CHAPTER 14

# Environmental law

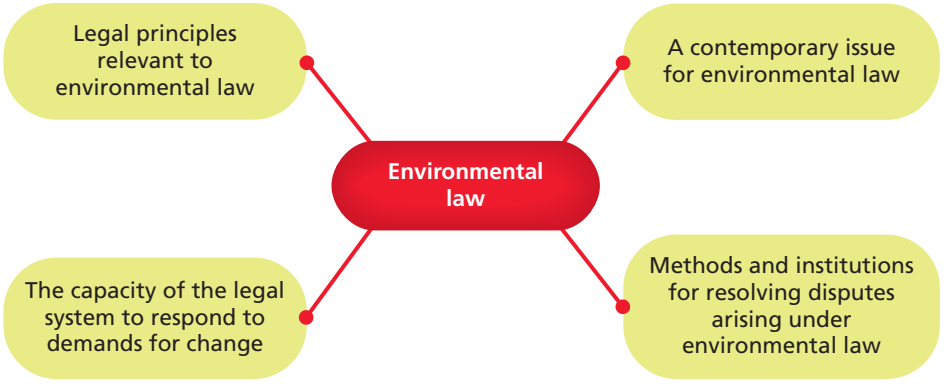
## WHY IT IS IMPORTANT

What is the connection between shampoo, toothpaste and frogs? Whenever you wash your hair or brush your teeth, you are releasing many dozens of chemicals into the environment, as our sewage treatment plants do not filter out all these pollutants. Frogs live in our waterways and are an important part of the food chain. They eat huge numbers of insects and other invertebrates, as well as providing food for other animals such as birds and snakes. A frog has very porous skin and can easily absorb chemicals directly into its body. Because of this sensitivity to pollution in water, many scientists regard frogs as a type of barometer that helps us measure our environmental health. Caring for the environment has now become a legal issue because laws have been passed to protect the air, water and land around us.

## WHAT YOU WILL LEARN

Use each of the points below from the Legal Studies study design as a heading in your summary notes.

## KEY KNOWLEDGE




## KEY SKILLS

These are the skills you need to demonstrate:

- define key legal terminology and use it appropriately
- research and gather information about legal cases and issues, using print and electronic media
- explain the current law and discuss related legal issues for environmental law
- discuss the ability of the law to respond to demands for change
- explain the different methods of dispute resolution to resolve legal problems.

Can you demonstrate these skills?

## Plastic waste reaching dangerous levels

In 1972, seafarers and scientists identified a huge area of concentrated plastic waste in the northern Atlantic Ocean, brought together by the movement of ocean currents. A similar area of plastic waste was identified in the northern Pacific Ocean in the 1990s. In 2011, scientists identified a similar concentration of plastic waste in the Tasman Sea between Australia and New Zealand, with evidence of large numbers of seabirds dying on and around Lord Howe Island. Birds such as albatross and shearwaters mistake small pieces of floating plastic for food, but the sharp edges tear at the birds' internal organs, quickly killing them. The rapid growth in the use of plastic drink bottles has aggravated the problem, particularly as these are often thrown out with household rubbish, find their way into landfill, into our waterways and out to sea. The law can help solve this problem. South Australia has had drink container deposit legislation since 1975. There is a 10 cents deposit on all bottles, cans and other drink containers, which can be claimed as a refund when these containers are returned to a recycling depot. In the Northern Territory, a similar scheme came into operation in 2012. South Australia has a return rate of 74 per cent for plastic bottles, compared with a national return rate of 36 per cent. In Victoria, drink container deposit legislation was introduced into the state parliament in July 2011, but was abandoned by the Victorian government in March 2012. How many bird lives could be saved if all Australian states encouraged recycling?

Could a deposit program clear this lake of plastic bottles?

# 14.1 Victorian environmental law

**KEY CONCEPT** Since 1970, all Australian states, and the Commonwealth, have enacted legislation relating to the environment, pollution control and relevant planning matters. Current state legislation includes legal principles for the sustainable management of water, air quality, land and forests, and locations with heritage or cultural significance.

Major legal responsibility for environmental matters in Australia lies with state governments, although both Commonwealth and local governments have environmental responsibilities that are reflected in both legislation and local council by-laws. Local government responsibilities, in relation to environmental matters, are generally those delegated under the *Local Government Act 1989*, such as the collection of household rubbish and management of parks and recreational facilities. Commonwealth legislation usually acts in conjunction with state legislation, although the Commonwealth has specific responsibility for matters such as offshore fisheries and international obligations to protect areas of significant world heritage.

## Victorian environmental law

Environmental law in Victoria is governed by 79 different Acts of parliament, as well as numerous regulations, State Environment Protection Policies (SEPPs), Water Management Policies (WMPs) and Notifiable Chemical Orders (NCOs).

Environmental law is administered by a number of government bodies as shown in the following diagram.

| The Department of Sustainability and Environment (DSE) | The Environment Protection Authority (EPA) | Sustainability Victoria | Heritage Victoria |
|---|---|---|---|
| Manages the state's water resources, state forests and other public land, as well as the conservation of natural ecosystems and **biodiversity** | Established in 1971 under the *Environment Protection Act 1970* (Vic.) as an independent statutory authority with the specific role of preventing and controlling air, land and water pollution, and industrial noise | A government agency that aims to encourage the sustainable use of resources and recycling by Victorian businesses and households | A government agency that has the role of identifying and protecting the state's most significant cultural heritage resources. It is part of the Department of Planning and Community Development. |

**Biodiversity** refers to the variety of different species of plants and animals that can exist in a particular ecosystem.

**Particulate matter** is fine particles of solid or liquid matter small enough to be carried in the atmosphere.

## Air quality

The monitoring and protection of air quality in Victoria is the direct responsibility of the EPA. It does so by setting air quality objectives and establishing processes for measuring the levels of pollutants in the atmosphere at regular intervals. Airborne pollutants such as carbon monoxide, nitrogen dioxide, sulphur dioxide and other **particulate matter** are measured several times each day and targets set for the reduction of these over time.

An excess of particulate matter in the atmosphere can lead to smog and poor visibility. Ultimately, it can affect our health.

The major source of air pollution in Melbourne is motor vehicle emissions, which contribute 80 per cent of carbon monoxide and 60 per cent of nitrogen oxides in the atmosphere. Despite the increase in numbers of motor vehicles on the roads, the presence of motor vehicle related pollutants has been decreasing since 1985. Improved standards in emission controls, and tighter government regulation, has seen a steep decline in emissions from new vehicles over this time. The *Environment Protection (Vehicle Emissions) Regulations 2003* (Vic.) set the standards for vehicle emissions and petrol quality and make it an offence to modify emission control and noise control systems in motor vehicles. Information also is available to help consumers choose 'greener vehicles' through the Green Vehicle website (an Australian Government initiative). Table 14.1 lists some of the best motor vehicles to purchase in terms of their reduced greenhouse and air pollution emissions.

**TABLE 14.1** 'Greener' car choices

| Motor vehicle | Rating: GreenVehicleGuide.gov.au |
|---|---|
| Mitsubishi iMiEV | ☆☆☆☆☆ |
| Tesla Roadster | ☆☆☆☆☆ |
| Toyota Prius Hybrid | ☆☆☆☆☆ |
| Lexus CT200h | ☆☆☆☆☆ |
| smart fortwo | ☆☆☆☆☆ |

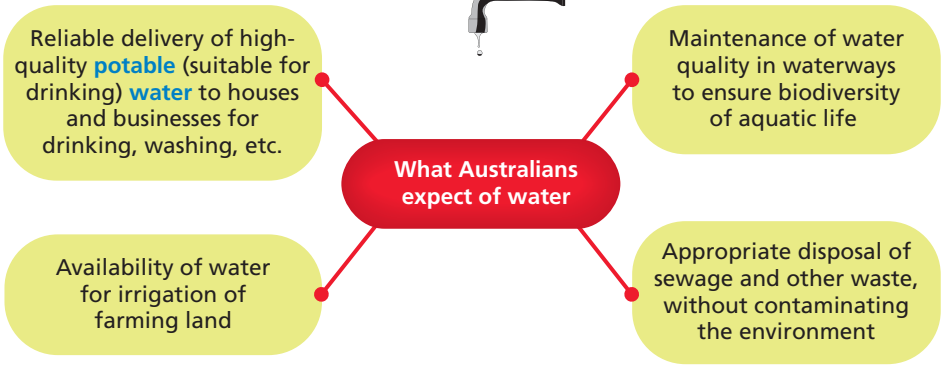
*Source:* GreenVehicleGuide.gov.au 2012.

**Potable water** is water that is of a sufficient quality to be consumed by humans without risk of disease or other harm.

## Water

Australia is the driest continent on Earth, and yet we have a number of expectations in relation to water. These are shown in the diagram at right.

What Australians expect of water



**DID YOU KNOW?**

In the United States and Singapore, drinking water is produced from sewage. This does not occur in Australia, but some local councils with severe water shortages are considering this.

Responsibility in Victoria for meeting these expectations ranges across a number of government departments and agencies. In broad terms, issues of water supply for domestic, commercial and agricultural use are the responsibility of the Department of Sustainability and Environment (DSE), through implementation of the *Water Act 1989*. In addition, the *Safe Drinking Water Act 2003* gives the Department of Health a role in monitoring the quality of drinking water delivered to households and businesses.

Issues of environmental water quality are also the concern of the EPA, which has particular responsibility for dealing with the disposal of waste water under provisions of the *Environment Protection Act 1970*. If pollution has occurred or is at risk of occurring, the EPA can issue a pollution abatement notice that directs the polluter to rectify the problem, or a pollution infringement notice that imposes a fine for breaching environmental standards. Both notices are legally enforceable. Any business intending to set up new premises, or alter its existing premises in such a way that might affect the environment, is required to apply for a works approval from the EPA. When the work is completed the EPA will issue a licence setting out waste discharge limits and conditions.

## Waste disposal

Responsibility for waste management and recycling is shared between local councils, the EPA and Sustainability Victoria. Local councils operate kerbside rubbish collection services, as well as collecting paper, glass, plastic and green waste for recycling. Sustainability Victoria provides advice to business and the community on the disposal of industrial and commercial wastes, and on recycling and energy efficiency. The disposal of hazardous waste is the responsibility of the EPA.

## Residential noise

Excessive noise from neighbours can lead to extreme stress.

### Dog owners fear for their pets

The kidnapping and killing of a noisy dog in Sydney's northern suburbs in January 2012 had local dog owners worried for the safety of their pets. The owner of the dog believed the crime was committed by a neighbour fed up with the Maltese terrier's constant yapping. When the story was reported in the local paper, many locals commented on how annoying a yapping dog can be, particularly at night. Stories of stabbings and poisonings of dogs appear to be on the rise, as higher density living and the popularity of smaller breeds has led to increased complaints to local councils. The problem of dogs barking in residential areas, particularly at night, raises a number of issues in relation to residential noise. The question is one of competing rights and responsibilities — to what extent should someone's right to enjoy their lifestyle within their own home be limited by their responsibility to not annoy their neighbours?

Finding an appropriate balance between the conflicting rights and responsibilities of neighbours in residential areas is always going to be a difficult problem for law makers. The following table summarises some of the noisy activities prohibited at certain hours of the day under the *Environment Protection (Residential Noise) Regulations 2008*. The regulations refer to a level of noise that can be heard inside neighbouring residential premises. Excessive noise can be considered unreasonable, even when it does not occur during prohibited times. Consistent failure to adhere to the regulations can result in prosecution.

**TABLE 14.2** Prohibited times for residential noise

| Prescribed items | Prohibited times |
|---|---|
| Motor vehicles (except those moving in or out of the premises)<br>Lawn mowers and other motorised gardening equipment<br>Electric powers tools and gardening equipment, such as power saws, angle grinders, compressors, nail guns or other impact tools | Monday to Friday: before 7 am and after 8 pm<br>Weekends and public holidays: before 9 am and after 8 pm |
| Domestic air conditioners, heat pumps, swimming pool or spa pumps, domestic heating equipment (including central heating and hot water systems) and domestic vacuum cleaners | Monday to Friday: before 7 am and after 10 pm<br>Weekends and public holidays: before 9 am and after 10 pm |
| Musical instruments and amplified sound reproducing equipment such as stereo systems, radio, television and public address systems | Monday to Thursday: before 7 am and after 10 pm<br>Friday: before 7 am and after 11 pm<br>Saturday and public holidays: before 9 am and after 11 pm<br>Sunday: before 9 am and after 10 pm |

**DID YOU KNOW?**

The Melbourne Cricket Ground (MCG) was included on the National Heritage list on 26 December 2005.

