LOCAL GOVERNMENT Reporter

PLANNING, ENVIRONMENT, GOVERNANCE — LAW, REGULATION & POLICY

Volume 5 Number 7 Print Post Approved 255003/06255

Contents

Information contained in this newsletter is current as at March 2007

LexisNexis® Butterworths

The plastic bag — ban it or bury it?

Dr Juin Majumdar
CENTRE FOR DESIGN, RMIT UNIVERSITY
and **Margaret C Jollands**
SCHOOL OF CIVIL AND CHEMICAL ENGINEERING, RMIT UNIVERSITY

Plastic bags are indispensable in the modern lifestyle. They are lightweight, cheap, moisture-resistant and strong. For the convenience they offer, plastic bags are used very widely in the retail sector for carrying goods. But, plastic bags also take a long time to degrade and because of their widespread use, they are one of the biggest components of the litter problem. Also, they are potentially hazardous to the environment. For these reasons, plastic bags have been the subject of ongoing debate in recent years. Why consume so much plastic? How to go about reducing the litter problem? What are the effects on the ecosystem? Should plastic bags be phased out?

A variety of strategies have been proposed to address the problems of plastic bags ranging from recycling, to a levy to reduce consumption, to an outright ban. Industry groups have been fighting reactively to 'save' the plastic bag. Environmental group campaigns are now paying off as governments are espousing bag-use reduction strategies. In Australia, the Commonwealth, state and territory governments are addressing the issues of waste generation and management, and developing strategies to minimise/eliminate their environmental impact. A broad outline of the planning process and management strategies for the plastic bag litter problem is available in the *Inquiry Report on Waste Management*, by the Productivity Commission,[1] and the *Consultation Regulatory Impact Statement* by the Environmental Protection and Heritage Council (EPHC).[2]

Plastic shopping bags — the problem

The number of retail plastic bags used in Australia in 2002 was estimated to be 3.9 billion.[3] With so many bags being used, it is inevitable that bags will be littered. It was estimated that 60–80 million bags ended up in the litter stream, approximately 180 million bags were recycled and, the rest went to landfills. The environmental impacts of such a large amount of plastic bags are manyfold. They can take hundreds of years to break down. In the litter stream, the plastic bags are a visible nuisance because of their size, shape and colour; they can get fragmented and accumulate in places difficult to access for cleaning up and can enter the natural environment, causing damage to the ecosystem. The World Wildlife Fund Australia cites '[plastic bags] can take hundreds of years to break down, and they usually end up in landfill or in our oceans, contributing to the deaths of turtles and other marine creatures'.[4] The Productivity Commission also noted that plastic bags can be a problem at landfill sites and outdoor public places such as recreational parks and shopping precincts, and that plastic-bag litter has the potential to injure marine wildlife (including endangered species).

In addition to the problem of litter, other environmental impacts of plastic bags also need to be looked at.

So called 'greenhouse gases' contribute to global warming. They are produced by all industrial activities, especially the generation of electricity. Plastic bags are very lightweight, but even so, 4 billion bags consume at least 20,000 tonnes per year of plastic, which would produce 48,000 tonnes per year of CO2 equivalent.

Cumulative energy demand includes all energy use, such as fossil, renewable, electrical and feedstock. It tends to show the same trends as greenhouse gases. Resource depletion is calculated from the additional energy

required to extract resources (both mineral and fossil) due to depletion of reserves, leaving lower quality reserves behind. Another impact factor of materials is eutrophication, which refers to the emission of nitrates and phosphates into waterways. Contributions to this impact factor come from nitrogen oxides emitted into the air from electricity generation from coal and crop fertilisers.

Therefore, the issue of plastic bags and their alternatives needs to be looked at from both litter and environmental perspectives.

What is being done about it?

To combat the problem of litter and danger to marine environment, Australian Commonwealth, state and territory governments recently announced a goal to phase out plastic bags by the end of 2008.[5] The SA Government is 'committed to a phase-out of single use plastic shopping bags'.[6] The Victorian Government is planning to ban distribution of free plastic bags by large retailers in 2008, proposing a levy to minimise inefficient resource use and litter problem.[7]

At the local government level, a number of municipalities/towns in Australia have gone 'plastic bag free', Coles Bay in Tasmania being the first such town. According to Bag Smart, in 2004 there were 200 towns on the road to radical reduction in plastic bag use.[8] Keep Australia Beautiful offers a 'Plastic Bag Reduction Award', which was launched in 2006; Barwon Regional Waste Management Authority was the Victorian winner. This authority organised 90 per cent of traders in the Anglesea area to become 'plastic bag free', replacing them with paper or other types of bags, saving 200,000 plastic bags per year.[9]

Some retailers have taken the simple initiative to stop supplying plastic bags to shoppers. This has drastically reduced the number of plastic bags being used. A levy on plastic bags has achieved the same effect. A 10 cent levy on plastic bags at the Bunnings Hardware stores has reduced bag usage by 99 per cent.[10] A 50 cent levy on Lord Howe Island reduced waste by 86 per cent.[11] Similar benefits were also recommended by Allen Consulting Group to the Environmental Protection and Heritage Council in 2006.[12]

Industry groups have also been active in reducing plastic bag usage. In 2003, the Australian Retailers Association (ARA) Code of Practice was introduced in line with the waste triangle, 'Reduction Reuse Recycle'. Its aim was to reduce plastic bag usage by 50 per cent in two years through the voluntary compliance of retailers. This has been quite effective; supermarkets claimed to have reduced bag usage by 33 per cent in the first year, while 50 per cent of Group II retailers (those other than supermarkets) claimed to have reduced plastic bag usage by 50 per cent in two years. This has had a big effect: between 2002 and 2005 plastic bag usage has reduced from 7 billion to 4 billion per year.[13] However, some goals in the Code of Practice have not been met, and the ARA is concerned that a ban will come into effect. They say a ban on plastic bags would increase the impact on the environment, as paper bags have higher environmental impacts than plastic bags for most factors except litter.[14] Already 25 per cent of smaller retailers have switched to paper bags.[15]

The Productivity Commission's view is that a legislated levy, disposal fee or retailers' charge on bags may have adverse effects on consumers, and that these 'social' effects have not been accounted for in a triple bottom line approach. The fact that the big reduction in plastic bag usage between 2002 and 2005 has not translated into reducing the litter problem led them to conclude that there is no clear evidence that a ban or levy will deliver less litter. On this basis, they recommend that the best approach is to make litter legislation more effective by providing education programs, adequate infrastructure, and involving industry and community. The EPHC, in the *Consultation RIS*, is also considering these issues, and has categorised the possible courses of action into three broad groups:

- actions focusing on the litter problem;
- no further government intervention; and
- actions focussed on plastic bag consumption.

