

the decision with respect to the San Gabriel River and the Los Angeles River. The Supreme Court granted certiorari. Oral arguments will be heard in December 2012 on the question 'can the transfer of water from one portion of a river to another portion via a manmade improvement for the purpose of controlling storm water runoff still be considered a 'discharge' under the Clean Water Act'.

Three of the decisions under review concern the *Clean Water Act* and its scope. The *Clean Water Act* regulates discharge of pollutants from, amongst other things, municipal stormwater sewer systems. The previously 'pro environmental' decisions of the Ninth Circuit were seen as a wide interpretation of the objectives of the Act. The decision by the Supreme Court to grant the petitions for judicial review will determine at the highest level the scope of the *Clean Water Act*.

FEDERAL Shol Blustein and Felicity Deane

Alpha Coal mine and rail project approved

Despite opposition from environmentalists, farmers and parts of the fishing industry, on 23 August 2012, the \$6.4bn Alpha coal mine and rail project in Queensland was approved under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), subject to 19 conditions.¹² The approval relates to the proposed construction and operation of an open-cut coal mine and 495km railway line to Abbott Point.

The conditions are directed at ensuring that matters of national environmental significance are protected. They require comprehensive management and monitoring arrangements and the project proponents to:

- submit a Caley Valley Wetland Management Plan for the Minister's approval and to ensure that coal dust impacts on the Caley Valley Wetland are minimised through various measures including covered wagons or equivalent

- prepare a Matters of National Environmental Significance Management Plan to maximise the ongoing protection and long term conservation of EPBC-listed threatened fauna
- prepare several management plans to manage potential impacts on the values of the Great Barrier Reef World Heritage Area and species including dugongs, turtles and migratory birds
- undertake significant and comprehensive land offsets to protect listed threatened ecological communities and species
- create a trust, with initial funding of \$2m, to conduct research on the black-throated finch and the squatter pigeon, with provision for a more strategic approach to protect all key species in the Galilee Basin in the event that any further mines are approved in the basin
- prepare management plans covering mine rehabilitation, vegetation, water quality and regional impacts on water quality
- identify threshold limits and management measures for any coal dust impacts on the Great Barrier Reef World Heritage Area and reporting to the Great Barrier Reef Marine Park Authority every six months.¹³

On a related matter, NELA has recently issued a submission to the Council of Australian Governments' in relation to its environmental regulation reforms. A copy of this submission has been reproduced later in this issue.

Strategic assessment of the Great Barrier Reef

In August 2012, the final terms of reference for the strategic assessment of the Great Barrier Reef were approved.¹⁴ The strategic assessment under s 146 of the EPBC Act is designed to enable a 'big-picture' approach to environment and heritage protection that provides certainty in the long term, by determining where sustainable development can go, the type of development that will be allowed and the conditions under which development may proceed. This will be achieved by:

12 Minister for Sustainability, Environment, Water, Population and Communities, the Hon Tony Burke MP, 'Alpha Coal mine and rail project approved, Commonwealth marine reserves: media release (23 August 2012) <www.environment.gov.au/minister/burke/2012/mr20120823.html>.

13 Minister for Sustainability, Environment, Water, Population and Communities, the Hon Tony Burke MP, Approval Decision: Alpha Coal Mine and Rail proposal, Galilee Basin Queensland <www.environment.gov.au/epbc/notices/assessments/2008/4648/2008-4648-approval-decision.pdf>.

14 Department of Sustainability, Environment, Water, Population and Communities, 'Strategic assessment: Great Barrier Reef' (28 September 2012) <www.environment.gov.au/epbc/notices/assessments/great-barrier-reef.html>.

- investigating the adequacy of the existing management arrangements for the Great Barrier Reef World Heritage Area, and
- assessing current and future development policies and planning in the Great Barrier Reef World Heritage Area and the adjacent coastal zone and analysing likely direct, indirect and cumulative impacts.

