably, it will cause delays in the carrying out of heritage conservation works since expenditure will only qualify for a rebate once a provisional certificate has been granted. Application for provisional certificates is likely to become highly competitive.

The registers which will be recognised by the Minister for the purposes of this legislation have not yet been declared. However, the Explanatory Memorandum indicates that the rebate is intended to relate to conservation works on buildings or structures listed in Commonwealth State or Territory heritage registers. Unless the Minister declares otherwise this means that tax payers who incur expenditure on work to buildings listed on local heritage registers will not be eligible for the rebate. Furthermore, the requirement that the building or structure also be of cultural significance is a curious one and potentially has the effect of limiting the applicability of the provisions.

As far as timing is concerned, a taxpayer will not know whether a rebate will be granted until a final certificate is issued. This creates difficulties where a taxpayer has applied for a final certificate in one financial year but does not receive approval until the next financial year. Since the rebate relates to the year in which application for a final certificate was made, a taxpayer in such circumstances may need to request an amended assessment.

Only approved expenditure incurred while a provisional certificate is in force will qualify for the rebate. In the case of partnerships a provisional certificate will lapse if the partnership is dissolved or otherwise terminated. This clearly gives rise to problems in situations where one or more partners leave or a new partner is admitted, which automatically results in a dissolution of the old partnership and formation of a new one.

Finally, the real value of the benefit is questionable in certain circumstances for example, where the expenditure is otherwise deductible or where it is incurred by a company whose franking account balance will be effected as a result of the rebate.

Franca Petrone,
Lecturer, Taxation and Commercial Law,
The Flinders University of South Australia

ANZECC POSITION PAPER ON FINANCIAL LIABILITY FOR CONTAMINATED SITE REMEDIATION

The Australia and New Zealand Environment and Conservation Council has released its position paper on Financial Liability for Contaminated Site Remediation.

The paper draws a fundamental distinction between "Risk" and "Non-risk" sites.

"NON-RISK" SITES
The paper takes the view that governments should not intervene in respect of sites that do not pose a risk to human health or the environment, unless:
- there is a proposal to put land to more sensitive use
- there is a proposal to transfer ownership or some other interests in the land.

In such cases, ANZECC recommends that governments ensure that planning permission is contingent upon adequate site investigation & remediation. This obligation has already been incorporated into the planning legislation in most states.

"RISK" SITES
Where sites pose a risk to on-site uses or contamination is migrating and threatening off-site uses, the position paper recommends that governments require compulsory remediation.

The paper proposes the following order in which financial liability should be attributed:

1. **Polluter.** Wherever the polluter of the site can be identified and is solvent, liability to clean-up should be imposed on the polluter.

2. **Owner with knowledge.** If subsequent purchasers acquired the site with full knowledge of the risks and purchase price reflected risk, government should target such owners first i.e. even before the polluter.

3. The person in **control of the site**.

4. Where the polluter is not solvent or identifiable and it would be "entirely inequitable" for the owner/occupier" to pay, **governments** should have the discretion to undertake or fund clean-up themselves.

5. Orphan sites. Where the polluter is unidentifiable or insolvent or the person in control cannot be made to pay, or the site is abandoned, governments should be responsible for ensuring necessary remedial action.

Standard of liability

The paper proposes that liability should be strict i.e. no proof of fault should be required. This will allow for quicker determination of liability, and will reduce the likelihood of expensive litigation. It also entrenches the polluter pays principle. The paper takes the view that a fault-based standard of liability would result in delays that may exacerbate existing health or environmental risks. The Paper notes that appeal rights from the imposition of strict liability may exist in various jurisdictions, but fails to address the significance of such rights in states like Queensland. The Contaminated Land Act 1991 (Qld) provides potentially far-reaching grounds of appeal which appear to convert the standard of liability to a fault-based standard.

Rights of Contribution and Joinder

ANZECC recommends that there be a statutory right to recover costs from polluters or others who may have exacerbated the contamination. This right should be vested in owners, occupiers, polluters who are directed to clean-up, or local authorities who undertake clean-up. The paper also recommends that the same parties be given the right to join other more "culpable" parties in the determination of liability.

Apportionment of liability

The position paper affirms that liability should be proportionate to a party's contribution to problem and notes that this will be a question of fact. It adds, however, that the resolution of questions of apportionment must not be allowed to delay the primary objective of abatement of the environmental or human health risk associated with the site. In other words, disputes over apportioning liability may only be resolved *after* the site had been remediated.

