



Environment Institute
of Australia and
New Zealand Inc.

Local Government and Environment Committee

**Environment Canterbury (Transitional Governance
Arrangements) Bill**

19 November 2015



Executive Summary

The Environment Institute of Australia and New Zealand Inc. (EIANZ) is an Australasian institute which represents environmental practitioners committed to the protection, management and enhancement of the environment for future generations through leadership in avoidance and mitigation of harms and adaptation to change.

On all issues and all projects the Institute advocates ethical good practice and environmental management delivered by competent and well credentialed environmental practitioners.

As an organisation committed to the protection and enhancement of the environment for future generations, the EIANZ supports:

- 1) the requirement (section 23) for Environment Canterbury to have particular regard to the vision and principles of the Canterbury Water Management Strategy when considering any proposed plan or regional policy statement.
- 2) the requirement (section 27) for Environment Canterbury to report on the progress made in achieving the outcomes sought under the Canterbury Land and Water Regional Plan and any other plans relating to the management of fresh water within the region and progress on the implementation of the Canterbury Water Management Strategy.

As an organisation committed to fostering good practice based on ethical, objective and well-founded environmental practice and on scientific evidence, the EIANZ is concerned that:

- 3) the current wording of the Bill (section 24) reduces the opportunity for technical review of the quality of advice available to RMA Commissioners. This could be addressed by making greater use of section 41 of the RMA by RMA Commissioners to obtain independent reviews by suitably qualified persons where there is conflicting advice.
- 4) the current wording does not give sufficient direction to the Commissioners on the need to give due weight to advice from the Zone Committees who are informed by local knowledge and technical expertise in the making of their recommendations.

1. Environment Institute of Australia and New Zealand (EIANZ)

The EIANZ champions good science as the foundation of good practice environmental management.

The EIANZ is the leading professional body for environmental practitioners in Australia and New Zealand, promoting independent and interdisciplinary discourse on good practice environmental management, and holding its members accountable to the EIANZ *Code of Ethics and Professional Conduct*.

The EIANZ is concerned to ensure that the provisions in the Environment Canterbury legislation do not undermine or detract from the use and quality of scientific data sought in the making on decisions on environmental effects and that the legislation provides strong guidance on the need for the Commission to give priority in its decision-making to the protection and enhancement of the region's freshwater resources for future generations.

2. Consideration of Section 41 Reports by RMA Commissioners

Under section 24 there is no provision for submitters to seek a review of Commissioner's decisions by the Environment Court and only on cases of law can the decisions of Commissioners be referred to the High Court. It is therefore very important that decisions made by the Commissioners are robust, drawing on the best technical information available regarding potential effects on the natural environment.

In reaching their decisions under the RMA, the Commissioners will have to weigh the merits of applicant's and submitters' arguments. As has been the case in previous years when there are opposing points of view, the Commissioners will have to decide between competing technical arguments. In such cases, the RMA (under section 41) allows hearing commissioners to seek independent advice.

EIANZ recommends that when there are differences between applicant's evidence and submitters' evidence Commissioners are required to use section 41 to obtain advice from a "suitably qualified professional" which should be defined in the legislation as it is in the Contaminated Land Act. The term "suitably qualified professional" has already been adopted in other Australasian jurisdictions (Refer to Appendix 1).

Further EIANZ recommends that the Commissioners be required to give weight to this advice in reaching their decision and when deviating from that advice be required to provide their reasons for doing so.

Our submission on this point is informed by previous experience of commissioner decisions. In the Central Plains Irrigation hearing for example, the commissioners did seek independent advice under section 41. Advice was sought but this advice was largely ignored in reaching their decision. That advice indicated that:

- several nitrogen thresholds were likely to be exceeded: nitrates in drinking water was already in excess of the nitrate health standard in 5% of groundwater monitoring wells and the effect of Central Plains development was to increase this percentage;
- the groundwater-fed streams exceeded the periphyton and macrophyte guidelines for nutrients and the Central Plains Scheme would make this worse;
- the nitrate toxicity in groundwater-fed streams was above the ANZECC Guidelines criteria and would be increased by Central Plains; and,
- the increased groundwater flow and increased nitrate levels would increase the Trophic Level Index for Te Waihora Lake Ellesmere from 7 to 7.2 when the TLI goal for the lake is 6.0.
- even without Central Plains, nitrate levels in the catchment would get worse as effects on groundwater from current land use intensification eventually reached the groundwater-fed streams and Te Waihora Lake Ellesmere.