The Plastics and Chemicals Industry Association (PACIA) also rejects bans and levies on plastic bags. They advocate reuse, landfill and recycling. They propose that supermarkets should be encouraged to take back plastic bags for recycling. They don't recommend biodegradable plastic or paper bags, as these are not environmentally friendly, and reusable bags are not what many consumers want. PACIA suggests that the best solution is to use heavier plastic bags that are stronger and more reusable, and to take them back to supermarkets for recycling.

In Europe, a levy on plastic bags is one of the common measures to reduce plastic shopping bags. In Ireland, a levy was introduced in 2002 for single use plastic bags. This reduced plastic bag use between 90 and 95 per cent,[16] with a reduction in litter from 5 per cent to 0.2 per cent.[17] In Denmark, a packaging tax on retailers as early as 1994 led to a reduction in bag usage by 66 per cent.[18] BagSmart report that in Germany retailers charge for plastic check-out bags of their own accord without any government legislation in place: 'the shopping culture is that using plastic shopping bags to carry shopping is frowned upon by the community'.[19] *The Times* reports that even Singapore is moving to ban free plastic bags,[20] suggesting that their punitive littering laws are not keeping the island as clean as the government would like (fines of $200 for a littering offence and $1000 for littering chewing gum[21]).

Alternatives to plastic bags

So, what other options are there to combat the problems of plastic bags? Based on social and environmental considerations, a number of alternatives are being pursued at present. These include paper bags, 'green bags' and degradable bags.

Paper bags are the most common single use bag apart from plastic bags and require minimal behaviour adjustment by consumers. They are not as strong or as water-resistant as plastic bags. Paper recycling in Australia is well established and so paper waste can be recycled readily. The initial litter problem is less given that paper bags degrade more readily than plastic bags.

Plastic bag litter is a much more common sight than paper bag litter.

Reusable or 'green bags', although typically made of polypropylene, are an attractive option since these can be used repeatedly. The total amount of resource depletion can thus be substantially less than that for single-use plastic bags. However, achievement of environmental benefits from the use of 'green bags' needs change in consumer behaviour: it requires consumers to remember to take their reusable bags with them when they go shopping. Indeed, market research by Nolan ITU has shown that many consumers shop spontaneously, limiting use of already purchased reusable bags.[22]

Degradable plastic bags are an attractive option for consumers. With these bags, consumers do not need to change behaviour at all. They are similar in appearance to conventional plastic bags and function just as well. They are available free in shops, just like plastic bags. They can be reused as bin liners. Environmental benefits of degradable bags include lower consumption of non-renewable resources and some claim to have a faster rate of degradation in the litter stream.[23]

Looking beyond the litter issue

But what if the debate is widened beyond litter? What are the other environmental impacts of paper, reusable and degradable bags? This was the focus of a study carried out at the RMIT University Centre for Design. They used streamlined life cycle assessment (LCA) and considered environmental impact factors including greenhouse emission, resource depletion and eutrophication. The results were alarming.

Reusable 'green bags' had the best environmental impact performance (assuming they would be reused 100 times). Paper bags were the worst possible solution from all aspects. Degradable bags also scored badly. Depending on the material used, they had worse or, at best, equal environmental impacts compared to the conventional plastic bags.[24]

Degradable bags are supposed to degrade faster than conventional plastics. However, the mechanism for degradation varies a lot, and so the lifetime of littered bags varies as well. They may also affect recycling of conventional plastics through contamination. The Productivity Commission notes that there is much to learn about degradable bags, and they might also pose a threat to the land-based wildlife while they are degrading.

It is clear that consumer behaviour as well as a broad environmental assessment should be considered when choosing the best alternative.

It is clear that consumer behaviour as well as a broad environmental assessment should be considered when choosing the best alternative. All the alternatives to conventional plastic bags have shortcomings. A better understanding of each alternative's properties and infrastructure implications is essential to solve this complex problem.

The present situation

The waste hierarchy tells us to 'reduce reuse recycle' and then, dispose. The Productivity Commission suggests this is too simplistic, that government policy should be based on cost–benefit analysis and that the waste hierarchy is being used to justify populist policies rather than environmentally sound policies. There are clear cases where the waste hierarchy leads to higher rather than lower environmental damage. For example, in some areas bottles are reused by collecting, washing and refilling. The collection process is energy-intensive because of transporting the bottles, while the washing process is water-intensive

compared to production of new bottles. Refillable systems work well in many areas in the USA and Europe. However, in outback Australia, such a system may not be economical, as well as leading to negative environmental impacts.

'Reduce' options include voluntary reductions and legislated bans. Voluntary reductions have led to big decreases in the usage of plastic bags, and bans have led to bigger decreases. However, the effect on the amount of litter is unclear. Some reports suggest reduction in litter, others no effect. Where paper bags replace plastic, there may be a reduction in litter, but this is a case of substitution rather than reduction. There is also a negative impact on most environmental indicators such as global warming and use of non-renewal resources.

'Reuse' options include a variety of reusable bags. Reusable bags, such as the green bag, are popular and have helped to achieve the reductions in plastic bag use brought about by levies. However, they don't suit everyone, especially impulse shoppers, and many consumers forget to shop with their reusable bags, especially where there is a voluntary reduction system in place rather than a ban or levy. In Germany, social pressure enhances compliance with a voluntary system.