Commonwealth marine reserve network

On 14 June 2012, the Federal Minister for Sustainability, Environment, Water, Population and Communities announced the details of the proposed network. If proclaimed, Australia's Marine Reserve Network will cover more than a third of Commonwealth waters.¹⁵

The proposed National Marine Network consists of five regions:

- *the Coral Sea Region*: an area of more than half the size of Queensland. The network includes protection for all reefs in the Coral Sea
- *the South-West Marine Region*: extending from the eastern end of Kangaroo Island in South Australia to Shark Bay in Western Australia
- *the Temperate East Marine Region*: running from the southern boundary of the Great Barrier Reef Marine Park to Bermagui in southern New South Wales, including the waters surrounding Lord Howe and Norfolk Islands
- *the North Marine Region*: including only the Commonwealth waters of the Gulf of Carpentaria, Arafura Sea and the Timor Sea extending as far west as the Northern Territory-Western Australian border
- *the North-west Marine Region*: stretching from the Western Australian - Northern Territory border through to Kalbarri.

The Government previously invited comments on its proposed marine network. This consultation process closed on 10 September.¹⁶

The World Conservation Congress in the Republic of Korea in September 2012 adopted a motion sponsored by the Australian Conservation Foundation, which NELA and other NGOs co-sponsored, that congratulated the Australian Government for its landmark announcement on marine reserves. The motion noted that the proposal is one of the most significant advances for marine environmental protection in Australia's history, and urged the Australian Government to proclaim the network swiftly. The motion also urged the global community to support similar initiatives that establish networks of marine reserves, informed by sound science and in accordance with IUCN's vision and mission.

Giant kelp marine forests to be protected

In August 2012 the giant kelp marine forests of South East Australia were listed as an endangered ecological community under the EPBC Act.¹⁷

Giant kelp marine forests are diverse, structurally complex and highly productive components, and foundation species of cold-water rocky marine coastlines around the world.¹⁸ These kelp forests provide a haven for a variety of marine life, protect coastlines from severe storm damage and are important carbon sinks.

The Federal Environment Minister claims that the listing in the EPBC Act is necessary as the giant kelp forests are being progressively lost due to warming of the sea surface temperature caused by climate change. These forests are also being threatened by invasive species and changing land use and coastal activities that contribute to increased sedimentation and runoff and biodiversity loss.

Consequently, any actions likely to have a significant impact on the giant kelp marine forests must now be referred for assessment under national environment law.

15 Minister for Sustainability, Environment, Water, Population and Communities, the Hon Tony Burke MP, 'Final consultation on Commonwealth marine reserves begins: media release' (11 July 2012) <www.environment.gov.au/minister/burke/2012/mr20120711.html>.

16 Minister for Sustainability, Environment, Water, Population and Communities, the Hon Tony Burke MP, 'Gillard government creates the world's biggest marine reserves network: media release' (14 June 2012) <www.environment.gov.au/minister/burke/2012/mr20120614.html>; and 'Final Commonwealth marine reserves network proposal' (2012) <www.environment.gov.au/coasts/mbp/reserves/index.html>.

17 Minister for Sustainability, Environment, Water, Population and Communities, the Hon Tony Burke MP, 'Giant Kelp Marine Forests to be protected: media release' (18 August 2012) <www.environment.gov.au/minister/burke/2012/mr20120818.html>.

18 'Advice to the Minister for Environment Protection, Heritage and the Arts from the Threatened Species Scientific Committee (the Committee) on an Amendment to the List of Threatened Ecological Communities under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) 1. Name of Ecological Community: Giant Kelp Marine Forests of South East Australia' (2012) <www.environment.gov.au/biodiversity/threatened/communities/pubs/107-listing-advice.pdf>.

Proposed amendments to the EPBC Act to stop super trawler

On 4 September 2012, the Government imposed new conditions on the management regime for the Small Pelagic Fishery. These conditions prevented the 'super trawler' *FV Abel Tasman* from fishing in Australian waters until its operators had taken all reasonable steps to ensure that listed threatened species, listed migratory species, cetaceans and listed marine species are not killed or injured through trawling operations. The conditions were initially imposed for a two week period.¹⁹

The Government has since proposed to amend the EPBC Act to make the new conditions permanent. This amendment is set out in the *Environment Protection and Biodiversity Conservation Amendment (Declared Fishing Activities) Bill 2012* (Cth), which was introduced into the House of Representatives on 11 September 2012.²⁰ The amendments propose to prevent super trawlers from engaging in a declared fishing activity in Commonwealth waters until an assessment is completed by an expert panel. Currently the EPBC Act does not include any general powers to prevent new fishing vessels from fishing whilst an assessment is being conducted.