Government liability

The paper supports the view expressed by numerous respondents to the discussion paper that government agencies should also be liable for site remediation. For such entities, the paper draws does not suggest strict liability, however. Rather, it recommends that government agencies or local governments who have contributed to or exacerbated contamination, or damage suffered as a result of it, by the exercise of their operation functions should be liable on the basis of *negligence* under the common law.

Funding clean-up of orphan sites

In light of its conclusion that the remediation of orphan sites will ultimately be the responsibility of the relevant government, the position recognises that a scheme is necessary to fund such clean-ups. This issue is left open, with the comment that the means of providing funding for the remediation of orphan sites will need to be determined by the governments concerned. It recommends that governments be entitled to sell orphan sites that they have cleaned-up, but makes no further suggestions.

The paper rejects the establishment of a Superfund, on the basis of criticisms of the US Superfund Scheme and appears to invite the Federal government to involve itself in constructing an appropriate funding scheme, in light of its wide revenue raising options with the potential to influence polluter behaviour and provide incentives for remediation.

Lender Liability

Many will be surprised by the position paper's view on lender liability. ANZECC recommends that where the lender merely holds a security interest in contaminated land and has taken no steps to enforce that security, it should not be liable. Where, however, the lender has clearly assumed the role of occupier, it should be in the same position as any other occupier.

The paper suggests that the lender has four options:

1. assume control and thus responsibility for remedial action which may be necessary;

2. transfer ownership to a party who is willing to undertake remedial action and provide financial assurance to that effect;

3. agree that the necessary remedial action be undertaken or funded by Govt, who may then recover costs in priority to the lender's security;

4. abandon the property as an orphan site and transfer all right, title and interest in the property to the appropriate government authority.

None of these will be greeted with much enthusiasm by the banking community!

COMMENT

The positions paper's views on the distinction between risk and non-risk sites, the imposition of strict liability, and the order in which liability should be imposed are all fairly consistent with the statutory schemes currently operating in several states. It is disappointing that ANZECC refrained from exploring possible funding mechanisms for the clean-up of orphan sites, given that government authorities will be directly responsible for these. The hard-line taken in respect of lender liability is certainly inconsistent with the mood prevailing in at least Victoria (see Recent Developments - Victoria, this edition), and it remains to be seen whether other states follow Victoria's lead or adopt ANZECC's stance.

Jan McDonald
Law School
Bond University

QUEENSLAND

DRAFT WASTE MANAGEMENT STRATEGY

The Queensland Department Environment and Heritage has released a draft Waste Management Strategy for the State. The Strategy applies to all major sources of waste, including the cumulative effects of small-volume waste emissions, but less emphasis is given to areas governed by other statutory regimes, such as air and water pollution and contaminated land remediation.

The draft strategy is based on four principles:

- the need for an integrated "cradle-to-grave" approach
- the use of "polluter pays" and "user pays" principles, where possible, in order to promote responsible waste management.
- responsibility for the fate of wastes or products to rest with the waste generators or product designers, until correct waste management or disposal can be assured.
- management tools should be prioritised in the following way:
  - prevention, including waste avoidance and reduction
  - recycling, including reuse, reprocessing and waste utilisation
  - treatment
  - disposal, to be used only as a last resort.

1. "CRADLE TO GRAVE" WASTE MANAGEMENT FRAMEWORK

Waste Management Environment Protection Policy

The strategy proposes the enactment of waste management legislation in the form of an Environment Protection Policy that will complement existing environmental protection initiatives. The legislation will be preventive - aimed at controls to avoid or minimise environmental damage - and should apply to materials and processes that generate wastes.

Government Co-ordination

The Department of Environment and Heritage will be the lead agency for waste management. It will be required to ensure compliance and consistency in enforcement and provision of services throughout various state government departments and at the local authority level. The Strategy contemplates the maintenance of a Waste Management Consultative Committee to liaise between industry, the community, state and local government. A Local Government Waste Management Working Group will be established with a view to identifying problems and evaluating options for dealing with problems.

Information collection and analysis

Recognising the importance of accurate information in implementing an effective waste management program, the strategy proposes the development of an waste management EPP that will provide a framework for reporting on waste generation, prevention, recycling etc. This framework will complement and enhance existing State of the Environment Reporting.

Education