In their decision, the RMA Hearing Commissioners stated they had considered the advice provided in the Section 41 report but they did not explain why the matters raised in that report failed to influence their decision which was to approve the application.

EIANZ submits that:

- i. Greater use of and greater weight be given to Section 41 advice as RMA hearing commissioners' decisions cannot be appealed on technical grounds.**
- ii. Only suitably qualified professionals should be commissioned to provide Section 41 advice (This term has been adopted in the legislation relating to the treatment and management of contaminated land. Information about the definition and use of the term "suitably qualified professional" in New Zealand and some Australian states is attached in Appendix 1).**

3. Recommendations from Zone Committees

The second point we wish to make is in relation to recommendations from Zone Committees. These recommendations are from a diverse range of stakeholders and informed by technical experts and local knowledge. Where the advisors are suitably qualified professionals, and the advice is based on sound scientific

evidence and the experts are in agreement, then these recommendations should be adopted by the Commission unless a deviation from that advice can be justified by sound scientific evidence. We note that in the case of the Hurunui Waiau River Regional Plan for example, the ECan commissioners increased the allowable nitrate loadings in the Hurunui catchment to 20% more than the level recommended by the Hurunui Waiau Zone Committee. That recommendation was based on comprehensive consideration of the available scientific evidence and alternative future scenarios.

EIANZ submits that:

- iii. In cases where the ECan commissioners' decisions amend the recommendations made by Zone Committees, the Commission be required to report publically via the decision report the basis for their decision to amend those recommendations.**

4. Strategic Framework

The EIANZ strongly supports the requirement under Section 23 for Environment Canterbury to have particular regard to the Vision and Principles of the Canterbury Water Management Strategy (Schedule 3) in reaching its decisions. The primary principles of that strategy clearly state that water must be managed in a way which ensures its sustainability and that the environment, customary use, community supplies and stock-water must be given first priority.

The primary principles also list as a priority, "*further development of scientific knowledge of the region's water resources and the impacts of climate change*".

Actual and potential cumulative effects arising from the taking and use of water is also listed as a principle to guide decision-making and, when information is uncertain, the principles require a cautionary approach to be taken.

EIANZ strongly supports all of these principles as being fundamental to good practice environmental management.

5. Conclusion

As a leading professional body representing environmental practitioners in Australia and New Zealand, the EIANZ advocates ethical good practice in environmental management delivered by competent and well credentialed environmental practitioners. To that end, our submission on this Bill focuses on the way in which decisions affecting the environment are supported by good science delivered by competent, ethical professionals.

EIANZ therefore supports:

- Section 23 of the Bill, which requires Environment Canterbury to have particular regard to the vision and principles of the Canterbury Water Management Strategy when considering any proposed plan or regional policy statement.
- Section 27 of the Bill, which requires Environment Canterbury to report on the progress made in achieving the outcomes sought under the Canterbury Land and Water Regional Plan and any other plans relating to the management of fresh water within the region and progress on the implementation of the Canterbury Water Management Strategy.

EIANZ is concerned that:

- Section 24 of the Bill has the effect of reducing the opportunity for technical review of the quality of advice available to RMA Commissioners. This could be addressed by making greater use of Section 41 of the RMA by RMA Commissioners to obtain independent reviews by suitably qualified persons where there is conflicting advice.

EIANZ recommends that the wording of this section be amended to make this a requirement in the event of conflicting advice.