Carbon Farming Initiative updates

Since June 2012, the Domestic Offsets Integrity Committee (DOIC) – which is the body charged with administering the Carbon Farming Initiative (CFI) – has released for public comment a number of proposed methodologies that are to operate under the CFI.

The proposed methodologies provide that Australian Carbon Credit Units (ACCUs) may be able to be created by landowners and farmers in the following circumstances:

- improved waste management practices by dairy farmers
- the establishment of trees on agricultural land that was previously clear of woody vegetation
- the capture and combustion of methane generated by the decomposition of piggery manure
- the diversion of waste from a landfill site to an alternative waste treatment facility

- the diversion of waste from a landfill site through a composting alternative waste treatment technology
- human-induced native forest re-growth
- permanent tree plantings on certain agricultural land using prescribed techniques
- avoiding emissions at landfill sites.

Public comment for these methodologies has now closed. Each is now being considered by DOIC or, alternatively, by the methodology proponent.²¹

The Federal Government has also amended the *Carbon Credits (Carbon Farming Initiative) Regulations 2011* (Cth). The amended regulations now include provisions relating to: the issuance of ACCUs; variations to project declarations; auditing, reporting, notification and record-keeping requirements for project proponents; variations to methodology determinations; and clarification of when the relinquishment of ACCUs is required.²²

Carbon Pricing Mechanism updates

On 15 June 2012, the Clean Energy Regulator published a list of the local council landfill sites that will be liable under Australia's Carbon Pricing Mechanism for the greenhouse gas emissions produced at these sites. Of the 559 council landfill sites across Australia, the Regulator determined that only 32 will be liable under the Carbon Pricing Mechanism.²³

On 28 August 2012, the Federal Government announced that Australia and the European Union will link their respective carbon pricing mechanisms. To give effect to this decision, the Federal Government proposed three changes to the current design of Australia's Carbon Pricing Mechanism. These are:

- the \$15 per tonne floor price will not take effect from 2015
- from 1 July 2015, there will be a 12.5% cap (reduced from 50%) on the amount of eligible units created under the Kyoto Protocol that can be surrendered to meet an entity's annual liability

19 Australian Government, Australian Fisheries Management Authority (AFMA), 'Small Pelagic Fishery map including zones' (2012) <www.afma.gov.au/managing-our-fisheries/fisheries-a-to-z-index/small-pelagic-fishery/maps/>.

20 Australian Parliament, 'Environment Protection and Biodiversity Conservation Amendment (Declared Commercial Fishing Activities) Bill 2012' (2012) <www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r4883>.

21 Australian Government, Department of Climate Change and Energy, 'Carbon Farming Initiative: Methodologies under consideration' (2012) <www.climatechange.gov.au/en/government/initiatives/carbon-farming-initiative/methodology-development/methodologies-under-consideration.aspx>.

22 Australian Government, Department of Climate Change and Energy, *CFI eNews*, June 2012 <www.climatechange.gov.au/government/initiatives/carbon-farming-initiative/subscribe/2012-06.aspx#N02>.

23 The Hon Mark Dreyfus QC MP, Parliamentary Secretary for Climate Change and Energy Efficiency, 'Clean Energy Regulator Determination on Local Government List' (15 June 2012) <www.climatechange.gov.au/minister/mark-dreyfus/2012/media-releases/June/MR-12-25-2.aspx>.

- from 1 July 2015, Australia will start one-way linking with the EU Emissions Trading Scheme (ETS). In 2018, this will become two-way.

To give effect to these changes, the Federal Government introduced into the House of Representatives the *Clean Energy Amendment (International Emissions Trading and Other Measures) Bill 2012* (Cth) together with six related bills.²⁴ These bills were referred to the House Standing Committee on Economics and the Senate Economics Legislation Committee, whose reports were due by 29 October 2012.

Kathryn Walker discusses the carbon price at p43.

Review of Renewable Energy Target

On 18 July 2012, the Climate Change Authority (the Authority) began its review of Australia's Renewable Energy Target (RET).²⁵ The Authority released an Issues Paper in August 2012 which set out the parameters of the review and the timetable for the review process.²⁶ Initial responses were due by 14 September 2012. The Authority has since issued a discussion paper with the final report due to be issued by 31 December 2012. The Review is the first study to be conducted by the Authority, which began operation on 1 July 2012.