## Heritage sites

Victoria's significant cultural resources are protected under the *Heritage Act 1995*, and Heritage Victoria is the government agency with the responsibility to identify and protect those resources. Anyone can nominate a place or object for inclusion on the Victorian Heritage Register and submit that nomination for consideration by the Heritage Council of Victoria. The Heritage Council makes decisions on what to include on the Heritage Register. Once a location has been included in the register, it is an offence under s. 64 of the Act to remove, demolish, damage, develop, alter or excavate any part of that location. If the location is private property, under s. 67 of the Act, the owner must apply to Heritage Victoria for a permit to perform any alterations or additions to that property.

**eBook*plus***

Use the **National heritage list** weblink in your eBookPLUS to find places on the National Heritage list in Australia.

### TEST your understanding

1. Outline the relationship between local, state and Commonwealth environmental laws.
2. List **three** statutes that govern Victorian environmental law.
3. Draw up the following table in your book and fill it in.

| Environmental issue | Action taken by government authorities to protect environment | Relevant legislation |
|---|---|---|
| Air quality | | |
| Water quality | | |
| Waste disposal | | |
| Heritage sites | | |

### APPLY your understanding

4. In each of the following situations, explain how Victorian environmental and heritage law might be applied.
   (a) A young man decides to 'hot up' his car and give it a loud exhaust noise to show off to his friends.
   (b) A factory empties its waste material directly into the creek that runs behind the factory. A neighbour reports this to the EPA.
   (c) A food-processing business wishes to expand the size of its factory, and realises that in doing so it may be producing much more waste material.
   (d) A group of young people in a share house hold parties every Saturday night. They regularly keep the music at full volume until 2 or 3 am.
   (e) A stone cottage on private farmland is recognised as the oldest example of a nineteenth-century farm labourer's cottage in Victoria.

# 14.2 Environmental issue — forest management

**KEY CONCEPT** Forest management is a controversial issue in Victoria, with strongly opposing points of view, particularly on the issue of the logging of old growth forests. Areas such as national parks are exempt from logging, while logging in state forests is regulated by government-imposed codes of practice and audits.

**Logging** is the process of removing timber from forests for commercial usage.

Management of Victoria's forests can be an emotive issue. Often, violent disputes have arisen between those wishing to utilise the forests for **logging** and those who wish the forests to be preserved in their natural state. Recent bushfires have raised the issue of clearing trees from around private dwellings, with strong views held both in favour and against such practices. The issue of preventative burning in forest areas to lessen the possible impact of bushfires also has its supporters and opponents.

**DID YOU KNOW?**

In September 2009, a Victorian Supreme Court justice granted an injunction over the logging of two zones of Brown Mountain in East Gippsland by VicForests. The aptly named Justice Forrest declared that photographs of logged areas on Brown Mountain reminded him of those he had seen of World War I battlefields of the Somme.

## The legal status of forests and parks

The management of Victoria's forests varies according to the legal ownership or tenure of the land on which they occur. The structure for control of forests is shown in the following diagram.


### National park management

Areas of Victoria that have particular environmental significance, due to the uniqueness of their ecosystems or biodiversity, have been declared national parks, state parks or wilderness parks, under the *National Parks Act 1975* (Vic.). The aim is to conserve these in their natural state, to ensure the survival of the particular ecosystem, to allow for research by scientists into the particular features of the ecosystem, as well as to allow public access for educational and limited recreational use. The first national park declared in Victoria was Wilsons Promontory in 1898. Approximately 16 per cent of Victoria is now declared as national parks. This has increased from about 4 per cent in the early 1970s, and is a direct result of a strategy to conserve examples of every type of land ecosystem in the state.

## Managing state forests

Forests in Victoria were first reserved for timber production in 1869, primarily to provide structural timbers for the mining industry. State forests are now managed by the DSE to be used for a variety of purposes, including the conservation of flora and fauna, the protection of water catchments from contamination, the sustainable harvesting of timber, and a variety of recreational and educational uses. In Victoria, management of the forests is regulated by the *Forests Act 1958, Conservation, Forests and Land Act 1987* and *Sustainable Forests (Timber) Act 2004*. Under part 5 of the Conservation, Forests and Land Act, a statutory document known as the Code of Practice for Timber Production 2007 regulates all commercial timber production on both public and private land. The code deals with the development of forest management plans, harvesting, regeneration, environmental values, **coupe** planning, and access road works in forests. It aims to ensure that timber harvesting is carried out in a way that is ecologically sustainable, that biodiversity and unique ecosystems are protected, that river catchments are protected from pollution, and that both Aboriginal and non-Aboriginal cultural values are respected.

The code prohibits logging in areas where endangered species are detected, although the Secretary of the DSE has the power to grant exemptions from this prohibition. Loggers need to apply to the Secretary to be granted this exemption.

A **coupe** is an area of forest identified for logging.

The harvesting of timber from Victorian forests is a controversial issue.

## Timber harvesting

Harvesting of timber is carried out by VicForests, a state-owned commercial forestry business. In December 2011, the Victorian Government announced a Timber Industry Action Plan to provide a new structure for the logging industry. Under this plan, VicForests now has the sole responsibility for determining the amount of timber that can be sustainably harvested, and when and where logging can take place. Timber companies can enter into contracts for up to 20 years to log particular areas. The government also introduced regulations to allow for the **'ecological thinning'** of forest areas in reserves, parks and water catchment areas. The timber industry welcomed the changes to timber harvesting practice, while some environmental groups have been critical of these changes. The harvesting of timber remains a controversial issue. Logging of **old growth forests** in East Gippsland has drawn protests from environmental groups, who maintain that this is a unique ecosystem that should have the same protection as a national park.

**Ecological thinning** is the selection and removal of some trees or stems to allow others to grow and reach their mature size faster.

**Old growth forests** are forests that have survived in their natural state, as opposed to those that have been planted by humans.

### **TEST** your understanding

1. Identify and explain the **three** different types of legal ownership of land on which Victoria's forests are found.
2. Why is it important we have national parks? How does legislation seek to protect our national parks?
3. State forests are still harvested for timber in Victoria. Explain **two** areas in which the Code of Practice for Timber Production seeks to ensure harvesting is managed appropriately.

### **APPLY** your understanding

4. Research arguments for and against current logging practice, and suggest recommendations for any changes that you believe could improve the current law. Use the following weblinks in your eBookPLUS to investigate this issue:

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*Arguments in favour of logging*
- **Victorian Association of Forests Industries**

*Arguments against logging*
- **Australian Conservation Foundation**
- **Wilderness Society.**

# 14.3 State environmental law responds to change

**KEY CONCEPT** Environmental law aims both to look to the future and to respond to environmental disasters. The disastrous consequences of the 2009 Victorian bushfires have led to changes in the relevant law, including the rights of landowners to clear native vegetation from around their homes.

**Proactive** law-making involves taking action in anticipation of changes or events likely to occur in the future.

**Reactive** law-making involves taking action in response to events or changes that have already occurred.

A **royal commission** is a public judicial inquiry into an important issue, with powers to make recommendations to government.

Changes to any laws often have a combination of **proactive** and **reactive** elements. Governments often will be proactive and look to the future and possible future developments, and enact legislation accordingly. Governments also react to major dramatic events, and will enact laws in response to these events. Environmental laws provide many examples of this combination of proactivity and reactivity. State planning laws are designed to provide a framework for both urban and rural land use into the foreseeable future, but these often need modification as information about patterns of population growth change. Serious natural disasters such as the Black Saturday bushfires of 7 February 2009 often lead to major changes in the operation of environmental laws as governments react to the disaster and attempt to prevent a repeat occurrence.

## Black Saturday: a case study in environmental law responding to change

The bushfires of February 2009 resulted in the deaths of 173 people, injuries to another 414, and the destruction of over 2000 homes. A **royal commission** was set up following the fires to examine their causes and to make recommendations to government on legislative and regulatory changes needed to deal with bushfires in the future. In particular, the law with regard to the clearing of native vegetation in the bush has come under the spotlight.


The Black Saturday bushfires led to a change in regulations in relation to the clearing of native vegetation around homes.

**DID YOU KNOW?**

Private ownership of land does not mean that the owner can ignore environmental issues. Because 30 per cent of habitat for Victoria's endangered species and 12 per cent of native forest survives on privately owned land, even private landowners are regulated by strict environmental protection laws.

The law places restrictions on the clearing of native vegetation for good reason. More than half of Victoria's native vegetation has been cleared since European settlement began, and there is now a realisation that remaining areas are essential to preserve the health of water catchments, as well as maintaining biodiversity and the habitats of endangered species. As the growth in population has seen more people moving to outer-suburban and semi-rural locations, restrictions on the clearing of native vegetation on private land have created tension as landholders seek to protect their homes from the threat of bushfires. The management of native vegetation comes under the *Planning and Environment Act 1987* (Vic.).

Following the devastating bushfires of 7 February 2009, there was a realisation that restrictions on the clearing of native vegetation may have contributed to some of the property losses, and even some loss of life in that catastrophic event. In November 2011, the government made changes to simplify the entitlements of residents to clear vegetation from around their homes in preparation for the threat of bushfires. The changes saw the introduction of the '10/50 right' and the right to clear vegetation from boundary fences.

The '10/50 right' gives residents the right to clear all vegetation, including trees, from around their homes to a distance of 10 metres, and all vegetation except for trees to a distance of 50 metres. The 10/50 rule replaces the 10/30 rule that had been introduced by the previous government in August 2009. Residents also have the right to clear vegetation either side of a property boundary fence to a combined maximum width of 4 metres. Neither of these actions requires a permit from government authorities, although only the owner of a property can carry out the clearing. Those renting a property must gain written permission of the owner. All of these changes apply only in designated rural and semi-rural municipalities, not in the built-up Melbourne metropolitan area.

The Bushfires Royal Commission found that a large number of fires were caused by powerlines sparking in some rural areas. When powerlines detect a fault, the power shuts off immediately, but is then turned back on automatically. This means that power is not lost to consumers, but the risk of fire is increased as the fault can continue to generate sparks, or come into contact with tree branches. The Victorian government has responded to the recommendations of the Bushfires Royal Commission in relation to powerlines with two main actions.

1. During the six week period of highest bushfire danger, the automatic switching on of electricity after a fault is detected has been limited. Switching power back on is to be done manually so that the fault can be checked. This may mean consumers lose power for a time.
2. Powerlines in the most dangerous bushfire areas are to be placed underground or bundled into cable that cannot cause fires.

## **TEST** your understanding

**1** Explain the difference between proactive law-making and reactive law-making.
**2** Why is protecting native vegetation important?
**3** Explain how the law with regard to clearing native vegetation has changed since the bushfires.
**4** What is the '10/50 right'? Explain how it applies to landowners in areas at risk of bushfire.
**5** Explain the steps that have been taken to reduce the risk of bushfires being caused by power lines.

## **APPLY** your understanding

**6** The Victorian Bushfires Royal Commission delivered its final report in July 2010.
Use the **Bushfires Royal Commission** weblink in your eBookPLUS to investigate the recommendations included in that report that affect forest management, and other relevant areas of environmental law. Prepare a report on the changes to the law that have been implemented, or are in the process of implementation as a result of the findings of the Royal Commission.

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# 14.4 Resolving disputes arising under state environmental law

**KEY CONCEPT** The EPA aims to assist businesses to reduce their water and energy usage. The EPA plays a regulatory role in protecting the environment and requires all businesses to seek approval for any work that may have a significant environmental impact. The EPA also has the power to take punitive action against serious polluters.

Disputes are likely to occur under environmental law when an individual or organisation fails to observe the legally required standards in terms of substances released into the atmosphere or waterways, or in the use of land resources. Enforcement of these standards lies primarily with the EPA, although both the Department of Sustainability and Environment and the Department of Planning and Community Development also have powers in relation to environmental issues.