Recycle options mean recycling bags into products such as more shopping bags. In Australia, the plastic bag recycling rate is at best 5 per cent[25] while plastic bottles are recycled at around 30 per cent.[26] Plastic bags need specialised technology to be recycled. The ARA Code of Practice aimed to increase recycling rates to 15 per cent, but in 2004 the ARA reported recycling rates were still only 3 per cent.[27]

Litter reduction has been claimed as a result of most initiatives. However, this is not supported by most of the available data. Clean Up Australia reported that in 2005 plastic bags comprised 2.4 per cent of litter, compared to 2.2 per cent in 2004 and 2003, and 2.0 per cent in 2002.[28] So while plastic bag consumption dropped from 7 to 4 billion, the fraction of 'shopping/retail' bags found in litter increased. The Productivity Commission reports that local councils are spending more on litter collection and are achieving less.[29]

Disposal options include landfill or incineration. Landfill is cheaper in regional areas than metropolitan, and in some cities space for landfill is running out. Plastic bags are inert in landfill and so do not contribute to pollution of groundwater. However, they do contribute to litter, as bags 'balloon' in the wind, blowing from the landfill into neighbouring areas. The EPHC Best Practice Guidelines for Plastic Bag Litter Management advise landfill operators to place screens of barbed wire around the landfill to snag plastic bags that balloon.[30] In countries with higher population densities than Australia, incineration is common. Denmark incinerates 60 per cent of its waste and the UK, 10 per cent, with more incinerators planned. However, critics argue that this will reduce recycling.

So this is a really difficult problem to solve and there is not even a consensus about what the problem is. The main point of agreement is that it has not been solved anywhere in the world. Ireland has the most famous 'solution' but its veneer shows some cracks. Germany probably leads the world in this area. A visit to an Aldi store is quite educational. Plastic bags are very good at what they do, from the point of view of 'function'. So a single replacement is not going to be found. Alternatives may reduce the litter problem. But, the alternatives such as paper and biodegradable bags are widely reported to have more negative environmental impact than plastic bags. Reusable bags have the least environmental impact but need retailers and consumers to change their behaviour. So before a voluntary or legislated levy or ban is introduced, a critical assessment of all the likely alternatives should be carried out.

What can the role of local government be?

Local government has an important role to play in achieving the best outcomes. A policy and strategy need to be developed that takes account of the many issues. This will guide local businesses and community groups.

Perhaps the most important role for the local government to play is one to change the behaviour of the local small and medium enterprises (SMEs). Local government forums can be an important way to raise awareness with retailers and harness industry participation. Awards will always be popular. SMEs will need help if legislated bans are introduced.

Another important role is to ensure provision of adequate infrastructure — avoiding littering depends on public bin design and effective barriers to windblown litter at landfills. Supporting composting of biodegradable packaging, to avoid contamination of the recycling stream, is also important.

Lastly, resources are needed to help educate the next generation, on littering as well as on consumer behaviour. ●

Dr Juin Majumdar, Centre for Design, RMIT University, and Associate Professor Margaret C Jollands, School of Civil and Chemical Engineering, RMIT University, Melbourne.
This article has been peer reviewed.

Endnotes

1. Productivity Commission *Waste Management* (2006) Inquiry Report, available at <www.pc.gov.au/inquiry/waste/finalreport/waste.pdf>.

2. Environment Protection and Heritage Council (EPHC) *Consultation Regulatory Impact Statement (RIS); Investigation of options to reduce the environmental impact of plastic bags* (2007), available at <www.ephc.gov.au/ephc/plastic_bags.html>.

3. Hyder Consulting *Plastic Retail Carry Bag Use: 2002–2005 Consumption* Report for the Department of the Environment and Heritage, Canberra 2006.

4. World Wildlife Fund Australia *Tips for Eco-living*, available at <wwf.org.au/act/ecotips>.

5. EPHC 'Ministers act on pollution, waste and water' Communiqué 1 July 2005 Adelaide.

6. SA Government 'Plastic Bag Reduction Program', available at <www.zerowaste.sa.gov.au/prog_bags.php#taskforce>.

7. Victorian Department of Sustainability and Environment *Action*

10: Less Waste and increased resource efficiency 2006, available at <www.dse.vic.gov.au/ourenvironment-ourfuture/documents/ESAS%202006%20-%20action%2010.pdf>.

8. Bagsmart 'Australian trends' (last updated August 2004), available at <www.bagsmart.com.au/index.php?id=44>.

9. Keep Australia Beautiful at <www.kab.org.au/01_cms/details.asp?ID=1>.

10. Keep Australia Beautiful media release (20 June 2006), available at <www.kab.org.au/_dbase_upl/QLD_release1.pdf>.

11. NSW Environmental Protection Authority *The Lord Howe Island Waste Minimisation Strategy* 2001, available at <www.epa.nsw.gov.au/waste/wg-33.htm>.

12. The Allen Consulting Group *Phasing out light weight plastic bags* 2006, available at <www.ephc.gov.au/pdf/Plastic_Bags/PlasticBags_ACG_LWPB_May06.pdf>.

13. Department of Environment and Heritage *Plastic Bags 2006*, available at <www.deh.gov.au/settlements/waste/plastic-bags/index.html>.

14. ARA *Phasing out light-weight plastic bags* 2006, available at <www.ephc.gov.au/pdf/Plastic_Bags/ARA_Plastic_Bag_Report_Dec_2005.pdf>.

15. ARA *Final Report December 2005*, available at <www.ephc.gov.au/pdf/Plastic_Bags/ARA_Plastic_Bag_Report_Dec_2005.pdf>.

16. Lamb R and Thompson M *Plastic bags policy in Ireland and Australia* SPICE briefing, The Scottish Parliament, 22 September 2005.

17. Butler B 'Would you like a bag with that Madam?' *The Times Online* 7 October 2005, available at <www.timesonline.com.uk>.

18. Smith S 'Plastic Bags' 2005, available at <www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/33469EB37225F1F8CA25)6ECF00077479>.

19. Bagsmart 'International Trends' (2006) <www.bagsmart.com.au/index.php?id=43>.

20. 'Plastic plague' *The Times Online* 11 November 2006, available at <www.timesonline.co.uk>.

21. Singapore Ministry of the Environment 'In response to media queries on stiffer penalties for gum littering' ENV news release (19 March 2004), available at <http://app.mewr.gov.sg/view.asp?id=SAS954>.

