

Water, forests and the law



By Anna Stewart and Andrew Walker, Executive Committee, Lawyers for Forests

There is a considerable amount of regulatory and policy activity currently being undertaken in relation to water in Victoria. Since 1 January 2004, the Essential Services Commission (ESC) has been responsible for the economic regulation of all 24 water businesses in the Victorian water sector.

The ESC's role is set out in the *Water Industry Act 1994* (Vic) (as amended) and the *Water Industry Regulatory Order (WIRO)*, in addition to the *Essential Services Commission Act 2001* (Vic). Over the coming year, amongst other things, the ESC will approve or specify price arrangements, standards and conditions of service applying to each water business for a three-year period commencing on 1 July 2005.

In August 2003 the Victorian Government released a discussion paper on water, 'Securing our Water Future' (*Green Paper*). The *Green Paper* proposes around 80 measures to encourage water conservation and to return water to the environment, including the following:

- Water authorities be retained in public ownership;
- Water users should pay the full cost, including infrastructure and delivery costs, and environmental costs associated with providing water services;
- Pricing and pricing structures should create incentives for water conservation by water customers;
- Increased use of water efficient appliances, including the introduction of mandatory AAA appliances;
- Use of rebates to encourage households to become 'Water Smart' in gardens and households - ie using water tanks, greywater systems;
- Increasing the 'fitness for purpose' use of water by substituting recycled water for drinking water for toilet flushing, gardening and other non-drinking water uses;
- Improvement of Victoria's water trading system;
- Improvement to environmental flows by the creation of an environmental reserve with legal status; and

- Financing improvements in river health by a transparent charge on water users.

While the Government is to be commended for recognising the importance of ensuring that access to a quality water supply is a key foundation of our economy, society and environment, it is disturbing that not one of the recommendations in the *Green Paper* relates to logging in water catchments and the impacts that this has on Victoria's water supplies. Chapter 6 of the *Green Paper* discusses the need for water pricing to reflect the needs of the environment. If this Government is committed to cost-reflective pricing, then it is time for the logging industry to pay the true cost of the millions of litres of water it uses every second in its operations.

Lawyers for Forests (LFF) believes that not only will continued logging in five of Melbourne's water catchments impact on the quality and quantity of water entering the reservoirs, but there are also economic implications in ignoring the issue of logging in water catchments. For example, research undertaken by Read Sturgess Associates in 1992¹ in relation to the Thomson catchment in Victoria's central highlands region showed that water is more valuable than timber – indeed, the research concluded that Victoria would be \$147 million better off if logging ceased in the Thomson catchment.

If the Victorian Government is genuinely attempting to secure Victoria's water future, the impact of logging in our water catchments is an issue which simply cannot be ignored. LFF hopes that the forthcoming White Paper will give consideration to this vital issue.

Review of forestry legislation

Before the last State election (in fact in February 2002) the Bracks Government released its "Our Forests Our Future" Policy (*Policy*), outlining a range of reforms to forestry law and practice. Whilst the reforms are welcome, the Government has not acted to address the key issue – that is, to protect all old growth and high conservation value forest.

From an environmentalist's viewpoint, the three major reforms (*Three Reforms*) outlined in the *Policy* can be summarised as commitments to:

- Leaving aside the failure to protect all old growth and high conservation value forest (which LFF believes is necessary for the Government to act in accordance with ecologically or environmentally sustainable development (ESD) principles), ensure Victoria's forests are managed in accordance with ESD principles;
- Make the legal and administrative mechanisms managing logging in Victoria's forests (*Victorian Forestry Controls*) operate in an open, transparent and accountable manner; and
- Undertake structural reform, with the formation of Vicforests as a separate entity from the Department of Natural Resources and Environment (now the Department of Sustainability and Environment (DSE)) with Vicforests to manage the commercial sale of wood.

Vicforests

In October 2003 the Bracks Government finally acted to implement the third of the *Three Reforms* and established Vicforests to manage the commercial sale of wood. Although the separation of commercial resource exploitation and environmental regulation roles between Vicforests and DSE is welcome, the nature of the separation is unclear. LFF believes the roles of the DSE and Vicforests in forest management should be clearly specified in legislation to avoid confusion and promote transparency.

Vicforests has a vested interest in producing commercial crops of timber at the expense of complying with ESD principles. Vicforests' functions should therefore be primarily related to managing the commercial sale of wood, and its 'forest management' role limited as far as possible. In particular, Vicforests should not manage the regeneration of logged coupes, and DSE not Vicforests should administer and monitor compliance with the Victorian Forestry Controls. DSE should also have appropriate enforcement powers.

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Victorian Innocence Project

By Paul Coady, Clayton Utz and Rob Craig, Blake Dawson Waldron

There have been many high profile incidences, both in Australia and internationally, of innocent people being convicted for serious crimes. The cases of Rubin "Hurricane" Carter in the United States and Lindy Chamberlain in Australia are just some examples of how innocent people have spent significant periods in prison before their wrongful conviction was discovered.