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Use the **Environmental Protection Authority** weblink in your eBookPLUS to visit the website for EPA Victoria.

## Roles and functions of the EPA

The EPA aims to work with industry and business to avoid environmental problems rather than prosecute polluters after the event. Industries are encouraged to consult with EPA advisers when planning new premises to ensure they meet the required standards, and a comprehensive approvals and licensing system gives the EPA a supervisory role assisting business to adhere to those standards.

### Environment and resource efficiency plans

A **terajoule** is a million million joules (a joule is a unit of energy).

Every business or industrial site using more than 120 megalitres of water, 100 **terajoules** of energy per year, or both, is required to register with the EPA, which will then assist the business to develop an environment and resource efficiency plan (EREP). The EREP is designed to identify actions that will allow the business to reduce water and energy usage, and waste generation. Around 250 industrial and commercial sites are currently participating in the program, including manufacturing, food processing and hospitals.

**DID YOU KNOW?**

One hundred terajoules is equivalent to the annual energy usage of 2000 average Victorian households, while 120 megalitres is equivalent to the annual water usage of 2000 Melburnians.

### Energy savings at the Austin Hospital

The Austin Hospital in Melbourne's northern suburbs has participated in the EPA's EREP program. The hospital has reprogrammed its air conditioning and ventilation systems to allow variations in output to match the level of occupancy of hospital beds. By spending $39 000 on variable speed drive motors and oxygen trim controls, the hospital anticipated that it would save $23 000 per year in energy costs. The hospital has also appointed an environment education officer who is working with staff to improve segregation of general and clinical waste and to increase recycling. Overall, the hospital put a strong emphasis on environmental sustainability and expected to recover its costs in less than 18 months.

### EPA licences and approvals

Under the Environmental Protection Act, any premises likely to have significant environmental impact, such as high energy or water use or high levels of toxic wastes, is required to gain works approval from the EPA before any construction or modification of facilities or processes. On completion of the works, the operator of the premises is required to apply to the EPA for a licence, which outlines

requirements such as the amount and types of waste that may be discharged, and other conditions relevant to the environmental impact of the premises. Licence holders are required to pay an annual fee and complete an annual performance statement (APS), in which they report their environmental performance for the year.

## Compliance and enforcement

The EPA has a variety of approaches at its disposal to ensure that businesses and individuals comply with environmental protection legislation.

### Remedial notices

A remedial notice is a written legal direction that requires a business or individual to undertake specified works or activities. Examples include a direction to clean up a site, stop works, or make changes to a process or activity. A remedial notice is not a punishment, but failure to comply with the notice may be an offence punishable through the courts. Remedial notices include:

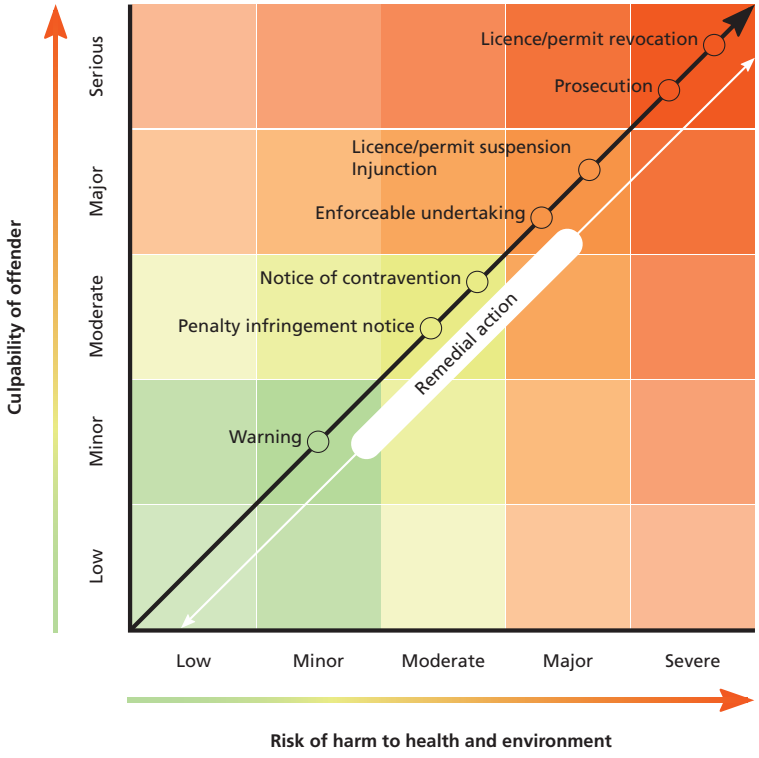
1. *pollution abatement notices:* these require that the activity causing the pollution ceases, or is modified in such a way as to remove the problem, usually within 30 days.
2. *minor works pollution abatement notices:* these apply when the problem requires an urgent response, usually in the form of onsite works to change a process. The aim is to stop pollution that has been occurring and prevent further problems.
3. *clean up notices:* these require the occupier of a site, or an individual or business that appears to have dumped or left waste, to remove waste, clean up the site, and ensure it remains clean in the future.

### Enforcement

EPA officers will apply a variety of measures to individuals and businesses to enforce environmental law. The severity of the response depends on a combination of two factors:

- the level of harm occurring or likely to occur to health or to the environment
- the degree of culpability, or blame, that can be assigned to the offender. Level of culpability is usually determined by looking at the degree to which the harm is intentional or accidental, whether it was foreseeable and could have been prevented, and the offender's previous history.

The EPA applies a scale of responses depending on these two factors. The following diagram summarises the scale of responses used to enforce the law.




*Warnings* can be issued if the degree of harm or threat of harm is minimal and the level of culpability on the part of the offender is also relatively low. A warning will be in writing and will allow the offender to fix the problem without further penalty.

*Penalty infringement notices* are imposed for more serious offences, carry a financial penalty and are the equivalent of an 'on-the-spot' fine imposed on a polluter. They are applied when there is a clear failure to comply with waste management regulations, or deliberate dumping of waste.

*Notices of contravention* are issued if there is an ongoing breach of the law. They advise that further legal action is planned. A daily penalty can be applied until the problem is resolved.

*Enforceable undertakings* are an alternative to prosecution, as they allow the offender to voluntarily enter into a binding agreement to take all steps to stop the pollution that may be occurring, as well as to repair any damage to the environment that has already occurred.

*Injunctions* to prevent the business from continuing the activity causing pollution can be applied for by the EPA in the Supreme Court. An injunction may prevent the business from operating until the issue is resolved.

*Suspension of licence or permit* is the temporary removal of the ability of a business to operate until all conditions of the licence or permit have been complied with. This can obviously be very serious for a business.

*Prosecution* may occur if the activity is not stopped. Offences against environmental law are indictable offences that can be heard through the processes of the criminal justice system. Company officers such as managers and directors can be personally prosecuted if their decisions can be proved to have caused significant environmental damage. In addition to imposing penalties, the courts can order an offender to make good any damage.

*Revocation of licence or permit* is the permanent removal of a licence or permit, effectively preventing the business from operating. It is the ultimate penalty for any business with a serious level of culpability, causing a severe level of environmental damage.

**DID YOU KNOW?**

The EPA encourages members of the public to report any suspected pollution directly to it for investigation. Any member of the community can report pollution to the EPA's 24-hour pollution watch line.

## University benefits from enforceable undertaking

Swinburne University is a major beneficiary of an enforceable undertaking negotiated with a shipping company following an oil spill. In 2008, the ship *Queen of the Netherlands* was conducting dredging operations in Port Phillip Bay when a spill of hydraulic oil occurred. The shipping company, Boskalis, has agreed to a number of actions to improve its environmental performance. These include the provision of $75 000 to Swinburne University to fund research into water quality in coastal areas of Victoria, as well as funding a university course on dredging and its environmental impacts. The company will also provide additional training to the crews on its ships. It has until 2014 to complete all the undertakings.

### TEST your understanding

1. In what ways does the EPA encourage good environmental practice, rather than simply punishing breaches of the law?
2. Explain how the EPA is able to protect the environment through its approvals and licensing processes.
3. Explain the purpose of remedial notices as issued by officers of the EPA.
4. What two factors does the EPA examine when determining the level of response to apply to a breach of environmental law?
5. Identify **two** possible benefits of enforceable undertakings as a means of responding to an environmental breach.

### APPLY your understanding

6. Explain the role of the EPA in each of the following situations.
   (a) A soft-drink manufacturing and bottling factory regularly uses several hundred megalitres of water each year in its production processes.
   (b) A butcher's shop wishes to double the size of its premises by leasing the shop next door and expanding into the extra space.
   (c) The owner of a panel beating business has been caught pouring unused paint into the storm water drains at the back of his workshop.
   (d) Leaking waste storage bins at a factory result in the pollution of a creek that passes the rear of the factory building.

# 14.5 Commonwealth environmental law

**KEY CONCEPT** Commonwealth environmental legislation identifies seven areas of national significance that are the subject of Commonwealth jurisdiction. The federal Minister for the Environment has specific powers to intervene in any activity that may affect any one or more of these seven areas.

The major Commonwealth environmental legislation is the *Environment Protection and Biodiversity Conservation Act 1999*. This Act deals with the following seven matters of national environmental significance:

- world heritage sites
- national heritage sites
- wetlands of international importance
- nationally threatened species and ecological communities
- migratory species
- Commonwealth marine areas, specifically those outside the three **nautical mile** limit of state waters
- nuclear issues.

Any activity that may have an impact on one or more of the above can invoke Commonwealth environmental law.

A **nautical mile** is an internationally recognised unit of distance, equivalent to 1.852 kilometres.

**DID YOU KNOW?**

The proposed Gunns pulp mill in northern Tasmania has proved to be a controversial project. It has provoked protests from environmental groups in Tasmania, and throughout the rest of Australia. The Commonwealth Government approved the project in 2007, imposing 48 conditions, based on Commonwealth legislation, while the state government has issued a permit on condition that the plant conforms to environmental issues that are within the state jurisdiction. Despite the government approval, the pulp mill has continued to be controversial and the company has had trouble attracting investors to fund the project.

## Environmental impact assessment

Any development or activity that is likely to have an impact on any of the above matters of national environmental significance is known as a 'controlled action', and requires the approval of the federal Minister for the Environment before it can proceed. The first step in the environmental assessment process is for the minister to decide if a particular proposal is a controlled action. The public may make submissions to the government about whether or not the proposal should be defined as such. If the minister decides that the proposal does involve controlled action, he will order an environmental impact assessment to be performed by officers of the Department of the Environment, Water, Heritage and the Arts. The department can seek expert opinion and submissions from interested groups or individuals, and will then make a recommendation to the minister about whether the project should proceed or not, and any conditions that need to be included with the approval. The federal minister can only intervene if one or more of the seven matters of national significance are involved. The minister has no general power to deal with issues of air or water pollution, excessive noise, or inappropriate land use, as these are the responsibility of state governments.

## Other aspects of Commonwealth legislation

The Commonwealth has responsibility for the protection of properties or sites that are covered by the international Convention for the Protection of the World Cultural and Natural Heritage, a treaty that is part of international law. This means that even areas controlled by the states, or privately owned can come under Commonwealth jurisdiction if they are listed under the World Heritage Convention. The *Environment Protection and Biodiversity Conservation Act 1999* also gives the Commonwealth Government powers to take action to protect endangered species and threatened **ecosystems**, and to ensure that any trade in wildlife and wildlife products does not threaten the survival of any native species or the ecosystem in which it lives. It also has powers to control or prohibit the import of any exotic plant or animal species that could threaten native Australian ecosystems.

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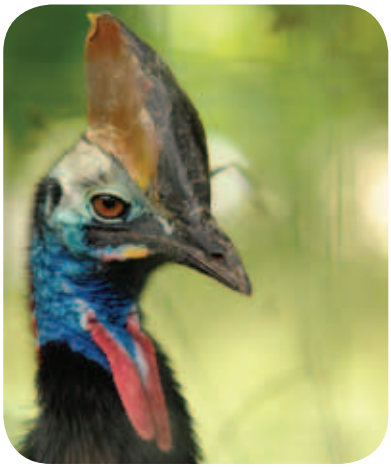
Use the **EPBC Act** weblink in your eBookPLUS to read and learn more about the *Environment Protection and Biodiversity Conservation Act 1999*.