22. ExcelPlas Australia, Centre for Design at RMIT and Nolan-ITU *The impacts of degradable plastic bags in Australia* (2003) Final Report to Department of the Environment and Heritage, available at <www.environment.gov.au/settlements/publications/waste/degradables/impact/pubs/degradables.pdf>.

23. Nolan-ITU *Biodegradable Plastics — Developments and Environmental Impacts* (2002) Report to Department of the Environment and Heritage, available at <www.environment.gov.au/settlements/publications/waste/degradables/biodegradable/pubs/biodegradable.pdf>.

24. James K and Grant T 'LCA of degradable plastic bags', paper presented at the Fourth Australian Conference on Life Cycle Assessment, 23–25 February 2005, Sydney, Australia; available at <http://lca-conf.alcas.asn.au/2005/Papers/James_and_grant.pdf>.

25. Shrager D 'Closing the loop in the plastic film industry', paper presented at the GPEC 2006 Global Plastics Conference, 28 February to 2 March 2006, Atlanta, Georgia, US.

26. PACIA *2005 National Plastics Recycling Survey*, available at <www.pacia.org.au/_uploaditems//Docs/2.2005polymerrecycsurv.pdf>.

27. ARA *2004 End of year report*, available at <www.ephc.gov.au/pdf/Plastic_Bags/ARA_COP_EndOfYear_Rpt_04.pdf>.

28. Clean Up Australia *The Rubish Reports*, available at <www.cleanup.org.au/au/NewsandMedia/rubbish-report.html?kw=rubbish%20reports>.

29. Phillip Hudson Consulting *Container Deposit Legislation* Consultancy Report for the SA Environment Protection Authority (March 2000), available at <www.epa.sa.gov.au/pdfs/cdl_report.pdf>.

30. EPHC *Guidelines for management of plastic bag litter at landfill sites* 2005, available at <www.ephc.gov.au/pdf/Plastic_Bags/Landfill_litter_guidelines_Jun05.pdf>.

LOCAL GOVERNMENT Reporter

Planning implications of smoke-free requirements: VCAT guideline decision

Nicholas J Tweedie
BARRISTER, OWEN DIXON CHAMBERS EAST

The *Tobacco (Amendment) Act 2006* (Vic) (the Act) is scheduled to come into operation in Victoria on 1 July 2007. One of the effects of the Act will be to ban smoking in the 'indoor' areas of all licensed premises in the state. Smoking will only be permitted in outdoor licensed areas, such as verandahs, balconies, courtyards, rooftops and street/footpath areas.

The implications of these new restrictions for planning decisions about licensed premises was recently the subject of consideration by the Victorian Civil and Administrative Tribunal (the Tribunal) in *Ryan v Port Phillip City Council* [2006] VCAT 1923.

The decision suggests what, on one view, is a controversial approach to considering planning applications for new licensed premises. The approach advocated by the Tribunal is likely to have significant implications for new premises applications. Accordingly, it is a decision that people concerned with the planning system in Victoria need to be familiar with and consider carefully.

Background

In *Ryan*, the Tribunal (constituted by Deputy President Gibson and Member Cimino) considered an application for a permit to use land in St Kilda for the purpose of a tavern with an on-premises liquor license.

The Tribunal noted that the Act would soon come into operation, and that the 'smoking ban' it implemented would require smoking patrons to go outside to smoke. For venues that did not have their own outdoor areas, the Tribunal concluded that it was likely that this would mean that patrons would be forced into 'the public realm' (or, in other words, onto the street or footpath outside the venue) to smoke.

It expressed the view (at [1]) that the primary concern associated with that state of affairs would be that the:

> … forcing of smokers to congregate in outdoor areas to smoke … will give rise to potentially adverse off-site environmental amenity impacts through noise, unruly behaviour, odour and butt litter.

This concern lead the Tribunal to ask whether the operators of such licensed premises ought to be responsible for these amenity impacts in a planning context.

After considering the issues, this question was ultimately answered by the Tribunal in the affirmative.

The Tribunal formed the view that there was a need to ensure that off-site amenity would not be detrimentally affected by outdoor areas (or the public realm) being used for smoking. The Tribunal (at [12]) expressed the view that:

> It is not socially responsible to make premises smoke free and then ignore where patrons go to smoke and the effects of their behaviour on other people.

The Tribunal (at [13]) also concluded that:

> Measures should be adopted to deal with them before the tobacco laws come into effect rather than waiting for problems to occur which are then passed on to other people — residents and local councils — to deal with.

The Tribunal emphasised that it was important that the new smoking laws, which were introduced in response to an occupational and public health problem, did not subsequently cause another health problem; namely, sleep disturbance in surrounding residents as a consequence of the amenity impact from patrons smoking outdoors.

The Tribunal was of the opinion that although residents living in, or abutting, activity centres and business zones could not expect to enjoy the same level of residential amenity as those living in a purely residential environment, they were still entitled to a reasonable level of amenity, in particular, a good night's sleep.

Further, it noted (at [15]–[16]) that effect on amenity is always a major consideration when deciding whether to grant or refuse a planning permit for a licensed venue under the *Planning and Environment Act 1987* (Vic).

Reference was also made to the provisions of the *Liquor Control Reform Act 1998* (Vic) relating to amenity and it was noted (at [18]) that the following was a condition of every liquor licence:

> The licensee shall not allow or permit undue detriment to the amenity of the area to arise out of or in connection with the use of the premises to which the license relates during or immediately after the trading hours authorised under this licence.

The Tribunal concluded (at [19]) by saying that:

> It is therefore clear that in complying with the new tobacco laws, licensees cannot ignore the need to protect amenity of surrounding areas, in particular from noise that may interfere with sleep at night.

In addressing the possible means of dealing with off-site amenity impacts, the Tribunal identified that the following measures might be considered:

- design of premises;
- conditions in permits; and
- management plans (the Tribunal indicated that such management plans may require staff to control noise, crowd behaviour and litter removal).

The Tribunal concluded that the most effective of these measures would be to properly design new premises, and observed that permit conditions 'are no substitute for a good design which locates outdoor areas away from noise sensitive locations', and that the effectiveness of management plans 'will depend upon the responsiveness of people responsible for implementing and maintaining them' (at [33] and [34]).