In the United States, innocence projects have been responsible for the release of more than 120 people who had been convicted of crimes that they did not commit. Several of these people were on death row.

In Australia, innocence projects have been established in Queensland, New South Wales and now Victoria. The Victorian Innocence Project (VIP) is a pro-bono project that, similar to the other Australian innocence projects, seeks to investigate cases of wrongful conviction and ultimately secure the release of innocent people from Victorian prisons.

The VIP will commence in 2005 as an elective subject available to fourth and fifth year law students at Melbourne University. The project has, as its dual objectives, the provision of practical legal education to law students and the provision of assistance to those who maintain their innocence while in prison.

The VIP will only investigate claims of 'actual' innocence (as opposed to technical legal innocence). In some matters, the VIP may be involved in a petition to the Attorney-General under s584 of the *Crimes Act 1958* (Vic) to either remit a petitioner's case to the Court of Appeal, or to consider the release of the petitioner. Therefore the VIP will only consider applications from people who have exhausted all avenues of appeal.

Students will work in small teams, investigating cases while being supervised by a legal practitioner with expertise in criminal law. Students may be involved in reviewing transcripts, witness testimonies and forensic evidence, searching for and obtaining evidence, re-interviewing witnesses and

engaging experts for any further review that may be required. Students will be required to rapidly gain a working knowledge of cases, and assessment will depend on students' progress and knowledge of their particular cases.

The VIP will also comment on legislative changes that are relevant to the area of criminal law. Currently the VIP is working on a submission to the Attorney-General regarding the current procedures for the preservation of forensic evidence in Victoria.

Furthermore, a VIP Lecture Series focusing on criminal law and forensic science will commence on 21 April 2004. The first seminar will focus on the handling of forensic evidence in both the investigative and trial process.

As the VIP is a pro-bono project, we require volunteers with an interest or speciality in this area to assist us. If you would like to learn more about the VIP, or volunteer your time please e-mail victorian_ip@hotmail.com. ■

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Ecologically sustainable logging and accountability

Logging in Victoria is not undertaken in accordance with ESD principles, nor does it operate in an accountable manner.

In relation to ESD:

- ESD principles are an accepted basis for environmental decision-making. For example the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) and the *Environment Protection Act 1970* (Vic) incorporate ESD principles. However the Victorian Forestry Controls (including the *Forests Act 1958* (Vic), the *Conservation Forests and Lands Act 1987* (Vic) and the Code of Forest Practices (the umbrella administrative document for logging operations in Victoria) (Code), do not incorporate any ESD principles. Arguably there is no requirement for decision-makers to take ESD principles into account in decision-making under these controls;
- Despite agreement between the Commonwealth and State Governments that an ESD forest management system should be developed, one has not been developed¹;
- As a result of an Order made under the *Flora and Fauna Guarantee Act 1988* (Vic) (FFG Act)², logging operations in Victoria are effectively

exempt from the operation of the FFG Act. Accordingly the FFG Act is arguably not required to be taken into account in decision-making; and

- Logging in Victorian forests included in Regional Forest Agreements is exempt from the operation of the EPBC Act and the Victorian Forestry Controls do not require adequate pre-logging Environmental Impact Assessment (EIA) to be conducted.

In relation to openness, accountability and transparency:

- The Victorian Forestry Controls are often not complied with nor are they adequately enforced by the DSE;
- The content of Victorian Forestry Controls is inadequate. For example the Code sets out few minimum compliance standards, generally setting "goals and guidelines" rather than creating clear and enforceable mandatory obligations³;
- There is inadequate provision in the Victorian Forestry Controls for community participation in forest management decision-making. In particular, there is no specified third party standing to uphold the provisions that can be enforced;
- It is often difficult to obtain information;
- The Victorian Forestry Controls also do not require decision makers to provide reasons for decisions; and

- There is a lack of government reporting mechanisms. Even when there are such mechanisms, reports are often not provided.

The Bracks Government has indicated that it will amend the relevant legislation and take other administrative steps to implement the first two of the Three Reforms. However it is not clear whether it will fully implement them and address all of the matters required to ensure logging is conducted in accordance with ESD principles, and ensure logging in Victoria is subject to an appropriate level of public scrutiny. However without such implementation of the Policy, logging operations in Victoria's forests will continue to be conducted in an unaccountable and unsustainable manner, and the Policy amount to no more than mere greenwash.

If you would like more information about Lawyers for Forests (including information about how to become a member) please visit www.lawyersforforests.asn.au or email lff@lawyersforforests.asn.au ■

¹ Read Sturgess and Associates "Evaluation of the economic values of wood and water for the Thomson catchment" (1992).

² Under the five controversial Regional Forest Agreements between the Commonwealth and State Governments.

³ *Flora and Fauna Guarantee Act* (Forest Produce Harvesting) Order 1988, made under s48(3) of the FFG Act. The order expired on 30 November 2003 but was renewed in January 2004.

⁴ For example section 2.3.6 of the Code deals with the conservation of flora and fauna. However this section refers to conservation "guidelines" which in turn refer to "approaches" that should be "considered" making enforcement unlikely.