An **ecosystem** is a community of plants and animals that have an interdependent relationship with each other and with their immediate environment.

## Commonwealth intervenes in alpine grazing trial

In January 2011 the newly elected Baillieu government allowed the reintroduction of cattle grazing into Victoria's Alpine National Park. This action was justified on the basis that it would form part of a trial to assess whether or not cattle grazing reduces fuel loads and helps prevent bushfires. In 2005 the Bracks Government banned cattle grazing in national parks, while allowing it to continue in nearby state forests. This followed a scientific study that had indicated that cattle grazing in alpine areas made no difference to bushfire risk and was damaging to the environment.

In March 2011, federal Environment Minister, Tony Burke, used his power under the Environment Protection and Biodiversity Conservation (EPBC) Act to declare the cattle grazing a controlled action, and ordered that cattle be removed from the national park. In December 2011, the Victorian government made official application to the federal Environment Minister under the EPBC Act to conduct its grazing trial. On 31 January 2012, the federal minister announced a permanent ban on grazing in the Alpine National Park.



## Beware — the cassowary is now protected!

The southern cassowary is a large, flightless bird, about two metres in height, that is found only on the Cape York peninsula in northern Queensland. Over the years its habitat has been reduced by land clearing, so that numbers have declined, and they are found only in two very limited areas of the Cape country.

Threats to the survival of the cassowary include the loss and fragmentation of their habitat, being hit by vehicles, attacks by introduced animals such as dogs, disease, and the influence of humans. Rubbish thrown from cars can attract cassowaries to the roadside, where they are in danger of being hit by passing vehicles. The cassowary population has now reached the stage where it is in danger of extinction.

The Commonwealth and Queensland governments have jointly established a recovery plan to prevent further loss of habitat, and to educate the public to avoid actions that could further threaten this rare bird.

### TEST your understanding

1 Identify and explain the key areas covered by the *Environment Protection and Biodiversity Conservation Act 1999*.

2 The following steps represent the process to be followed when a project is subject to an environmental impact assessment, but they are listed in the wrong order. Re-write the steps in the correct order.
- The minister orders an environmental impact assessment to be performed by officers of the Department of the Environment, Water, Heritage and the Arts.
- The minister decides that a proposed project involves controlled action.
- The public make submissions to the government about whether or not a proposed project should be defined as a controlled action.
- The department makes a recommendation to the minister about whether the project should proceed or not, and any conditions that need to be included with the approval.
- The department seeks expert opinion and submissions from interested groups or individuals.
- The federal minister only has the power to declare a controlled action if one or more of the seven matters of national significance are involved.

3 What was the legal basis for Environment Minister Burke's intervention to ban alpine grazing in Victorian national parks?

4 Explain the role of Commonwealth environmental law in the protection of wildlife.

### APPLY your understanding

5 Research the arguments in favour and against the building of the Gunns pulp mill on the Tamar River in northern Tasmania. Use the **Pulp mill** weblink in your eBookPLUS to investigate this issue. Arrange a class debate on the issue.

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# 14.6 Commonwealth environmental issue — the Murray–Darling Basin

**KEY CONCEPT** Throughout most of Australia's history, there has been no coordinated management of the environment of the Murray–Darling Basin. Recent agreement between the states and legislative changes have allowed for establishment of a coordinating authority with power to take action on the environment of this important river system.

The Murray–Darling Basin contains the most significant internal waterways in Australia, covering one-seventh of Australia and producing 40 per cent of our agricultural produce. For over 100 years, the Murray–Darling Basin was managed between the states of Queensland, New South Wales, Victoria and South Australia, each of which had its own interests and needs.

Long periods of drought and over-allocation of water for irrigation have severely stressed rivers in the Murray–Darling Basin.

## The problem — too many managers

The Murray–Darling Commission was established in 1914 to manage the river system and its basin, but could not act on any proposal unless there was unanimous agreement from all four states on the proposed action. This has meant that the commission was effectively powerless, and private, state government and commercial interests could use sections of the rivers within their boundaries in any way they saw fit, without any regard for the overall environmental health of the basin. During the first decade of this century, a long drought affecting inflows into the river system, combined with increasing amounts taken out for agricultural irrigation, have placed the ecosystem of the entire basin under severe stress.

## Damage to the Murray–Darling Basin

The combination of dams, weirs and other diversions has resulted in storage of over 35 000 gigalitres of water in the Murray–Darling Basin. The removal of this

quantity of water from the river system has resulted in a number of environmental problems.

- Reduced water flows and the absence of regular flooding has had a severe impact on important wetlands and flood plains, including the habitats of many species of migratory birds and stands of river red gums.
- The Murray provides about 40 per cent of Adelaide's drinking water, the quality of which is dependent on adequate river flows.
- Regular outbreaks of toxic blue-green algae result from inadequate water flows through the system.
- As a result of irrigation in the basin, the water table has risen, severely increasing the **salinity** of the soil, ultimately rendering it useless for agriculture.
- Less than 20 per cent of the system's water reaches the mouth of the Murray in South Australia, severely stressing the internationally recognised Coorong wetland, which has lost 90 per cent of the bird species that once inhabited it.

**Salinity** refers to salt levels in the soil.

## Legal and constitutional steps to restore the basin

A **referral of powers** is the handing over of legislative powers by one or more of the states to the Commonwealth Parliament, under s. 51(xxxvii) of the Australian Constitution.

As a result of an agreement by the relevant states for a **referral of powers** to the Commonwealth, the Commonwealth Parliament has passed the *Water Act 2007*, and the *Water Amendment Act 2008* to regulate water usage in the Murray–Darling Basin. This legislation established the Murray–Darling Basin Authority (MDBA) to replace the Murray–Darling Basin Commission. The authority has powers, including enforcement powers, to ensure the basin water resources are managed in a sustainable manner.

Over the years, farmers wishing to use water from the basin for irrigation required a licence, issued by the relevant state government. The licence would usually give the farmer the right to divert a set quantity of water per year for irrigation purposes. Different state governments applied different rules, with some granting licences annually, others granting them for longer periods. Some licences gave an absolute right to fixed quantities of water; others were adjusted to each year depending on the availability of water from the rivers. Licence holders have the legal right to sell all or parts of their entitlement. The MDBA has the power to buy back some of these water rights from farmers and return the water to the system to improve environmental flows in the river system.

**DID YOU KNOW?**

Water bought from farmers by government is controlled by an organisation called the Commonwealth Environmental Water Holder. In 2009–10 this body had 187 gigalitres available for allocation to environmental uses. Of this total, 11 gigalitres were used to restore lakes and wetlands in the Hattah Lakes National Park in north-western Victoria. These wetlands had traditionally been supplied by flows from the Murray River.

## The Murray Darling Basin Plan

The first task of the Authority has been to develop a long-term strategic plan for the integrated management of the entire basin. The plan was released for public consultation in November 2011 and contained 10 key points.

1. The plan would be fully implemented by 2019, and would take a balanced approach to the needs of farming communities and the environment.
2. The plan aims to reduce the amount of water taken from the basin for farming and other uses by 2750 gigalitres per year by 2019.
3. Scientific research supported the plan's aim as achievable in the time set.
4. The plan is not just about the volume of water needed for farming and environmental flows, but the variety of ways in which water is used throughout the basin.
5. The Authority will review its progress in 2015.
6. Existing rules and practices will be reviewed as part of the 2015 review, allowing for adjustments to be made at that time.
7. Different rules may be necessary for the northern and southern parts of the basin due to differences in climatic conditions and water usage.

8. The plan aims to allow for different approaches in different catchment areas of the basin.
9. Social and economic impacts will be considered alongside environmental issues, so no water holder will have their entitlement reduced or compulsorily acquired.
10. Local communities will have input into the implementation of the plan in their area.

The basin plan has been very controversial. Many farmers and members of rural communities believe that cutting the allocation of water allowed for irrigation and agricultural use will adversely affect the livelihood of farmers in the basin. They believe that the plan could result in reduced food production, the abandonment of farming in many parts of the basin, and the destruction of local rural communities. Many environmental scientists disagree with this view. They do not believe that the return of 2750 gigalitres to the river system will be sufficient to restore environmental health to the basin. They argue that unless more water is allocated to the environment, the river system will continue to deteriorate, ultimately making farming and all other land use unsustainable.

Some of us mistakenly regard water as a free commodity but this is not the case. Water trading is the buying and selling of water or, more specifically, the right to access water.

**DID YOU KNOW?**

The Commonwealth Government has allocated $3.1 billion over 10 years for the purchase of water rights in the Murray–Darling Basin. As at 30 September 2009, the program had secured the purchase of 612 gigalitres of water entitlements.

## **TEST** your understanding

1. Why has there been no coordinated effort to conserve the Murray–Darling Basin until very recently?
2. Identify and explain **three** environmental issues facing the basin.
3. Describe the key aims of the Murray–Darling Basin Authority.
4. Explain why the Murray Darling Basin Plan has been so controversial.

## **APPLY** your understanding

5. As well as improving water flows, the MDBA aims to improve the ecosystems of six identified 'icon sites'. Use the **Living Murray** weblink in your eBookPLUS to investigate **one** of these sites, and write a brief report explaining:
   - the environmental issues involved
   - the actions taken to deal with these issues
   - any legislative or regulatory steps taken by state or Commonwealth governments to achieve the environmental goals.

# 14.7 Commonwealth environmental laws respond to change

**KEY CONCEPT** Commonwealth environmental law has grown in importance as the courts have applied it in ways that have often seen it overriding state law. Commonwealth law has often proved to be very responsive to dealing with new environmental challenges as they have arisen.

As with many other areas of Australian law, environmental law has seen the broadening of Commonwealth Government powers, often at the expense of state powers. Although the intention of the Australian Constitution was to divide legislative powers between the state and Commonwealth parliaments, the Commonwealth now makes laws that involve areas of society beyond those envisaged by the architects of the Constitution.

### The *Tasmanian Dam Case*

In the early 1980s the Tasmanian Government, through its Hydro-Electric Commission, wished to build a dam on the Franklin River in south-west Tasmania. The proposal led to strong opposition from environmentalists, not just in Australia, but from all over the world. In November 1982, the United Nations Educational, Scientific and Cultural Organization (UNESCO) declared the Franklin and Lower Gordon Rivers a world heritage site. The newly elected Hawke Labor Government made use of this piece of international law to pass the *World Heritage Properties Conservation Act 1983*. This Act empowered the Commonwealth to protect any areas declared as world heritage sites. The Tasmanian Government challenged this legislation in the High Court, claiming that because the provision of electricity is a state responsibility, the Commonwealth had no right to intervene in the building of the dam. In the case *Commonwealth of Australia and Anor v. State of Tasmania and Ors* [1983] HCA 21 (the *Tasmanian Dam Case*), the High Court found in favour of the Commonwealth, on the grounds that the area was covered by an international treaty, and that the Commonwealth had the power to make laws in support of international law, under s. 51(xxix) of the Constitution.

The *Tasmanian Dam Case* effectively gave the Commonwealth the power to override state legislation in areas of environmental or heritage importance. The provisions of the World Heritage Properties Conservation Act were eventually incorporated into EPBC Act.

## Further growth of Commonwealth environmental powers

The EPBC Act has been applied in a number of cases over the past decade that have emphasised the extent to which this Act can be applied to a variety of environmental issues.

### The *Flying Fox Case*

In 2000, the North Queensland Conservation Council, a voluntary regional conservation group, became aware that a farmer was using aerial electric grids to electrocute hundreds of flying foxes as a means of protecting his lychee crop. The flying foxes were inhabitants of the nearby Wet tropics World Heritage area, and

a protected species. A member of the council, Dr Carol Booth, inspected the site and found that as many as 300–500 flying foxes were being killed each night. The matter was reported to the Queensland Parks and Wildlife Service, which visited the farm and issued the farmer with a permit to kill the flying foxes. The failure of state authorities to act led Dr Booth to take the matter to the Federal Court, relying on the newly enacted EPBC Act.