Several articles in this issue discuss the RET in more detail.

ARENA funding strategy

On 26 July 2012, the Australian Renewable Energy Agency (ARENA) released its draft funding strategy for the period 2012–13 to 2014–15, seeking stakeholder feedback on the principles proposed to guide its support of renewable energy technologies in Australia.²⁷ The public consultation period for the strategy closed on 27 August 2012.

24 Australian Government Clean Energy Future, *Implementing links to overseas emissions trading schemes - Draft legislation Clean Energy Legislation Amendment (International Emissions Trading and Other Measures) Bill 2012 and related bills: Explanatory Note* (31 August 2012) <www.climatechange.gov.au/government/clean-energy-future/~media/government/clean-energy-future/CELA-ExplanatoryNote-and-DraftBills-20120831.pdf>.

25 Australian Government Climate Change Authority, 'Renewable Energy Target scheme review gets under way' (18 July 2012) <<http://climatechangeauthority.gov.au/news/20120718>>.

26 Australian Government Climate Change Authority, *Renewable Energy Target Review Issues Paper* (August 2012) <<http://climatechangeauthority.gov.au/sites/climatechangeauthority.gov.au/files/RET-Review-20120820.pdf>>.

27 Australian Government, Minister for Energy and Tourism, 'ARENA Funding Strategy out for consultation' (26 July 2012) <<http://minister.ret.gov.au/MediaCentre/MediaReleases/Pages/ARENAFundingStrategyConsultation.aspx>> and www.arena.gov.au/_documents/funding-strategy/consultation-draft-general-funding-strategy.pdf.

Climate change adaptation

A report prepared by AECOM for the Department of Climate Change and Energy Efficiency, titled *Economic framework for analysis of climate change adaptation options*, was released in August 2012. The report provides cost benefit analyses of case studies of climate adaptation of settlements and infrastructure for:

- coastal inundation at Narrabeen Lagoon
- securing long-term water supply for Central Highlands Water
- temperature impacts on Melbourne's metropolitan rail network.²⁸

National Water Commission amendments

On 21 June 2012, Federal Parliament passed the *National Water Commissions Amendment Bill 2012* (Cth) to amend the *National Water Commission Act 2004* (Cth). The effects of the amendments are to:

- continue the National Water Commission (NWC) beyond its sunset date of 30 June 2012
- revise the functions and operations of the NWC
- close the Australian Water Fund (AWF) Account and remove the NWC's ability to administer any AWF funds
- reduce the number of NWC commissioners
- provide for a review of the NWC's performance by the end of 2017, with further reviews every five years.²⁹

The Parliamentary Secretary for Sustainability and Urban Water, the Hon Senator Don Farrell, noted that the Act represented the delivery of the Federal Government's promise to continue the operation of the NWC in order to work towards reform for more sustainable management and use of Australia's water resources through the National Water Initiative.³⁰

28 AECOM, *Economic framework for analysis of climate change adaptation options: Framework specification* (17 August 2012) <www.climatechange.gov.au/~media/publications/adaptation/economic-framework-adaptation-options-20120817-pdf.pdf>.

29 Australian Parliament, 'National Water Commission Amendment Bill 2012', <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:legislation%2Fbillhome%2Fs873>>.

30 Parliamentary Secretary for Sustainability and Urban Water, Senator the Hon Don Farrell, Parliament passes National Water Commission Amendment Bill, Media release DF12/033 (21 June 2012) <www.environment.gov.au/minister/farrell/2012/pubs/mr20120621.pdf>.

Water efficiency labelling and standards scheme enhanced

In June 2012, the *Water Efficiency Labelling and Standards Amendment (Scheme Enhancements) Act 2012* (Cth) was passed by Federal Parliament. The Act amends the Water Efficiency Labelling and Standards (WELS) Scheme which requires washing machines, dishwashers, showers, toilets and tap equipment to be registered and labelled with a water efficiency rating of between zero to six stars. The Scheme, which is part of the National Water Initiative, also sets minimum water efficiency standards for toilets and washing machines.