- The current wording of the Bill does not give sufficient direction to the Commissioners on the need to give due weight to advice from the Zone Committees who are informed by local knowledge and technical expertise in the making of their recommendations.

EIANZ recommends that a new section be added which states that in cases where the ECan commissioners' decisions amend the recommendations made by Zone Committees, the Commission be required to report publically the basis for their decision to amend those recommendations.



Michael Chilcott FEIANZ CEnvP
President, EIANZ

APPENDIX 1

LEGISLATION / REGULATIONS

Concerning Suitably Qualified Persons and Suitably Qualified and Experienced Persons

NEW ZEALAND

Relevant category: Contaminated Land

2011-12-21: The New Zealand National Environmental Standard (NES) for contaminated land has identified CEnvP as one method for assessing a suitably qualified and experienced practitioner.

Draft Users' Guide: National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health as follows:

"One method for assessing whether someone is a 'suitably qualified and experienced practitioner' is to refer to existing professional bodies that currently certify New Zealand based environmental professionals. The requirement for being "suitably qualified and experienced" would apply to those members with demonstrated contaminated land experience. Examples of such professional bodies are:

- The Institution of Professional Engineers New Zealand (IPENZ) – see www.ipenz.org.nz
- The Certified Environmental Practitioner (CEnvP) scheme run by the Environment Institute of Australia and New Zealand (EIANZ) – see www.cenvp.org."

Reference: Ministry for the Environment. 2011. Draft Users' Guide: National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health. Wellington: Ministry for the Environment. <http://www.mfe.govt.nz/publications/rma/draft-users-guide-nes-for-assessing-managing-contaminants-in-soil/>

AUSTRALIA – FEDERAL

Environment Protection & Biodiversity Conservation Act 1999

2011-08-25: The Australian Government has published its response to the Report of the Independent Review of the Environment Protection & Biodiversity Conservation Act 1999.

The Review put forward 71 recommendations, one of which was to develop a national Code of Conduct for environmental consultants, and create a unit to enforce good environmental practice. The Government Response was as follows:

"The government recognises that environmental industry-based certification schemes and voluntary codes already operate in Australia. An example of an industry-based certification scheme is the Certified Environmental Practitioner Program, which is an initiative of the Environment Institute of Australia and New Zealand, a professional body of environmental practitioners in Australasia. This program assesses environmental professionals in competency criteria of training, experience, professional conduct and ethical behaviour, and provides industry-wide accreditation."

Reference: Australian Government Department of Sustainability, Environment, Water, Population and Communities, "Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999", Commonwealth of Australia, 2011.
<http://www.environment.gov.au/epbc/>

Section 133 of the Environment Protection and Biodiversity Conservation Act 1999
Potentially relevant for all certification categories:

Persons who may take action covered by approval

(2A) An approval granted under this section is an approval of the taking of the action specified in the approval by any of the following persons:

(a) the holder of the approval;

(b) **a person who is authorised, permitted or requested by the holder of the approval, or by another person with the consent or agreement of the holder of the approval**, to take the action.

Section 363 of the Environment Protection and Biodiversity Conservation Act 1999
Resolving disagreement between land council and Director over implementation of plan.
Potentially relevant for all certification categories:

Minister to resolve disagreement

(1) If the Chair or Chairperson of a land council for indigenous people's land in a jointly managed reserve and the Director disagree about whether the Director is exercising the Director's powers and performing the Director's functions consistently with a management plan in operation for the reserve:

(a) the Director must inform the Minister; and (b) the Minister must appoint a person the Minister considers to be **suitably qualified** and in a position to deal with the matter impartially to inquire into the matter

Section 364 of the Environment Protection and Biodiversity Conservation Act 1999
Resolving disagreement between Director and Board over implementation of plan.
Potentially relevant for all certification categories

(1) The Director must inform the Minister if the Director believes that: (a) a decision of a Board for a Commonwealth reserve is likely to be substantially detrimental to the good management of the reserve; or (b) a decision of a Board for a Commonwealth reserve is contrary to a management plan in operation for the reserve.