The killing of flying foxes by electric grids was found to be illegal under the Environment Protection and Biodiversity Conservation Act.

The case, *Booth v. Bosworth* [2001] FCA 1453 (the *Flying Fox Case*), was the first full trial under that Act. An injunction was granted by the Federal Court in 2001 stopping the use of the electric grids, and eventually the federal Minister for the Environment declared this method of killing flying foxes a 'controlled action' under the Act and refused approval for it to continue. The case was particularly important because it reinforced the right of ordinary members of the public to initiate legal action under the Act.

These two cases illustrate the reach and application of the EPBC Act. The Act can be applied in the case of any threat to important ecosystems, or to the biodiversity and environmental health of heritage areas. The willingness of the courts to give broad application to the Act is a demonstration of the capacity of environmental law to deal with the changes that reflect higher levels of public expectation in relation to environmental protection.

## The *Nathan Dam Case*

In 2002, a proposal to build a dam on the Dawson River in central Queensland was referred to the federal Minister for the Environment for approval under the EPBC Act. The Dawson River joins the Fitzroy River and flows to the coast near Rockhampton. Outflows from the Fitzroy catchment area are considered to have an impact on the health of the Great Barrier Reef. The aim of the dam was to provide water for irrigation for cotton farms in the lower Dawson and Fitzroy valleys.

The Queensland Conservation Council challenged the minister's approval of the project in the Federal Court. In the case, *Minister for the Environment and*

**DID YOU KNOW?**

The brush-tailed bettong, a medium-sized ground-living marsupial had almost been wiped out after being preyed on by foxes across southern Australia. It has been saved as a result of a program by the Commonwealth, South Australian and Western Australian governments to poison the foxes in the bettong's habitat. The poison used ingredients that occur naturally in the bettong's food, so the bettongs were immune to the poison.

*Heritage v. Queensland Conservation Inc*. [2004] FCA 190 (the *Nathan Dam Case*), the court found against the minister and determined that, although the dam itself was no threat to the environment, the farming activity it would support could lead to chemical and other outflows that could have an impact on the Great Barrier Reef. The key principle here was that both the direct and indirect effects of a project should be considered under the EPBC Act.

Marine life on the Great Barrier Reef was threatened by farming activity that was likely to result from the construction of a dam, so the dam was stopped.

In 2008 the federal Minister for the Environment commissioned an independent review of the EPBC Act aimed at evaluating the operation of the Act and making recommendations on how the legislation can be improved. There was a recognition that environmental issues can change and evolve, and that the law needs to be updated from time to time to account for this. In August 2011, the minister announced the government's response to the recommendations in the review and the general improvements to be introduced into legislation.

## TEST your understanding

1. What important legal principle was established by the High Court decision in the *Tasmanian Dam Case* of 1983?
2. In what way does the *Flying Fox Case* demonstrate the increasing authority of Commonwealth environmental law over state law?
3. Explain the key legal principle in the *Nathan Dam Case*.
4. Use the **EPBC Reform** weblink in your eBookPLUS to answer the following.
   (a) Identify and explain **four** key elements of the reform package.
   (b) What is 'biodiversity banking' and how is it expected to operate?

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## APPLY your understanding

5. Select **one** of the following cases and write a brief report, explaining:
   (a) the facts of the case
   (b) the legislation or previous court decision that was applied
   (c) the court's decision in the case, including any penalties imposed.
   - *Minister for Environment and Heritage v. Greentree* [2004] FCA 741 (the *Greentree Case*)
   - *Minister for Environment, Heritage and the Arts v. Lamattina* [2009] FCA 753 (the *Lamattina Case*).

Use the **EPBC Cases** weblink in your eBookPLUS to find the relevant information.

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# 14.8 Resolving disputes under Commonwealth environmental law

**KEY CONCEPT** Commonwealth environmental legislation includes provisions that ensure compliance with the law. In addition, both civil and criminal actions through the courts are possible to deal with parties in breach of the law.

Disputes can occur under Commonwealth environmental legislation when there has been a contravention of the EPBC Act or any other Commonwealth legislation. Officers of the Department of Environment, Water, Heritage and the Arts have a role in monitoring compliance with legislation. As has been seen in cases such as the *Flying Fox Case*, an individual or group can initiate action if they believe the Act has been breached. A dispute can also occur in relation to the ministerial approval of a project following an environmental impact assessment, if there are individuals or organisations who disagree with the minister's decision.

## Compliance and enforcement

In order to encourage compliance with environmental legislation, and enforce the law in cases of contravention, the department can make use of administrative action, civil action and criminal action, depending on the severity of the issue.

### Administrative action

The department aims to encourage compliance with the legislation through education and persuasion. If an investigation reveals a minor breach of the Act, a warning letter may be sent to give the individual or organisation an opportunity to rectify the situation. Under s. 497 of the EPBC Act, department officers can issue an infringement notice, including an on-the-spot fine to any party in breach of the Act. If a contravention of the Act is suspected, but not immediately evident, s. 458 to 462 allow for a directed environmental audit of the suspect individual or organisation to clarify the situation. The suspect party is required to cooperate with departmental officers in the performance of that audit. Under s. 480D, the minister has the power to order **remediation action** to repair damage done by a breach of the Act. Under ss. 486DA and 486DB of the Act, an alleged offender can enter into an enforceable undertaking with the minister to carry out this action. Such undertakings are similar to those that apply under state environmental law (see case study next page). If a party to whom approval has been granted to carry out 'controlled action' fails to comply with the conditions of that approval, the minister can suspend the approval for a period of time (s. 144) or revoke the approval completely (s. 145).

**Remediation action** involves restoring a site to its previous or natural condition, or to an equivalent condition, by removing pollutants or other introduced substances or structures.

### Civil action

The initiation of civil action through the Federal Court is the next level of severity in enforcing the EPBC Act. Civil action is appropriate when the environmental harm has been caused by negligence or recklessness, rather than deliberate or intentional actions. In order for the civil action to succeed, the Federal Court must be satisfied that substantial harm to the environment or national heritage has occurred, and that there has been a blatant disregard or significant degree of indifference on the part of the defendant. Successful civil action can result in the court granting an injunction ordering the harmful activity to cease, ordering the defendant to repair or otherwise make good the damage, or a financial penalty of up to $550 000 for a person or $5.5 million for a corporation.

## Criminal action

Criminal prosecution may occur when damage is caused as a result of intentional action on the part of the defendant, where there have been attempts to avoid detection, or where the defendant has a previous history of offending. The department presents relevant evidence to the Director of Public Prosecutions (DPP), and the DPP has responsibility for the conduct of any prosecution before the Federal Court. If criminal guilt is proven, penalties can include a fine of up to $46 200 or imprisonment for up to seven years for an individual, or a fine of up to $231 000 for a corporation.

Geelong Council has undertaken to rehabilitate endangered native grasslands.

## Disputes relating to ministerial decisions

Under the provisions of the Commonwealth *Administrative Decisions (Judicial Review) Act 1977*, an individual or organisation can apply to the Federal Court for a review of a ministerial decision. This means that an organisation seeking approval to carry out 'controlled action' in an environmentally sensitive area can apply for a judicial review if the minister has denied the application. It also means that interested parties can make application to the court if they believe that the minister has wrongly approved a project, as occurred in the *Nathan Dam Case*. The Federal Court can send the matter back to the minister, directing him or her to act in a particular way, or it can overrule the minister's decision.

### Geelong Council undertakes grassland rehabilitation

In December 2010 the Greater Geelong Council committed $131 000 to rehabilitate native grassland after it was found to have destroyed almost one hectare of nationally protected grasslands. The damage occurred between December 2009 and April 2010, when the council carried out works near the Geelong–Bacchus Marsh Road near Lara. The council had failed to gain approval for the works, despite the works being a controlled action under the EPBC Act. The council entered into an enforceable undertaking with the federal environment department to pay $44 000 towards rehabilitating the damaged area and $20 000 towards the Grassy Groundcover Research Project. It also allocated $67 000 to fund a review of its environmental planning and works processes to ensure that a similar breach does not occur in the future.

### TEST your understanding

1. Identify **two** situations in which a dispute may arise under the EPBC Act.
2. Explain **three** different types of administrative action that can be taken by departmental officers in response to an alleged breach of the Act.
3. What types of remedies can a court award when successful civil action is taken under the EPBC Act?
4. Explain the process by which criminal action can be taken under the EPBC Act.

### APPLY your understanding

5. Explain the legal action that could occur in each of the following cases.
   (a) A farmer drains a small section of protected wetland to build an access road to part of his property.
   (b) A landowner is concerned that his neighbour's land clearing may threaten endangered wildlife.
   (c) A property developer begins demolishing a national heritage building without bothering to find out the status of the building.
   (d) Two hunters wander into a protected wetland and shoot some of the birds living there.
   (e) A tourist operator applies to set up observation shelters next to a wetland area to allow his customers to view the wildlife. The minister's office refuses his application.

# 14.9 International environmental law

**KEY CONCEPT** International environmental law consists of a number of treaties and conventions agreed to by most countries as members of the international community. Australia has taken an active role in ensuring that international environmental law is enforced within its own borders and beyond.

## What is international law?

International law can be defined as a body of law which countries feel themselves bound to observe, and which they do usually observe in their dealings with each other. The most important sources of international law are the **treaties** and **conventions** formally agreed to by nations. International law suffers from the fact that many countries will put their national self-interest ahead of their international obligations, and so the enforcement of international law is much more difficult than enforcing laws within national boundaries. In addition, only those countries that actually sign a particular treaty and **ratify** it by having the government formally approve it are legally bound by that treaty. Once a country signs and ratifies a treaty or convention it is agreeing to be bound by the provisions of that treaty or convention, which often requires the passing of legislation by that country's parliament to put those provisions into effect. When the federal parliament passed the *World Heritage Properties Conservation Act 1983* it was providing the Commonwealth Government with the power to protect any area within Australia declared a world heritage site under the international World Heritage Convention.

A **treaty** or **convention** is an agreement between countries that has the force of law.

To **ratify** a treaty or convention is the process by which the government of a country accepts that treaty or convention and agrees to be bound by it.

International treaties and conventions help to maintain the delicate balance in our environment.

**TABLE 14.3** Environmental treaties relevant to Australia

| Environmental treaty | Aim of the treaty | Application to Australia |
|---|---|---|
| The International Convention for the Regulation of Whaling 1946 (International Whaling Convention) | Regulates whaling | Australia no longer engages in whaling. |
| The Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971 (sometimes known as the 'Ramsar Convention' as it was signed in the Iranian city of Ramsar in 1971) | Provides for the listing and protection of wetlands that are the habitats of migratory birds. | There are currently 64 Ramsar wetlands in Australia, including 11 in Victoria. A number of these are located within the Murray–Darling Basin, as well as in coastal areas of both Westernport and Port Phillip bays. |
| The Convention Concerning the Protection of the World Cultural and Natural Heritage 1972 ('World Heritage Convention') | Administered by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and aims to identify and protect sites around the world that are considered to be of outstanding natural or cultural heritage value. | Australia has 16 world heritage sites, including the Great Barrier Reef, the South-West Tasmanian Wilderness area and the Sydney Opera House. The one world heritage site in Victoria is the Royal Exhibition Building in Carlton Gardens. |
| The International Convention for the Prevention of Pollution from Ships 1973 | This convention is administered by the International Maritime Organization and aims to control discharges from ships, either from accidental causes or through normal operational processes. | The *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* was passed by the Commonwealth Parliament to give the Australian Government the power to enforce this convention in Australian waters. It empowers the Australian Maritime Safety Authority to protect Australia's marine environment from pollution caused by shipping and related activities through a national pollution prevention and response strategy. |

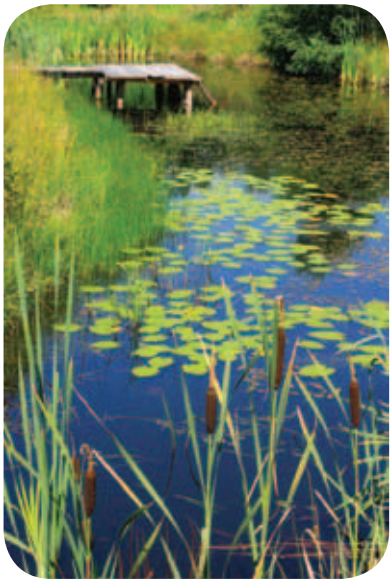
Whaling is now controlled by international convention.