The Tribunal accordingly expressed the view that, as a general rule, licensed premises should provide a 'suitably designed and located outdoor area for smoking'. It noted that by 'suitably designed and located', it meant that its use should comply with the new laws and not give rise to any adverse off-site amenity impacts relating to noise, odour or patron behaviour (at [39]).

Further, the Tribunal noted (at [40]) that if new venues could not provide such an area on site, then this may mean that the use should not be permitted.

Indeed, the Tribunal went so far as to state that the fact that a venue could not cater for smoking patrons on-site (unless it was of small scale or had access to an off-site area that was part of the premises) was 'indicative that the premises are unsuitable to be used as licensed premises, under this new regulatory regime' (at [43]).

Further, the Tribunal expressed the view that a similar approach should apply to existing venues, even if it was not possible to implement the approach through the planning system and suggested that (at [41]):

> It will be up to the Director of Liquor Licensing as to what conditions should be imposed when licences are renewed or varied.

It is this latter two conclusions, or findings, that are likely to be the most significant, and potentially problematic, of those made by the Tribunal in *Ryan*. The suggestion that approval of a licensed premises application not only might, but should, generally be refused if it cannot provide for a smoking area within the premises is something of a revolutionary proposition.

The Tribunal did, in fairness, go on to list some exceptions to the general rule that licensed premises provide suitably designed and located outdoor areas for smokers such as:

- in the case of 'small scale' venues, public areas such as footpaths may be an outdoor area for smokers, providing an appropriate management plan is in place; and
- where there are existing approved outdoor areas, providing an appropriate management plan is in place.

The Tribunal did not attempt to define what it meant by 'small-scale' venues. Rather, it expressed that view that what is 'small scale' would become apparent with experience over time. This is unlikely to provide permit applicants, or council officers who are being expected to make decisions about what is, or is not, 'small scale', with much comfort in the short term.

The Tribunal's decision in *Ryan* makes it clear that the requirement for a smoke-free indoor environment will have significant implications for applicants for new licensed premises.

Implications

The Tribunal's decision in *Ryan* makes it clear that the requirement for a smoke-free indoor environment will have significant implications for applicants for new licensed premises. The Tribunal's conclusion that the absence of a suitably designed smoking area would be grounds for refusal of an application for a venue is likely to be seized upon by opponents of new venues without such dedicated areas.

There exists the very real risk of this part of the decision being elevated to the status of a strict prohibition on any new venue that does not, or cannot,

provide that facility. This is so despite the Tribunal making it clear that there would be instances where exemptions would apply, such as the 'small-scale' use.

For some venues, it might be relatively easy to provide such a facility. Large, greenfield, hotel developments in isolated areas, well removed from residential users are unlikely to have difficulty complying with this requirement. However, new venues in existing buildings in intensively developed inner urban areas (where land and/or space is very expensive or not easy to acquire) such as the Melbourne CBD, might very well find the requirement impossible to satisfy. Ironically, it is these very places where the demand for licensed venues is highest, and where many planning policies express a preference for such venues to locate.

Venues seeking to open in buildings which are heritage-listed, or which they do not own, or which are subject to the control of a body corporate (and therefore require the approval of other tenants for many building works) might well find it impossible to create an outside area to accommodate smokers. Accordingly, the possible range of suitable venues in areas like the Melbourne CBD (an area where licensed venues are generally encouraged) will be severely restricted if *Ryan* is applied strictly and without some discretion.

Further, some licensed premises may wish to become, or remain, entirely smoke-free. It seems an odd proposition to refuse such premises on the basis of their inability to provide an area for smokers, especially given that the 'smoking ban' is intended to restrict opportunities for smoking. One would have thought that it should be possible to argue that a 'non-smoking' venue is unlikely to attract smokers, at least in significant numbers. Whether or not such an argument would succeed remains to be seen.

In view of these comments, I would suggest that it will be a brave applicant indeed who seeks to present an application for any new venue without an on-site smoking area in the post-*Ryan* planning world. It is to be hoped that the principles expressed in *Ryan* are applied intelligently and with common sense (which it appears the Tribunal intended) and not simply as a blanket prohibition on any new venue without a smoking area. Whether this happens or not remains to be seen. ●

Nicholas J Tweedie, Barrister, Owen Dixon Chambers East, Melbourne.

Nuclear-free Queensland?

Peter Rowell BLAKE DAWSON WALDRON

Mr Peter Beattie, Premier of Queensland, will no doubt clash head on with Canberra over the recently passed *Nuclear Facilities Prohibition Act 2006* (Qld) (the Act). This is an Act to prohibit particular nuclear facilities in Queensland, and for other purposes. The Bill was introduced into Queensland Parliament on 29 November 2006 and was passed on 20 February 2007. It received Royal Assent on 28 February 2007.

The purpose of the Act is to help protect the health, safety and welfare of the people of Queensland. That purpose is achieved primarily by prohibiting the construction and operation of particular nuclear reactors and other facilities in the nuclear fuel cycle.

By s 4, the Act purports to bind all persons including the state of Queensland, and to the extent the legislative power of the Queensland Parliament permits, the Commonwealth and other states. No doubt it will be challenged by Canberra as constitutionally invalid.

By s 5, the Act will apply despite any other Act or law to the contrary.

What the Act purports to do is prohibit certain development. The concept of prohibitions in Queensland was effectively abolished by the *Integrated Planning Act 1997* (Qld) (IPA). Notwithstanding, s 7(1) of the Act states that a person must not construct or operate a nuclear facility. A 'nuclear facility' means any of the following:

(a) a facility for converting uranium ore into uranium hexafluoride or another chemical to enable its enrichment;

(b) an isotope separation plant or other facility for enriching nuclear material;

(c) a fabrication plant or other facility for transforming nuclear material into a form suitable for use as fuel in a nuclear reactor;

(d) a nuclear reactor, whether or not designed for generating electricity;

(e) a reprocessing plant or other facility for the chemical separation of fuel that has been irradiated in a nuclear reactor;

(f) a separate storage installation for storing or disposing of nuclear material in the nuclear fuel cycle used in or resulting from a nuclear facility under paragraph (a), (b), (c), (d) or (e).