(2) The Minister must take the steps he or she thinks fit to resolve the matter.

(3) If the Minister cannot resolve the matter, the Minister must appoint as an arbitrator to inquire into the matter a person whom the Minister thinks is **suitably qualified** and in a position to deal with the matter impartially

Section 369 of the Environment Protection and Biodiversity Conservation Act 1999
Resolving disagreements between Director and Board in planning process.
Potentially relevant for all certification categories:

(1) The Director and the Board for a Commonwealth reserve must inform the Minister if they cannot agree on: (a) the content of a management plan they are preparing for the reserve; or (b) any changes to be made following comment made in response to an invitation to comment on a draft management plan for the reserve; or (c) whether the Director should give a management plan for the reserve to the Minister for approval (either initially or after the Minister has given the plan back to the Director with suggestions under paragraph 370(3)(b)).

(2) If the Minister is advised by the Director and a Board of a disagreement, the Minister must take the steps the Minister thinks fit to resolve the disagreement.

(3) If the Minister cannot resolve the disagreement, the Minister must appoint as an arbitrator to inquire into the matter a person whom the Minister thinks is **suitably qualified** and in a position to deal with the matter impartially

Section 390 of the Environment Protection and Biodiversity Conservation Act 1999

Special rules to protect Aboriginal interests in planning process.

Potentially relevant for all certification categories:

(7) If the Minister receives comments from the Chair or Chairperson of a land council for indigenous people's land in the reserve and the Minister is satisfied that there is a substantial difference of opinion between the Chair or Chairperson and the Director over the plan:

(a) the Minister may appoint a person the Minister considers to be **suitably qualified** and in a position to deal with the matter impartially to inquire into the matter

AUSTRALIAN CAPITAL TERRITORY (ACT)

Environment Protection Act 1997, last revised 2014. Division 9.2 Environmental audits, Section 75

Certain auditors to be approved:

Depending on the type of environmental audit required, this Division of the Act is potentially relevant for all certification categories:

(1) An environmental audit for section 76 or section 78 must be conducted by a person approved by the authority to conduct the environmental audit.

(2) The authority must not approve a person under subsection (1) unless satisfied that the person—

(a) **has appropriate qualifications and experience** to enable the person to conduct the audit; and

(b) meets the prescribed criteria.

QUEENSLAND

2011-05-01: Queensland Government Department of Public Works recognises Certified Environmental Practitioners in its prequalification system for building industry consultants.

Environmental Protection Act 1994 and Environmental Protection Regulation 2008

Schedule 8 of the Environmental Protection Regulation 2008 identifies the EIANZ as a prescribed organisation for the purposes of Section 115A of the Regulation and that in turn points to Sections 564 and 572(b)(ii) of the Environmental Protection Act 1994. Section 564 of the Act provides a **definition of a Suitably Qualified**

Person (SQP) for performing a regulatory function and section 572 sets out the criteria for deciding an application for approval as an auditor. Both sections refer to being a member of a prescribed organisation.

NEW SOUTH WALES

On 7 March 2014, the NSW Government finalised an amendment to the State Environmental Planning Policy (Port Botany and Port Kembla) 2013, to apply the same planning controls to the Port of Newcastle that already apply at Port Botany and Port Kembla. As a consequence of the amendment, the State Environmental Planning Policy (Port Botany and Port Kembla) 2013 was renamed to the **State Environmental Planning Policy (Three Ports) 2014** ('Three Ports SEPP').

All complying development at Port Botany and Port Kembla relating to bulk liquid storage tanks requires a hazard analysis, fire safety study, and hazard and operability study. Hazard studies must be completed by a **qualified person** approved by the Secretary for the Department of Planning and Environment. The Department is inviting applications from suitably qualified persons to apply to be approved to prepare hazard analysis and/or fire safety studies in relation to bulk liquid storage tanks (modifications to pipelines and flow rates) at the Port of Newcastle.