A key amendment is that the Federal Minister for Sustainability, Environment, Water, Population and Communities is able to determine the details of the scheme, including the registration of certain products. The Explanatory Memorandum suggests that this will make it easier for the scheme to be modified to improve its efficiency and effectiveness, without the need to amend supporting state and territory legislation.³¹ Any changes will continue to require agreement from a majority of state and territory governments. The Act also introduces a range of new civil penalties, many of which complement existing criminal offences.³²

Next phase of Caring for our Country

In June 2012, the Federal Government invited community feedback on the next phase of the Caring for our Country program. According to the report, *An Outline for the Future*, the next phase will incorporate funding of \$2.2bn for the five year period from 1 July 2013.³³ The funding will be divided between sustainable environment and sustainable agriculture. The sustainable environment stream will focus on protecting and managing nationally significant flora

and fauna, ecological communities, ecosystems, land and seascapes. It will also focus on enhancing the capacity of Indigenous communities to conserve and protect natural resources. The sustainable agriculture stream will focus on increasing the sustainability of agricultural production.³⁴

Following the release of *An Outline for the Future* there was an eight week period of public consultation which closed on 15 August 2012.³⁵

Notice by Murray-Darling Basin Ministerial Council under s43A(7) of the Water Act 2007 (Cth)

The Murray-Darling Basin Ministerial Council has issued a notice to the Federal Minister for Sustainability, Environment, Water, Population and Communities asking him to advise on comments of various aspects of the Altered Proposed Basin Plan that was received by the Council on 6 August 2012.³⁶ This notice specifies the views of the Council on the Proposed Basin Plan in accordance with s 43A(7) of the *Water Act 2007* (Cth). The Murray-Darling Basin Authority must now consider the information in order to progress the draft plan.³⁷

Savage River tailings dam wall

In June 2012, the Minister for Sustainability, Environment, Water, Population and Communities approved a proposal to raise the existing Main Creek tailing dam wall at Savage River Iron Ore Mine in Tasmania without any further environmental assessment. The approved project will increase the capacity of the existing tailings dam that services the Savage River Iron Ore Mine.

The proposal was approved on the understanding that it would not have an impact on threatened species or any other matters protected under national environmental law. The Minister noted the importance of 'adequately containing tailings' to protect the downstream environment.³⁸ The decision was made under s 75 of the EPBC Act.

31 Australian Parliament, House of Representatives, Water Efficiency Labelling and Standards Amendment (Scheme Enhancements) Bill 2012 Explanatory Memorandum (2012) <http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4823_ems_3a4ad269-4073-4e77-8c19-249707146697/upload_pdf/368739.pdf;fileType=application%2Fpdf#search=%22legislation/ems/r4823_ems_3a4ad269-4073-4e77-8c19-249707146697%22>.

32 Parliamentary Secretary for Sustainability and Urban Water, Senator the Hon Don Farrell, 'Water efficiency labelling and standards scheme enhanced' Media release DF12/034 (28 June 2012) <www.environment.gov.au/minister/farrell/2012/mr20120628.html>.

33 Minister for Sustainability, Environment, Water, Population and Communities, the Hon Tony Burke MP, and Senator the Hon Joe Ludwig, Minister for Agriculture, Fisheries and Forestry, 'Public consultation opens for next phase of Caring for our Country: Joint media release' (21 June 2012) <www.environment.gov.au/minister/burke/2012/mr20120621a.html>.

34 Australian Government, *Caring for Our Country: An Outline for the Future 2013-2018* (2012) <www.nrm.gov.au/about/caring/review/pubs/c4oc-outline-future.pdf>.

35 Australian Government, 'Let's continue the conversation' (2012) <<http://caringforourcountryreview.com.au/>>.

36 'The Murray-Darling Basin Ministerial Council' (2012) <www2.mdbc.gov.au/about/murraydarling_basin_ministerial_council.html>.

37 Australian Government, Murray-Darling Basin Authority, 'Statement from the Chair' (28 August 2012) <www.mdba.gov.au/media_centre/media_releases/statement-from-the-chair_28-aug-2012>.

38 Minister for Sustainability, Environment, Water, Population and Communities, the Hon Tony Burke MP, 'Decision made on Savage River Tailings dam wall' (20 June 2012) <www.environment.gov.au/minister/burke/2012/mr20120620a.html>.