Section 7 provides for certain exemptions, for example:

- if the facility is for storage or disposal of radioactive waste material resulting from the use of nuclear material for research or medical purposes; or
- another purpose authorised under the *Radiation Safety Act 1999* (Qld); or
- the operation of a nuclear-powered vessel.

What the Act purports to do is amend other relevant legislation to ensure that no consent, approval, licence or permission can ever be given to enable a person to construct or operate a nuclear facility in Queensland. Section 8(1) provides that a development approval under the IPA must not be given which authorises the construction of a nuclear facility. Section 8(2) provides that a mining tenement under the *Mineral Resources*

Act 1989 (Qld) cannot authorise the construction or operation of a nuclear facility. Both these sections apply whether the approval or tenement was granted before or after the commencement of the Act.

Furthermore, s 9(1) provides that a generating authority under the *Electricity Act 1994* (Qld) cannot be given to authorise the connection, under that Act, of a generating plant to a transmission grid or supply network if a nuclear reactor is used for, or in connection with, the plant. Again, this provision applies whether or not the authority was granted before or after the commencement of the Act.

The Act contains various enforcement powers. It confers open standing to enable a person to start a proceeding in the Planning and Environment Court for an order (an enforcement order) to remedy or restrain the commission of an offence against the Act. The court is also conferred with the power to grant an interim enforcement order. The proceeding can be commenced whether or not a right of the applicant has been, or may be, infringed by, or because of, the commission of the offence. These provisions are set out in s 10 of the Act. The relevant minister administering the Act can elect to become a party to these proceedings. The Planning and Environment Court can make an enforcement order if it is satisfied the relevant offence:

- is being, or has been, committed; or
- will be committed unless the enforcement order is made.

The court can also make an order whether or not there has been a prosecution for the offence.

The Planning and Environment Court is conferred, by ss 13 and 14 of the Act, with very wide powers when making orders. These powers are similar to, and as broad as, those powers in relation to enforcement orders conferred on the Planning and Environment Court in the IPA. The powers include under s 15 an order requiring restoration or rehabilitation of the land. That can be very important for owners of the land and subsequent successors and transferees of the land. If orders are made in relation to the land, the Registrar of Titles has to record any such order on the relevant title in the Queensland Land Registry.

The Act also makes provision for the Queensland Government to conduct a plebiscite in Queensland to obtain the views of the people of Queensland about the construction of a prohibited nuclear facility in Queensland, if the relevant minister is satisfied that the Commonwealth Government has taken, or is likely to, take any steps supporting or allowing the construction of a prohibited nuclear facility in Queensland (s 21). However, the relevant section does not go on to provide what happens in the event that the people of Queensland vote in favour of a nuclear facility in Queensland.

No doubt there will be a challenge by the Commonwealth Government in relation to the validity of this Act on constitutional grounds in the event that the Commonwealth Government proceeds with the establishment of a nuclear facility in Queensland. ●

Peter Rowell, Special Counsel, Blake Dawson Waldron, Brisbane.

Postscript: Since writing this article, a similar Bill was introduced into the SA Parliament. The Nuclear Facility (Prohibition) Bill 2007 (SA) was tabled on 14 March 2007 and proposes to prohibit the establishment of certain nuclear facilities in the state, among other things.

The Bill provides that a person must not construct or operate a nuclear facility, with penalties ($500,000 or imprisonment for 10 years in the case of individuals and $5 million for bodies corporate): s 7. It also provides that a person must not bring nuclear waste into the state or transport nuclear waste within the state for delivery to a nuclear waste storage facility in the state. The Bill provides exemptions in s 5.

Section 13 of the Bill provides that:

> If a license, exemption or other authority to construct or operate a nuclear facility in this State is granted under a law of the Commonwealth, the Environment, Resources and Development Committee of Parliament must inquire into, consider and report on the likely impact of that facility on the environment and social-economic wellbeing of this State.

CASENOTE

Solar access in subdivision layouts: planning principle

WALLIS & MOORE PTY LTD v SUTHERLAND SHIRE COUNCIL

[2006] NSWLEC 713

This class 1 appeal, eventually resolved by way of consent orders, concerned one of the last significant areas of undeveloped residentially zoned land in the Sutherland Shire local government area.

The original appeal was in respect of council's refusal of a development application to create 55 torrens title lots as well as necessary fire trails, drainage, underground bushfire protection water storage tanks and landscaping, including the transplantation of endangered flora.

The relevant environmental planning instrument was the Sutherland Shire Local Environmental Plan 2000 (the LEP). Pursuant to the LEP, subdivision was permissible with development consent. Nonetheless, the court was required to consider the objectives of the residential zone including the requirement that the scale, amenity and general character of the area is preserved. The court was also required to consider the impact of the proposal on adjoining development and the requirement within the LEP that the consent authority must be satisfied that the proposed development would not have a significant adverse effect upon endangered flora and fauna as well as wildlife corridors and vegetation links.

Prior to the hearing, the application was amended, such that consent was sought for community title subdivision and the creation of 35 residential allotments, one community property allotment and a residue development lot.

Faced with an application for consent orders by both parties following the amendments made by the applicant, the court was required to consider in some detail the lay evidence marshalled by objectors to the development application. Those issues concern, among other things, bushfire protection and vehicular access.

Of particular interest to the court, however, was the need to design residential subdivisions in a way that maximised passive solar access for future dwellings.

In that regard, the court observed that residential subdivisions should be designed to maximise the number of allotments with side boundaries orientated in a generally north/south direction. In undertaking such designs, regard must also be had for topography, views and special natural features of the land. These matters need to be balanced with the more general proposition that good solar access should be achievable for most if not all future dwellings.

In other words, as a principle of planning, those designing subdivision layouts should seek to ensure good solar access for as many future dwellings as possible. That general proposition is to be weighed in relation to designing subdivision layouts that permit future dwellings to enjoy any views, and the retention of special natural features.

In the circumstances of the case, the court was satisfied that the council and the applicant had worked together to maximise passive solar design on a site that contained a number of existing constraints. Accordingly, in the circumstances the application warranted conditional consent. ●

Jeff Reilly, Home Wilkinson Lowry (incorporating Abbott Tout), Sydney.