The Convention for the Prevention of Pollution from Ships aims to control the discharge of waste materials at sea.

| Environmental treaty | Aim of the treaty | Application to Australia |
|---|---|---|
| The Convention on International Trade in Endangered Species 1973 ('CITES') | Aims to provide protection to over 30 000 species of plants and animals, whether they are traded as live specimens or in the form of seeds, skins, furs or other products. | Incorporated into Australian domestic law under Part 13A of the EPBC Act. The Department of Environment, Water, Heritage and the Arts administers the protection of species included in the convention, assisted by the Australian Customs Service, which has the responsibility of detecting attempts to smuggle protected species into or out of the country. |
| The Convention on Biological Diversity 1992 ('the Biodiversity Convention') | First signed at the Rio de Janeiro Earth Summit in 1992 (see section 14.11) and aims to preserve both marine and terrestrial ecosystems to ensure the continuation of the natural biodiversity of these systems. | The Commonwealth and state governments have agreed to a National Biodiversity Conservation Strategy 2010–2020. This strategy sets the priorities for meeting Australia's obligations under the international convention. |
| The United Nations Framework Convention on Climate Change 1992 | This convention provides a framework for regulating human impacts on global warming. In 1997, a conference in Kyoto, Japan agreed to a **protocol** by which signatory countries would agree to internationally set targets for the reduction of greenhouse gases. | Australia finally ratified this protocol in December 2007. Since that time a number of international conferences have occurred with a view to arriving at internationally acceptable action on climate change. |

**DID YOU KNOW?**

The United Nations regularly declares particular years to have a specific environmental focus. For example, 2007 was the International Year of the Dolphin, 2010 was the International Year of Biodiversity, and 2011 the International Year of Forests. It is hoped that individual countries will be encouraged to take action on these environmental issues during these years.



International treaties preserve unique ecosystems to maintain biodiversity.

A **protocol** is a rule under international law that guides how an activity should be performed.

## **TEST** your understanding

1. Explain the importance of treaties and conventions in international law.
2. In what circumstances will a country be bound by an international treaty?
3. Identify **four** environmental treaties that are binding on Australia, and explain our legal obligations under each of these treaties.

## **APPLY** your understanding

4. In groups of two or three, identify and discuss the strengths and weaknesses of the existence of a body of international environmental law. Report your findings to the rest of the class.

# 14.10 International environmental issue — whaling

**KEY CONCEPT** International controversy surrounding the hunting of whales has made this a very emotive environmental issue. Whaling is governed by international law through the International Whaling Convention.

## Whales need protection

Whales have been hunted for hundreds of years, particularly in the North Atlantic and by communities around the Arctic Circle. Whaling occurred off the Australian coast from the time of the first European settlement in the late eighteenth century until November 1978, when the last catch of whales was brought back to Albany in Western Australia. The demand for whale oil for use in oil lamps and other products drove the commercial expansion of whaling during the nineteenth century. The development of large factory ships and their ability to hunt and capture large numbers of whales during the 1920s and 1930s led to concern about a serious decline in the numbers of some whale species, and a belief among whaling nations that a regulatory framework should be set up to ensure the sustainability of the whaling industry. This led to the signing of the International Convention for the Regulation of Whaling (International Whaling Convention) in 1946.


Greenpeace protesters spell out their anti-whaling message.


## The International Whaling Convention

The original aim of the convention was to conserve whale stocks to ensure the ongoing viability of the whaling industry. The convention established the International Whaling Commission (IWC) as a body to promote this objective. It consists of representatives of those 58 member countries that are signatories to the convention.

The Convention consists of two major parts. The first of these established the IWC and its powers and responsibilities. The second part is the annexed schedule which contains the specific standards to be observed in the conservation and use of whale resources. It includes details such as which species are protected, dates of whaling seasons, whale sanctuary areas, catch limits, size limits for each whale species, and an inspection regime to oversee the process. The schedule can be amended from time to time by the vote of a 75 per cent majority of IWC members. In 1982, the schedule was amended to declare a **moratorium** of commercial whaling which came

A **moratorium** is the suspension of an activity for a period of time.

into force from 1986. The schedule was also used to establish the Indian Ocean whale sanctuary in 1979 and the Southern Ocean sanctuary in 1994. These whale sanctuaries were designed to put a stop to whaling in these areas.

## Weaknesses in the convention

- The '*objection*' *provision*. All members of the IWC have the right to object to any amendment of the schedule and, if a member objects, that member is not bound by that provision while that objection is maintained. This right was used by Norway and Russia to object to the 1986 moratorium on whaling, so neither of these countries is legally bound to observe the moratorium on commercial whaling.
- The '*scientific research*' *exemption*. The convention allows any member country to continue to hunt whales for scientific research and also allows that country to set its own conditions for doing so. This has been a controversial provision and is the exemption relied on by Japan to continue its whaling activity. A number of other countries have used this exemption in the past; in fact, the number of whales taken for scientific research in the season after the 1986 moratorium came into effect was greater than the number taken in commercial whaling during the previous season.
- The '*enforcement*' *provision*. The Whaling Convention is largely self-regulating. Each country has the power to take action if any of its own citizens breach the convention, but the IWC has no enforcement powers. This has meant that environmental organisations such as Greenpeace, the Sea Shepherd Society and the Humane Society International have often taken it on themselves to attempt to enforce the moratorium. This has included occasions when groups have physically attacked whaling ships and attempted to disrupt their activities.
- The '*withdrawal*' provision. Any member of the IWC may withdraw its membership of the commission and, when it does so, it is no longer bound by the International Whaling Convention. This is a far more drastic action than simply objecting to an amendment to the schedule, but has been carried out by a number of countries over the years. Japan and Norway have withdrawn in the past, but have later rejoined the IWC. Canada withdrew in 1982 and has not rejoined. Iceland withdrew in 1992 and set up an alternative organisation with Norway and Greenland to coordinate their whaling activities in the North Atlantic Ocean.

Whaling remains a divisive international issue. Each year the Japanese whaling fleet ventures into the Southern Ocean to harvest whales. Organisations such as Greenpeace also send their own vessels into these areas to attempt to disrupt the Japanese whaling activity. In recent years this has led to clashes between the two opposing groups, with anti-whaling groups having attempted to board Japanese vessels on more than one occasion. Australia has commenced legal action against Japan over the whaling issue (see p. 420), but until this case is decided, the clashes are likely to continue.

**DID YOU KNOW?**

Japan has killed 8882 minke whales in the Antarctic for 'scientific research' since the 1986 moratorium came into effect. Norway lodged an objection to the moratorium in 1992 and resumed commercial whaling in 1993. Since then they have taken more than 6879 minke whales. Iceland resumed commercial whaling in 2006 and has since killed more than 480 whales.

### **TEST** your understanding

1. What was the original aim of the International Whaling Convention?
2. Identify and explain the **two** parts of the International Whaling Convention.
3. Describe how the schedule to the convention can be changed or amended, and give **two** examples of when this has occurred.

### **APPLY** your understanding

4. Although commercial whaling has been effectively banned under international law since 1986, it is still possible for whaling to occur quite legally. Explain why this is the case.

# 14.11 International environmental law responds to change

**KEY CONCEPT** Countries have generally demonstrated a willingness to enter into new treaties and to change international law in response to recognised environmental threats.

Despite the weaknesses of international law, most countries have generally been prepared to become signatories to treaties and conventions with environmental aims, and to abide by the provisions of those treaties. In some cases, the discovery of an environmental threat has quickly encouraged the international community to take decisive action through the use of international legal frameworks, demonstrating the capacity of international environmental law to respond to change.

## Action on ozone depletion

The **ozone layer** is the part of the Earth's atmosphere that is important in protecting us from excessive ultraviolet radiation from the sun.

Ozone is a small part of the Earth's atmosphere that is mostly found in the stratosphere, about 10 kilometres above the surface of the Earth. This **ozone layer** is important in protecting us from excessive ultraviolet radiation from the sun, which can cause skin cancer and cataracts of the eyes. In the mid-1970s, scientists discovered that the ozone layer was thinning, and that it was so thin over the Antarctic, that a hole in the ozone was developing. It was soon realised that ozone-depleting chemicals were causing the problem, the main culprit being chlorofluorocarbons (CFCs). These were widely used as propellants for spray-can products and for refrigeration in air conditioners and coolers. In 1985, a conference of 20 of the world's largest CFC-producing countries took place in Vienna, Austria, and the Vienna Convention for the Protection of the Ozone Layer (1985) was signed. It provided a framework for the development of a set of international regulations for controlling and reducing the use of CFCs.

A change in the chemicals used in spray cans has successfully prevented ozone layer depletion.

A further meeting in Montreal, Canada, in 1987 produced the Montreal Protocol on Substances that Deplete the Ozone Layer (1987). This was negotiated under the Vienna Convention and specified that the production and use of ozone-depleting substances such as CFCs were to be phased out by 2000–2005. The protocol has been very widely adopted throughout the world and the depletion of the ozone layer has been stabilised. It has been estimated that if the level of adherence to the Montreal protocol continues, the ozone layer could be restored to acceptable levels by 2050. The Montreal protocol has been described as the most successful international environmental agreement in history and is an example of the way in which international environmental law can readily adapt to meet changing circumstances.

## Global warming

A **protocol** is a rule under international law that guides how an activity should be performed.

While there has been disputation in some scientific quarters about the details of climate change science, there has been ready acceptance in the international community that the current and projected levels of greenhouse gases in the atmosphere are likely to cause substantial changes to the world's climate. This principle was recognised when representatives of 172 countries attended the United Nations Conference on Environment and Development, also known as the Earth Summit, in Rio de Janeiro, Brazil, in 1992. The conference produced the United Nations Framework Convention on Climate Change (UNFCCC), which aimed to develop methods of stabilising concentrations of greenhouse gases in the atmosphere to minimise the risks of climate change. The UNFCCC did not actually set specific limits on greenhouse gas emissions, but set in place a process by which future meetings of the signatories would establish **protocols** to identify emission limits that each country would agree to observe.

## The Kyoto protocol

In December 1997, a conference of the signatories to UNFCCC was held in Kyoto Japan, to set out specific goals for greenhouse gas reduction. These varied according to the existing levels of emissions from each of the signatories, as measured at the base year of 1990, and the level of industrialisation and economic development experienced by each country. The result was an agreement that the advanced industrialised countries would, between them, reduce greenhouse gas emissions by 5.2 per cent below 1990 levels by 2012.

**TABLE 14.4** Kyoto protocol — expectations for reduction in greenhouse gas emissions

| Country or region | Expected change in emissions by 2012 |
|---|---|
| European Union | 8 per cent below 1990 levels |
| Japan | 6 per cent below 1990 levels |
| Canada | 6 per cent below 1990 levels |
| United States (has not ratified the protocol) | 7 per cent below 1990 levels |
| Australia | Permitted 8 per cent above 1990 levels |
| China | Exempt, as a developing economy |
| India | Exempt, as a developing economy |

## Recent developments

The international community has continued to meet annually to attempt to meet the challenges of climate change. In December 2007 attendees at a conference in Bali, Indonesia, agreed to begin working on new targets for greenhouse gas reduction for the period after 2012 when the Kyoto protocol expires. At a conference in 2008 in Poznan, Poland, principles for providing financial assistance to poor countries to help them reduce their emissions and to help them deal with any damaging consequences of climate change were agreed on. At the 2009 conference in Copenhagen, Denmark, it was planned to set actual targets for the period beyond 2012, but only a non-binding agreement on some broad general principles could be reached. Another international meeting in Cancun, Mexico in 2010 agreed to the need to restrict global warming to two degrees Celsius above pre-industrial levels. At the 2011 conference in Durban, South Africa all countries agreed to begin developing a binding treaty to meet the 2 per cent target. This agreement would be prepared for signing by 2015 and come into effect from 2020.