Section 89E of the Environmental Planning and Assessment Act 1979

Development permit granted under **Section 89E of the Environmental Planning and Assessment Act 1979**:

(p10): Extraction Plans C5. The Applicant shall prepare and implement an Extraction Plan for second workings within each longwall mining domain to the satisfaction of the Director-General. Each extraction plan must: (a) be prepared by **suitably qualified and experienced persons** whose appointment has been endorsed by the Director-General;

(p17): Surface Water Management Plan D15. The Applicant shall prepare and implement a Surface Water Management Plan for the development to the satisfaction of the Director-General. This plan must be prepared in consultation with NOW and EPA by **suitably qualified and experienced persons** whose appointment has been endorsed by the Director-General, and submitted to the Director General for approval within 6 months of the date of this consent.

Local Government (Environmental Upgrade Agreement) Act 2010 (NSW); and Local Government Amendment (Environmental Upgrade Agreements) Regulation 2011 (NSW) Guidelines for Environmental Upgrade Agreements

NSW Government and Councils provide loans called 'Environmental Upgrade Agreements' for the financing of sustainability improvements to existing buildings. The loans require 'Verification that the works result in an environmental improvement, as provided by a **suitably qualified expert**'.

TASMANIA

In Tasmania, contaminated sites are regulated under the Environmental Management and Pollution Control Act 1994 (EMPCA). Where a pollutant is released into the environment at levels that cause or are likely to

cause environmental harm, the person responsible must notify the Director, EPA. The assessment of contaminated sites must be in accordance with the NEPM (Assessment of Site Contamination) 1999 or as varied, which is a state policy. Contaminated site assessment involves a staged process of investigation and risk assessment undertaken by **suitably qualified and experienced consultants**. (EPA is the relevant agency.)

<http://epa.tas.gov.au/regulation/contaminated-sites>

Best practice environmental management is defined in Tasmania's ENVIRONMENTAL MANAGEMENT AND POLLUTION CONTROL ACT 1994.

VICTORIA

'Environmental significance overlay' is one type of Overlay provided by the Victoria Planning Provisions. Overlays are used as part of constructing Planning Schemes by each local government in Victoria. In combination with Zones which control land usage, Overlays are designed to control land development. Many of the environmental significance overlays use the term '**suitably qualified person**'.

This affects the relevant authorities which are the EPA and City Councils.

Purpose:

- To implement the *State Planning Policy Framework* and the *Local Planning Policy Framework*, including the *Municipal Strategic Statement* and *local planning policies*.
- To identify areas where the development of land may be affected by environmental constraints.
- To ensure that development is compatible with identified environmental values.

Example: Schedule 6 of the Environmental Significance Overlay section of the Moorabool Planning Scheme mentions an application requirement of "A land and environmental management plan prepared by a **suitably qualified person**".

NORTHERN TERRITORY

Environmental Assessment Act

The **Environmental Assessment Act** is administered by the Northern Territory Environment Protection Authority. The Environmental Assessment Act and Environmental Assessment Administrative Procedures set out a legal process for environmental assessment of proposed actions.

The same Environmental Assessment Administrative Procedures regulate the process that the Environment Protection Authority must follow in assessing a proposed action. The Administrator of the Northern Territory determines the content and any changes to the Environmental Assessment Administrative Procedures. The Environmental Assessment Act permits the Environmental Assessment Administrative Procedures to be varied from time to time.

The Environmental Assessment Administrative Procedures regulate the following:

- The responsibilities of the Environment Protection Authority when assessing the environmental impacts of projects.
- The assessment process that must be followed by the proponent when the Environment Protection

Authority directs a proponent to prepare either a Public Environmental Report or an Environmental Impact Statement.

The Environment Protection Authority must examine the final environmental impact statement in consultation with any advisory bodies it considers appropriate. Within 21 days of receiving the final environmental impact statement, the Environment Protection Authority may request further information from the proponent or request comments from a **suitably qualified person** or organisation regarding the environmental impact statement.