National legislation update

Jurisdiction	Legislation	Status	Comment
Queensland	Local Government and Other Legislation Amendment Bill 2006	Tabled in Parliament on 28 November 2006.	The main objective of this Bill is to increase public trust and confidence in local government election processes. The Bill amends the *Local Government Act 1993* (Qld) to: • enhance transparency and accountability in local government elections and decision-making; and • avoid duplication of process where *Size, Shape and Sustainability* local government reviews meet current requirements for major reviewable local government matters. The amendments are intended to be in place for the March 2008 local government elections. *Source: Explanatory Notes.*
	Prostitution Amendment Act 2006	Received assent on 11 August 2006, with provisions yet to commence.	This Act amends the *Prostitution Act 1999* (Qld) to, among other things: • clarify that brothel licenses may operate under a corporate structure; • allow the maximum number of sex workers permitted on a brothel premises at any one time to be increased; • extend the jurisdiction of the Independent Assessor to include appeals against an assessment manager's decision; and • enable brothel licenses to be granted for a three-year period. *Source: Explanatory Notes to the Amendment Act.*
	Local Government (Candidates for State Elections) Amendment Bill 2007	Tabled on 8 February 2007.	This Bill proposes to amend the *Local Government Act* with regards to removing the barrier to local government councillors standing for state Parliament. Currently, councillors are required to resign from their position on the council when standing for a state seat. *Source: Explanatory Notes to the Bill.*
	Nuclear Facilities Prohibition Act 2006	Received Royal Assent on 28 February 2007; yet to be proclaimed.	This is an Act to prohibit particular nuclear facilities in Queensland, and for other purposes. See the article by Peter Rowell on p 97 for a discussion.
SA	Local Government (Public Place Amenity) Bill 2006	Tabled 21 June 2006.	A minor Bill that amends s 254 of the SA *Local Government Act 1999* to allow councils to order an owner or occupier of a public place that exceeds the prescribed area to plant and maintain specified types of trees or other vegetation in specified areas. However, the Bill provides that the council is not to do so if it would 'substantially detract from the owner's or occupier's use of the public space'.
	Local Government (Open Space) Amendment Bill 2006	Tabled 21 June 2006	This Bill amends the SA *Local Government Act* and seeks to preserve open space that is controlled by local government by requiring a poll of residents where land classified as community land is to be revoked. It modifies s 194 such that where a revocation is proposed and the community land is significant open space, then the public consultation policy must provide for a copy of the council's report under s 194(2) to be provided to electors who reside within 500 m of the land and for those electors to make submissions to the council in relation to the revocation. If more than 10 per cent of electors notify the council that they want a poll to be conducted on the matter, a poll must be conducted under the *Local Government (Elections) Act 1999* (SA) of the entire local government electorate. If electors vote against the proposal, the revocation cannot go ahead unless a subsequent poll is undertaken and the result changes or the council is re-elected and the proposal submitted again. *Source: Second Reading speech (the Hon Nick Xenophon).*

National legislation update continued

Jurisdiction	Legislation	Status	Comment
SA (cont'd)	Development (Assessment Procedures) Amendment Bill 2006	Passed Second Reading on 15 March 2007.	This Bill is one of a suite of Bills originally packaged as one set of amendments to the *Development Act 1993* (SA). This Bill introduces a range of improvements to the existing development assessment procedures. *Source: Second Reading speech (the Hon P Holloway).*
	Statutes Amendment (Affordable Housing) Bill 2006	Progressed to Legislative Council on 22 February 2007.	This Bill implements some important initiatives stemming from a review of the state's social housing system. It amends a number of pieces of legislation, including the *Development Act*. The Bill establishes the Affordable Housing Trust, which will work with local government and planning authorities to provide the legislative and policy framework to encourage developments that include affordable housing targets of 15 per cent affordable housing (including 5 per cent high-needs housing). Amendments to the *Development Act* specify the need to consider affordable housing in strategic planning and local council development plans. Section 23 of the Act will be amended to provide that a development plan may set out objectives or principles relating to the provision of affordable housing within the community. The *Housing and Urban Development (Administrative Arrangements) Act 1995* (SA) will be amended to include the promotion of planning and development systems that support sustainable and affordable housing outcomes within the community, including by participating in the referral system established under s 37 of the *Development Act*, which will enable the certification of developments that meet the 15 per cent affordable housing targets. *Source: Second Reading speech to the Bill (the Hon J W Weatherill).*
	Sewerage (Greywater) Amendment Bill 2006	Passed in Legislative Council on 6 December 2006; now in House of Assembly.	This Bill is to allow people to discharge on a permanent basis water from their domestic washing machines onto their lawn or garden. Current legislation provides that if a property is connected to the undertaking (that is, the waste water pipe network), it is illegal for someone to discharge any waste water onto their property. *Source: Second Reading speech (the Hon D W Ridgeway).*
	Sewerage (Water Management Measures — Use of Waste Material) Amendment Bill 2006	Passed in Legislative Council on 6 December 2006; now in House of Assembly.	This Bill allows prescribed entities to establish a pumping station to extract material from the sewer, to recycle the water and discharge the solid material back into the sewer stream (a technique known as 'sewer mining'). It establishes a licensing system to allow people (for example, local councils) to undertake such a sceheme. *Source: Second Reading speech (the Hon D W Ridgeway).*
	Development (Regulated Trees) Amendment Bill 2006	Second Reading on 7 December 2006.	This Bill proposes to clarify the intent and application of the legislative controls applying to urban trees, addressing some issues that emerged since the *Development (Significant Trees) Amendment Act 2000* (SA). The Bill proposes to simplify the development process for the majority of trees above the prescribed trunk circumference by introducing a two-tier system of tree classification and assessment: *regulated trees* and *significant trees*.