**DID YOU KNOW?**

Australia is the world's sixteenth largest emitter of greenhouse gases, even though our emissions contribute only 1.5 per cent to the global total. The 15 countries ahead of us contribute about two-thirds of total emissions, while the 175 countries below us contribute about one-third of the total. Australia is the highest producer of greenhouse gases per head of population in the world. At 1.5 per cent of emissions, and only 0.3 per cent of the world's population, we are actually producing five times our fair share.

### **TEST** your understanding

1. Why is the ozone layer important?
2. Describe the international action that was taken to protect the ozone layer.
3. Explain the aims and key provisions of each of the following:
   - United Nations Framework Convention on Climate Change
   - the Kyoto protocol.

### **APPLY** your understanding

4. Why do you think the Montreal protocol has been described as the 'most successful environmental treaty in history'?
5. What do you think has to happen to create an international law on climate change that could be as successful as the international law on ozone depletion?

# 14.12 Resolving disputes under international environmental law

**KEY CONCEPT** Disputes arising under international environmental law can be decided through international tribunals. A country can use its domestic courts to deal with environmental matters if the dispute involves activities in the seas off its coast, recognised as coming under the control of that country.

There is no specific court or other institution set up to deal with disputes under international environmental law. Existing international courts and tribunals have occasionally dealt with environmental matters, and some matters that are relevant to international environmental treaties have been heard in the domestic court systems of individual countries.

## The International Court of Justice

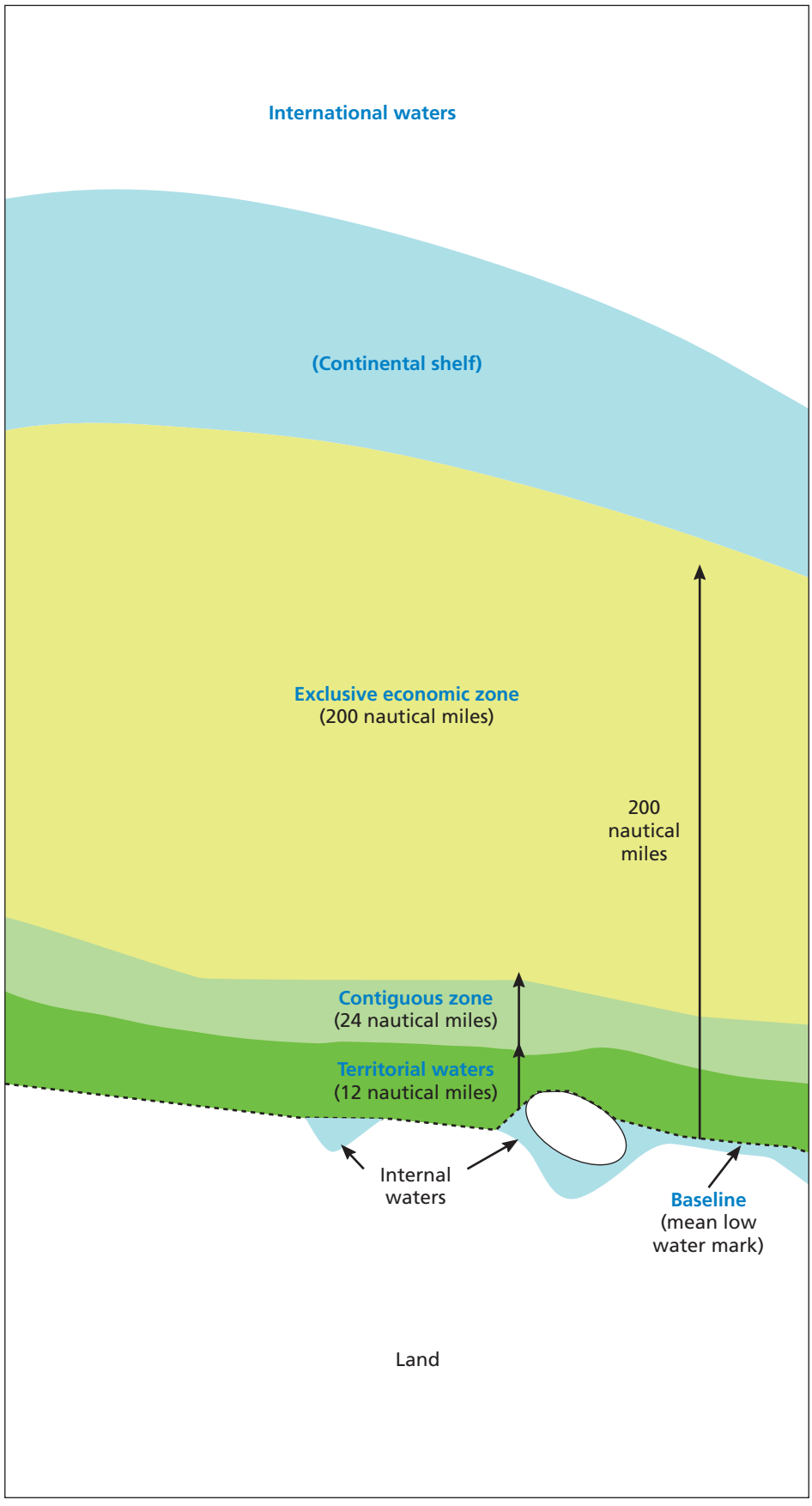
The major court that hears international cases is the International Court of Justice (ICJ) based at The Hague in the Netherlands. It is able to decide cases brought to it by countries in dispute over an issue of international law, as well as provide advisory opinions on international legal matters. It can only deal with disputes between countries, so individuals and other organisations do not have access to it. The ICJ has occasionally dealt with environmental disputes. Most recently, in 2006–07 it was called on to deal with a dispute between Uruguay and Argentina over the risk of pollution from the proposed building of pulp mills on the Uruguay River, which forms the boundary between the two countries. In 1974, Australia and New Zealand brought proceedings against France in the ICJ over the testing of nuclear weapons in the South Pacific Ocean, and the risk of environmental damage from radioactive fallout.

## The Permanent Court of Arbitration

The Permanent Court of Arbitration (PCA) is not a court in the normal sense. It is an administrative organisation that offers dispute resolution services to individuals, organisations and countries on issues of international law. In 2001, the PCA established the *Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment*. These rules provide a framework by which parties to a dispute relating to an environmental treaty can agree to an arbitration process through the PCA. Governments, environmental organisations and individuals can use this process, provided all parties agree to be bound by the decision of the arbitrator. In addition, the PCA also introduced *Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment* in 2002, allowing for a conciliation process to be used as a means of resolving disputes relevant to environmental issues. While both of these sets of optional rules provide a useful method for resolving environmental disputes, participation by both sides is voluntary.

## The law of the sea and domestic courts

The United Nations Convention on the Law of the Sea 1982 identifies a number of different zones that a country can claim to have degrees of control over. For example, coastal waters that extend three nautical miles beyond the low tide level are controlled by Australia and, in particular, the Australian states. Exclusive economic zones (EEZ) are defined under the convention as areas where a country has control of all natural resources within the EEZ, and the right to engage in other activities, such as the production of energy from wind, wave or tidal power. The following diagram shows how different zones are defined according to their distance from the coast.




**International waters** are those outside the control of any nation. All nations are expected to obey international law in these waters.

The **continental shelf** is the natural extension of the land, usually under relatively shallow water. It is usually assumed to be 200 nautical miles, but can extend up to a limit of 350 nautical miles, if the natural seabed formation continues outside this limit.

An **exclusive economic zone (EEZ)** is an area beyond territorial waters up to a limit of 200 nautical miles from the low tide level. The coastal nation has the sole exploitation rights over natural resources.

The **contiguous zone** is a zone outside territorial waters, up to a limit of 24 nautical miles from the low tide level. Within this zone a country can enforce its customs, immigration, quarantine or sanitation laws.

**Territorial waters** are an area up to 12 nautical miles from the low tide level. All domestic laws of the coastal nation apply in this area.

The **baseline** for measuring the different zones is the low tide mark on the coast.

eBookplus

Use the **United Nations Convention on the Law of the Sea 1982** weblink in your eBookPLUS to find out more about who has the power to control the seas.

Who has the power to control the seas? The United Nations Convention on the Law of the Sea 1982 identified different zones depending on how many nautical miles they are from the land.

## Australia commences legal action against Japan in the ICJ

On 31 May 2010, Australia commenced legal action against Japan in the International Court of Justice over the issue of whaling. In its documentation, Australia claimed that Japan had illegally carried out whaling activities inside the boundaries of the Southern Ocean whale sanctuary, as declared in 1994. Australia also claims an exclusive economic zone (EEZ) over the seas adjacent to its Antarctic territories, and alleged that Japan had breached international law by whaling in this EEZ. Japan does not recognise Australia's claim to this EEZ. The Australian case also claims that Japan is in breach of the Convention on International Trade in Endangered Species 1973 by hunting some endangered species of whales; and that Japanese whaling also breaches the Convention on Biological Diversity (1992).

Action before the International Court can take a long time to be resolved. The Court ruled that Australia had until 9 May 2011 to file all its written evidence, and that Japan had until 9 March 2012 to file its written response to Australia's claims. Each side then has the opportunity to present verbal arguments to the Court. Cases before the ICJ typically take anywhere between three and ten years to be concluded, so a quick decision is unlikely.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### TEST your understanding

1. Explain the role of the ICJ in resolving disputes under international environmental law.
2. In what ways has the PCA moved to establish itself as a body suitable to deal with disputes under international environmental law?
3. Explain why conventions such as the United Nations Convention on the Law of the Sea 1982 are necessary.

### APPLY your understanding

4. In January 2008, the Humane Society took action in the Federal Court and secured an injunction against whaling in the Australian whale sanctuary in Antarctica. Prepare a report on the *Japanese Whaling Case (Humane Society International Inc v. Kyodo Senpaku Kaisha Ltd* [2008] FCA 3). Include the background to the case, arguments presented and the court's decision in your report.
   Use the ***Japanese Whaling Case*** weblink in your eBookPLUS to gather information.
5. Read the case study 'Australia commences legal action against Japan in the ICJ'. Australia claims that Japan has breached many conventions.
   (a) Explain the conventions that Australia claims have been breached.
   (b) Conduct an internet search to find the latest update on this case.

# EXTEND AND APPLY YOUR KNOWLEDGE:
Environmental law in action

## State environmental law

### Petrol spill leads to heavy fine for transport company

In February 2010, Scott's Transport Industries was fined $80 000 in the Ringwood Magistrates' Court after pleading guilty to a charge of polluting waterways and making the water harmful to wildlife. The fine is to be used to support two community environmental projects.

The court heard that 7200 litres of unleaded petrol entered stormwater drains at a service station in Wantirna when a delivery pipe beneath a petrol tanker was ruptured and the entire contents of one of the tanker's compartments were spilt. The incident occurred because a chassis rail on the prime mover did not comply with the minimum clearance specifications of Australian Standards.

The petrol made its way through the stormwater drains to the nearby Dandenong Creek and killed nine ducks and a number of fish. Petrol fumes also affected two police officers who had been stationed at the creek to keep members of the public away from the dangerous spillage.

Of the $80 000 penalty, $55 000 will be spent on a project aimed at researching the platypus habitat in the Yarra River and improving the environment to encourage an increase in platypus populations around the river. The remaining $25 000 goes to Darebin Creek Management Committee to support an educational program involving local schools participating in the conservation and restoration of the creek.

### QUESTIONS

1. Why was the pollution in the creek considered to be the fault of the transport company rather than the owner of the service station?
2. Explain how the money collected from the fine in this case is being used to help the environment.
3. Many of the creeks and waterways around Melbourne and other Victorian towns and cities are at risk of environmental degradation. Local councils and environmental groups have established many programs to protect and restore the environment around these waterways. Research **one** such project and write a brief report outlining:
   - the environmental problems identified in the waterway
   - the action being taken to protect and conserve the waterway
   - the source of funding for the project
   - the degree of success achieved so far.

## Commonwealth environmental law

### Officers seize illegal wildlife

Over 100 specimens of exotic fish, turtles and toads were seized by environment investigations officers during searches on properties in Sydney in August 2009. It is believed that the two men who were in possession of these imported animals were planning to sell them over the internet. The seized specimens included fire-bellied toads, red-eared slider turtles and exotic fish species, such as snakeheads and freshwater sharks.

Imported exotic animals such as the cane toad have wreaked havoc on the environment in northern Australia.

Under the EPBC Act, it is illegal to import these types of fish, reptiles and amphibians into Australia, as they can cause enormous environmental damage. If they escape into the natural waterways they can compete with native species for food and introduce diseases into the habitat of native animals. Many of these species are dangerous to humans. The fire-bellied toad can be toxic to children, and fish such as the adult snakehead are very aggressive and can inflict a serious bite.

The Act imposes fines of up to $110 000 or a jail term of up to 10 years for the illegal importation of exotic species into Australia.

### QUESTIONS

1 Why are there such strict controls over the importation of wildlife from overseas?
2 Select one of the introduced species listed below and write a report explaining:
   (a) how it was introduced to Australia
   (b) why it became an environmental problem
   (c) legislative and other action being taken by government and other environmental bodies to control the particular pest
   (d) level of success of the action taken.

- cane toad
- feral camel
- feral horse
- European wild rabbit
- feral cat
- feral donkey
- European red fox
- feral goat
- feral pig

## International environmental law

### The *Gabcikovo-Nagyramos Dam Case (Hungary v. Slovakia)* 1997

In 1977, Hungary and Czechoslovakia signed a treaty to cooperate in building dams in Hungary and Slovakia to produce electricity and control flooding of the Danube River. In 1989, Hungary decided not to continue with the project on environmental grounds, fearing that the project could affect the environment and the quality of drinking water in its capital, Budapest. In 1993, Czechoslovakia split into two countries, the Czech Republic and Slovakia. The Slovakian government began proceedings against Hungary in the International Court of Justice (ICJ), insisting that Hungary carry out its treaty obligations and complete the project. The ICJ found that Hungary should fulfil its part of the treaty, and ordered both parties to negotiate to ensure all aspects of the construction conformed to best environmental practice.

#### QUESTIONS

1. Under international law, what were the grounds for the legal action Slovakia took against Hungary?
2. How did the ICJ resolve the issue in a way which could satisfy the concerns of both parties?
3. In light of the above case study, is it appropriate for one party to break a legally binding agreement if they discover, after a period of time, that there would be adverse environmental consequences? Write your opinion on this issue and justify your point of view. Consider the following issues:
   - What happens if the other party is not prepared to negotiate a new agreement?
   - What if there are no available solutions that will solve the environmental problems?

   Prepare and conduct a class debate on this issue.

## Assessment task — Outcome 3

On completion of this unit the student should be able to explain the area of environmental law, and discuss the legal system's capacity to respond to issues and disputes related to environmental law.

### Practise your key skills

Use this assessment task to practise the following skills:

- define key legal terminology and use it appropriately
- research and gather information about legal cases and issues, using print and electronic media
- explain the current law and discuss related legal issues for the selected area of law
- discuss the ability of the law to respond to demands for change
- explain the different methods of dispute resolution to resolve legal problems.

### Report

You are to prepare a report on an environmental issue and how the law has responded to that issue. You can select the issue from any area of state, Commonwealth or international law. You will be required to present a report to the class, making use of visual media, such as a series of photographs or a PowerPoint presentation. A written copy of the text of your report should also be submitted to your teacher for assessment. Your report should include the following:

- appropriate use of legal terminology and concepts
- evidence of research from a variety of sources
- a clear understanding of the types of legal response to the issue and the effects of these — legislation, regulations, etc.
- the level of success of the law in addressing the environmental issue
- examples of cases that have been decided under the particular environmental laws.

Issues could include air quality, protection of waterways, land degradation such as increasing salinity, endangered species protection, biodiversity, protection of unique ecosystems and the like.

### Tips for completing the report

Use this checklist to make sure you write the best report you possibly can.

| Performance area | Yes | No |
|---|---|---|
| **Define key legal terminology and use it appropriately.**<br>**Research and gather information about legal cases and issues, using print and electronic media.** | | |
| Use of a variety of different sources, and preparation of a bibliography. | | |
| **Explain the current law and discuss related legal issues for the selected area of law.** | | |
| Include specific legislation (state, federal, etc.), other regulations, or treaties and conventions in the case of an international issue. | | |
| **Discuss the ability of the law to respond to demands for change.** | | |
| Has the law changed or developed to meet changing community expectations? | | |
| **Explain the different methods of dispute resolution to resolve legal problems.** | | |
| Does the legal system allow for alternative dispute resolution such as mediation or conciliation, as well as action through the courts? | | |

## Chapter summary

- **Victorian environmental law**
  - Although major responsibility for environmental protection lies with state governments, Commonwealth and local governments have responsibilities that complement state responsibilities.
  - Victorian environmental law is administered by the DSE and a number of government agencies with specific responsibilities.
  - The EPA has the responsibility for monitoring air quality in Victoria. Tight regulations have seen improvements in Melbourne air quality since the mid-1980s.
  - The DSE and a number of other government agencies are responsible for meeting the community's expectations in relation to water supply and usage.
  - The EPA has responsibility for dealing with issues of waste disposal that may affect natural waterways.
  - Waste management and recycling activities are regulated by the EPA, local councils and Sustainability Victoria.
  - Important cultural sites are protected under Victoria's heritage legislation.

**Legal principles relevant to the selected area/s of law**

- **Environmental issue — forest management**
  - Forest management is a controversial issue, with differing views on how forest resources should be utilised.
  - Management of Victoria's forests varies according to the legal ownership of the land on which they occur.
  - National parks are created to conserve examples of different ecosystems in their natural state.
  - State forests have a variety of purposes, including sustainable timber harvesting regulated by a code of practice.
  - Harvesting of timber in state forests is carried out by a government-owned agency, overseen by various regulations and audits, but remains a controversial issue.

**A contemporary issue for the selected area/s of law**

- **State environmental law responds to change**
  - Environmental laws attempt to deal with possible future developments, as well as reacting to the consequences of environmental and natural disasters.
  - The law places restrictions on the clearing of native vegetation to ensure the health of our water catchment areas, maintain biodiversity and to protect endangered species.
  - As a result of the bushfires in February 2009, government regulations have been changed to introduce the '10/50 right' to clear native vegetation around dwellings, and around boundary fences.

**The capacity of the legal system to respond to demands for change**

- **Resolving disputes arising under state environmental law**
  - The EPA has the primary task of enforcing environmental standards.
  - EREPs are designed to assist businesses to reduce their water and energy usage.
  - Any modification of a business premises likely to have an environmental impact requires a works approval from the EPA, and the completed project requires a licence. The regulations allow for considerable public comment on the process.
  - The EPA enforces environmental laws through the issuing of pollution abatement notices, which direct an individual or business to take specific action to remove the problem.

**Methods and institutions for resolving disputes arising under the selected area/s of law**

- **Commonwealth environmental law**
  - Commonwealth environmental law deals with seven specific matters of national importance.
  - The federal Minister for the Environment has the power to order an environmental impact assessment of any project likely to involve any of the matters covered by Commonwealth environmental legislation.

**Legal principles relevant to the selected area/s of law**

– The federal government has the power to protect world heritage sites and endangered species, and to control any trade in wildlife or wildlife products.

**A contemporary issue for the selected area/s of law**

- **Commonwealth environmental issue — the Murray–Darling Basin**
  - The Murray–Darling Basin is the most significant internal waterway in Australia, but for most of our history there has been no coordinated environmental protection of this important area.
  - The removal of water from rivers in the Murray–Darling Basin has severely stressed the basin ecosystem.
  - Commonwealth legislation has established the Murray–Darling Basin Authority with powers to develop a strategic plan for the environmental health of the rivers in the basin.
  - The MDBA has the power to purchase water rights from farmers so that environmental flows can be returned to the rivers.

**The capacity of the legal system to respond to demands for change**

- **Commonwealth environmental laws respond to change**
  - As with other areas of law, the Commonwealth Parliament has gained powers to override state legislation in areas of environmental or heritage significance.
  - The courts have interpreted Commonwealth legislation very broadly in cases brought to further the goals of environmental protection.

**Methods and institutions for resolving disputes arising under the selected area/s of law**

- **Resolving disputes under Commonwealth environmental law**
  - Officers of the relevant government department can monitor compliance with environmental legislation, and individuals have the power to initiate legal action to achieve environmental aims.
  - The federal Minister for the Environment and officers of the department have a number of different administrative powers to enforce provisions of the EPBC Act.
  - Officers of the Commonwealth department can take civil action against any party causing environmental harm through negligence or recklessness, with a variety of civil remedies applicable in the case of a successful action.
  - When environmental harm has been intentional, the DPP can initiate criminal action against an offender, with serious fines applying in the case of a successful prosecution.
  - Decisions by the Minister for the Environment can be challenged in the Federal Court, and, if successful, can lead to a change in the detail of the decision, or the complete overruling of that decision.

**Legal principles relevant to the selected area/s of law**

- **International environmental law**
  - The main source of international law is found in treaties and conventions that countries sign and ratify, and agree to be bound by.
  - Australia has signed and ratified all of the major international environmental treaties and conventions, and has passed legislation to put them into effect within national borders.

**A contemporary issue for the selected area/s of law**

- **International environmental issue — whaling**
  - While uncontrolled whaling has been carried out for hundreds of years, a decline in whale numbers led to regulation through an international convention in 1946.
  - The International Whaling Convention was originally set up to manage whaling, but has more recently been used to restrict whaling as a commercial activity.
  - The International Whaling Convention has a number of exemptions that allow signatories to continue whaling legally, despite the moratorium on commercial whaling.

**The capacity of the legal system to respond to demands for change**

- **International environmental law responds to change**
  - Most countries have been prepared to respond to environmental threats with new international law.
  - A realisation that CFCs were causing depletion of the ozone layer led to international action to reduce the use of CFCs.

- The international community has widely agreed to phase out the use of CFCs in order to protect the ozone layer.
- A recognition of the danger to the climate of excessive emissions of greenhouse gases led to the development of the UNFCCC, aiming to stabilise the presence of these gases in the atmosphere.
- The Kyoto protocol of 1997 set targets for advanced industrialised countries to reduce their greenhouse gas emissions.
- Additional conferences in recent years have attempted to provide a framework for reductions in greenhouse gas emissions after 2012.

- **Resolving disputes under international environmental law**
  - The International Court of Justice has occasionally heard disputes between countries on environmental matters.
  - Countries, organisations and individuals can agree to take environmental disputes to the PCA for conciliation or arbitration.
  - International law recognises a country's sovereignty over areas of the open seas adjacent to that country's coastline.

## Examination questions

Now that you have completed your revision it is time to test your own knowledge.

### Question 1

Identify two activities carried out by the EPA in Victoria, and explain the way in which each of these helps protect the environment. **(3 + 3 = 6 marks)**

### Question 2

Describe two activities that are legally permitted in a state forest that are not permitted in a national park. **(2 + 2 = 4 marks)**

### Question 3

Explain four of the issues of national significance that are covered by the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*. **(4 × 2 = 8 marks)**

### Question 4

Outline the steps that must be taken when an activity is identified as a 'controlled action' under the Environment Protection and Biodiversity Conservation Act. **(8 marks)**

### Question 5

Explain one example of a case where Commonwealth environmental law has been seen to override state law. **(5 marks)**

### Question 6

Under what circumstances could officers of the federal Department for the Environment begin civil action against a defendant? **(4 marks)**

### Question 7

Identify one international environmental treaty that Australia has agreed to, explain the aim of that treaty, and describe the action taken within Australia to put those aims into action. **(3 + 3 + 3 = 9 marks)**

### Question 8

Explain two weaknesses in the International Whaling Convention that have made it difficult to enforce an international moratorium on whaling. **(3 + 3 = 6 marks)**

**(Total 50 marks)**

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### Examination techniques tip

You might be given 15 minutes reading time if you are sitting an exam set by your teacher. Active use of the reading time means deciding which questions you are most confident with and will answer first, as well as analysing each question to determine the exact information required. Do not simply read the exam through once and wait for the instruction to start writing.