National legislation update continued

Jurisdiction	Legislation	Status	Comment
SA (cont'd)	Development (Regulated Trees) Amendment Bill 2006 (cont'd)	Second Reading on 7 December 2006.	*(Cont'd)* Regulated trees will be determined by a purely quantitative measure of a two-metre circumference threshold. A regulated tree will be subject to a preliminary assessment of whether the tree is significant (based on character/visual amenity and biodiversity). Significant trees would be subject to stronger development plan policies for retention than regulated trees. *Source: Second Reading Speech (the Hon P Holloway).*
	Local Government (Stormwater Management) Amendment Bill 2006	Passed on 13 March 2007 and currently awaits assent.	In March 2006, the SA Government entered into a memorandum of agreement on stormwater management with the SA Local Government Association. The agreement addressed responsibilities for stormwater management, and provided the basis for joint and collaborative action by all levels of government to deal with the threat of flooding and better manage the use of stormwater as a resource. The Bill establishes the Stormwater Management Authority as the statutory authority to implement the agreement. *Source: Second Reading speech (the Hon M J Atkinson).*
	Nuclear Facility (Prohibition) Bill 2007	Tabled on 14 March 2007.	This Bill proposes to prohibit the establishment of certain nuclear facilities in SA, among other things. See p 98 for details.
WA	Local Government Amendment Bill 2006	Passed committee stage in the Legislative Council on 23 November 2006.	The purpose of the Bill is to change the date for local government ordinary elections from the first Saturday in May to the third Saturday in October, and to introduce the state parliamentary system of voting for local government elections. The Bill also provides for the removal of the first-past-the-post system and the inclusion of the same system that applies for the state Parliament. For both single member and multi-member electorates, the system will be based on the proportional system applying for elections for the Legislative Council. *Source: Second Reading speech (the Hon M P Murray).*
	Local Government (Functions and General) Amendment Regulations 2007	Operational on 30 March 2007.	These amendments increase the current tender threshold from $50,000 to $100,000 and require local councils to have a purchasing policy for amounts under the new threshold.

backyardblitz

NEWS AND EVENTS AROUND THE COUNTRY

NATIONAL

National water charging stocktake

27 February 2007. The first national stocktake of water charging policies in urban and rural water sectors has been released by the chairman and CEO of the National Water Commission, Ken Matthews.

The stocktake is the first step in developing consistent approaches to the way water charges are set across Australia — a key objective of the National Water Initiative (NWI).

The stocktake highlights the marked differences in water charging across states and territories, with three areas in particular highlighted for further action — namely, approaches to:

- recovery of capital expenditure in urban and water sectors;
- charging customers for urban water services; and
- identifying and recovering the costs of water planning and management.

The NWI Steering Group on Water Charging is developing issues papers directed at these three areas of difference. ●

An executive summary and water stocktake reports addressing these areas are available from the National Water Commission at <www.nwc.gov.au/nwi/consistency_in_water_charging.cfm>.

OH&S in government procurement

5 March 2007. The Australian Safety and Compensation Council (ASCC) has released *Guidance on Occupational Health and Safety in Government Procurement*, which intends to make it easier for people who are purchasing goods and services on behalf of government to consider OH&S in procurement decisions.

ASCC Chairman Mr Bill Scales said that the publication was a significant step towards improving the workplace safety culture in Australia.

'This publication provides procurement managers with simple-to-use checklists, templates and models to ensure occupational health and safety is considered in each stage of the procurement cycle. It provides government organisations with the information they need to build occupational health and safety into their everyday procurement processes,' said Mr Scales.

'For example, a local council purchasing new plant equipment may consider the type of after-sales support that is offered by a supplier, such as OHS training, and whether the operating manuals include advice on safe operating and maintenance.

'On a larger scale, in preparing the contract of service for a major catering project, a government department could consider including specific clauses on risk management, OHS performance reporting and procedures used in the event of an OHS incident. This Guide includes examples of OHS clauses as well as worksheets and safe work procedure templates, said Mr Scales.' ●

The Guide is available from the ASCC at <www.ascc.gov.au>.

NEW SOUTH WALES

New SEPP — mining, petroleum production and extractive industries

16 February 2007. The State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (the SEPP) has been gazetted.

The SEPP consolidates and updates many existing planning provisions related to mining, petroleum

production and extractive industries, as well as introducing new provisions to ensure that potential environmental and social impacts are adequately addressed during the assessment and determination of development proposals.

The SEPP complements reforms made in August 2005 to improve the relationship between the *Mining Act 1992* (NSW) and the *Environmental Planning and Assessment Act 1979* (NSW) in the assessment and approval of mines. These amendments revoked the provisions that allowed mines to expand without the need for a transparent assessment of their impacts or consent under the *Environmental Planning and Assessment Act* once a mining lease has been granted. ●

Source: NSW Department of Planning Circular PS 07-005 (22 February 2007).

VICTORIA

New litter strategy: consultations

March 2007. The Victorian Government is holding public consultations on a new litter strategy for the state.

As part of the consultation process, the government has released an issues paper which examines past and current efforts to reduce litter in the state, identifying successes and areas where further action is required.

The paper notes that local councils alone report over $58 million expenditure on litter management in 2004–05, increasing to over $70 million when extrapolating data for illegal dumping and roadside litter.

The review of the state's litter policy has been prompted by several factors including increased community expectations for an ever-cleaner environment, changes to responsibilities (such as those of industry through the National Packaging Covenant), changes in structures such as the expansion of regional waste management groups and changes impacting on the types and volume of litter.

The issues paper and a background paper are available from Sustainability Victoria at <www.sustainability.vic.gov.au/www/html/2286-submissions.asp?intSiteID=4>. Submissions close on 13 April 2007. ●

PUBLISHING EDITOR: Darren Smith MANAGING EDITOR: Bruce Mills PRODUCTION: Christian Harimanow
SUBSCRIPTION INCLUDES: 10 issues plus binder SYDNEY OFFICE: Locked Bag 2222, Chatswood Delivery Centre NSW 2067 Australia
CUSTOMER RELATIONS: 1800 772 772 GENERAL ENQUIRIES: (02) 9422 2222 FACSIMILE: (02) 9422 2404 DX 29590 Chatswood
www.lexisnexis.com.au darren.smith@lexisnexis.com.au

ISSN 1447-2163 Print Post Approved PP 255003/06255 This publication may be cited as (2007) 5(7) *L Gov R*