



James Sloan – CLE Programme
“EMA brief overview”

FELA's activities

- Established 3 years
- Membership of lawyers and scientists
- Website www.fela.org.fj – regularly updated and sets out the variety of activities undertaken
- 2011 comprehensive series of CLE's

FELA's 2011 CLE programme – 6 booked, aiming for 10

- 20 April 2011, Nick Barnes on “Opportunities for public interest litigation”
- 18 May 2011, Christine Trenorden, “Environmental Crime: The Law in relation to Offences under the EMA”
- 15 June 2011, Tim Nolan “Sustainable Forest Management of Tropical Forests.”
- 17 August 2011, Vika Rogers “ODS Act and General Awareness”
- 21 September 2011, Aminiasi Qareqare: “EIA Process & Public Participation”
- 7 December 2011, Deborah Sue: “The Forest Stewardship Council and Fiji”
- Others? – Waste management / pollution and offences ?

This CLE

- Go through some key provisions of EMA [not repeat detailed talks – www.fela.org.fj]
- Start differently – not directly into the law – why do it?
- Look at some of the legal concepts
- Set out what still needs to be done
- Suggest – as lawyers we can all play a part now – through our advice to clients

Why bother?

- Protect what we have





Why bother?

- There may be valuable flora and fauna, that future generations should see
- It could have medicinal properties or other uses
- Tourism means \$\$\$
- As an industry it provides jobs, and more foreign investment



Why bother?

- Our quality of life
 - Quality of life of future generations
 - Developments that respect the environment
 - Ensure that cultural rights are respected
 - Development is “Sustainable”
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- The concept of “Sustainable Development” is enshrined in the EMA
 - EMA is not anti-development – but it is development within boundaries that aimed to minimise “IMPACT” on the environment – central to this are EIAs (Environmental Impact Assessments)









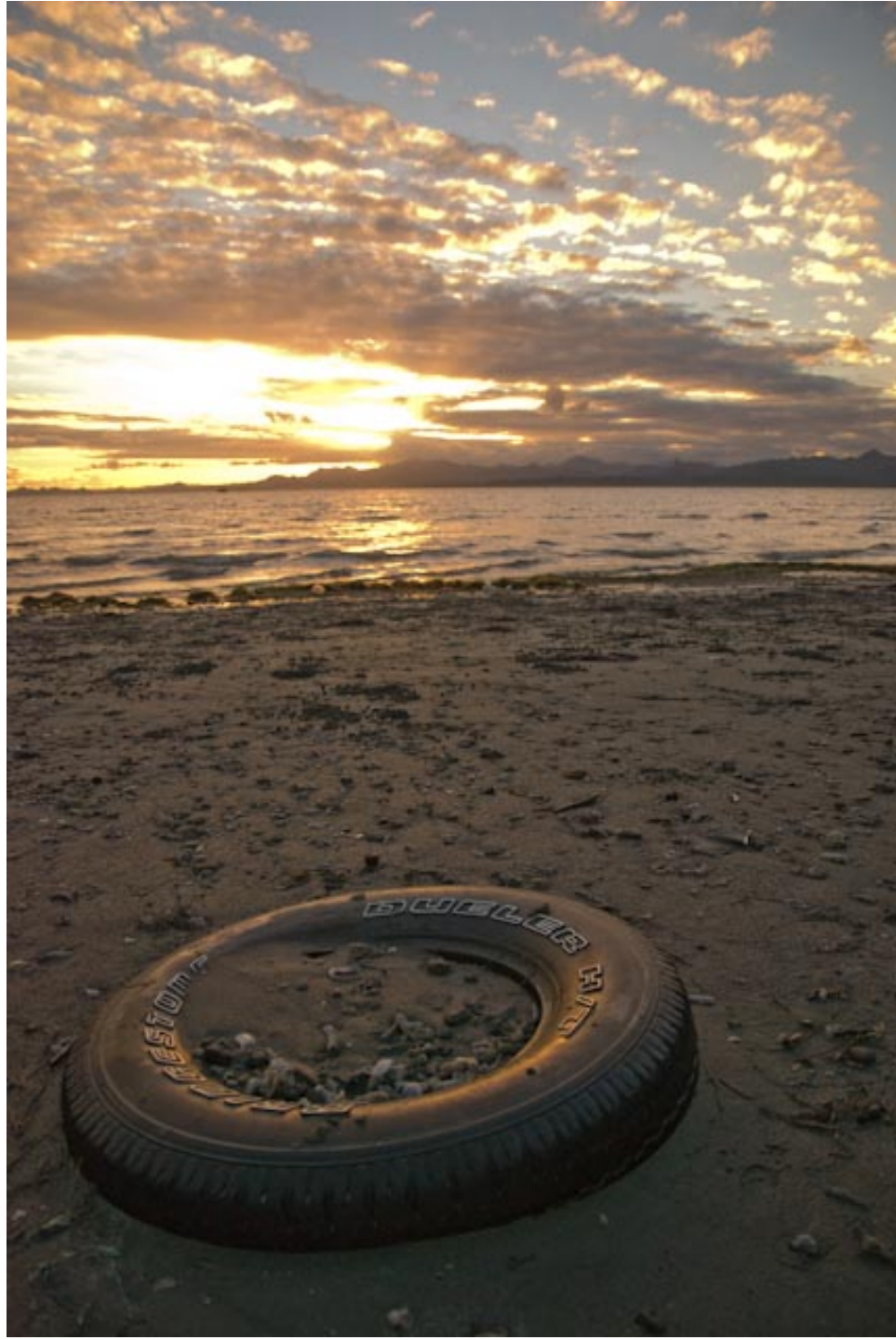






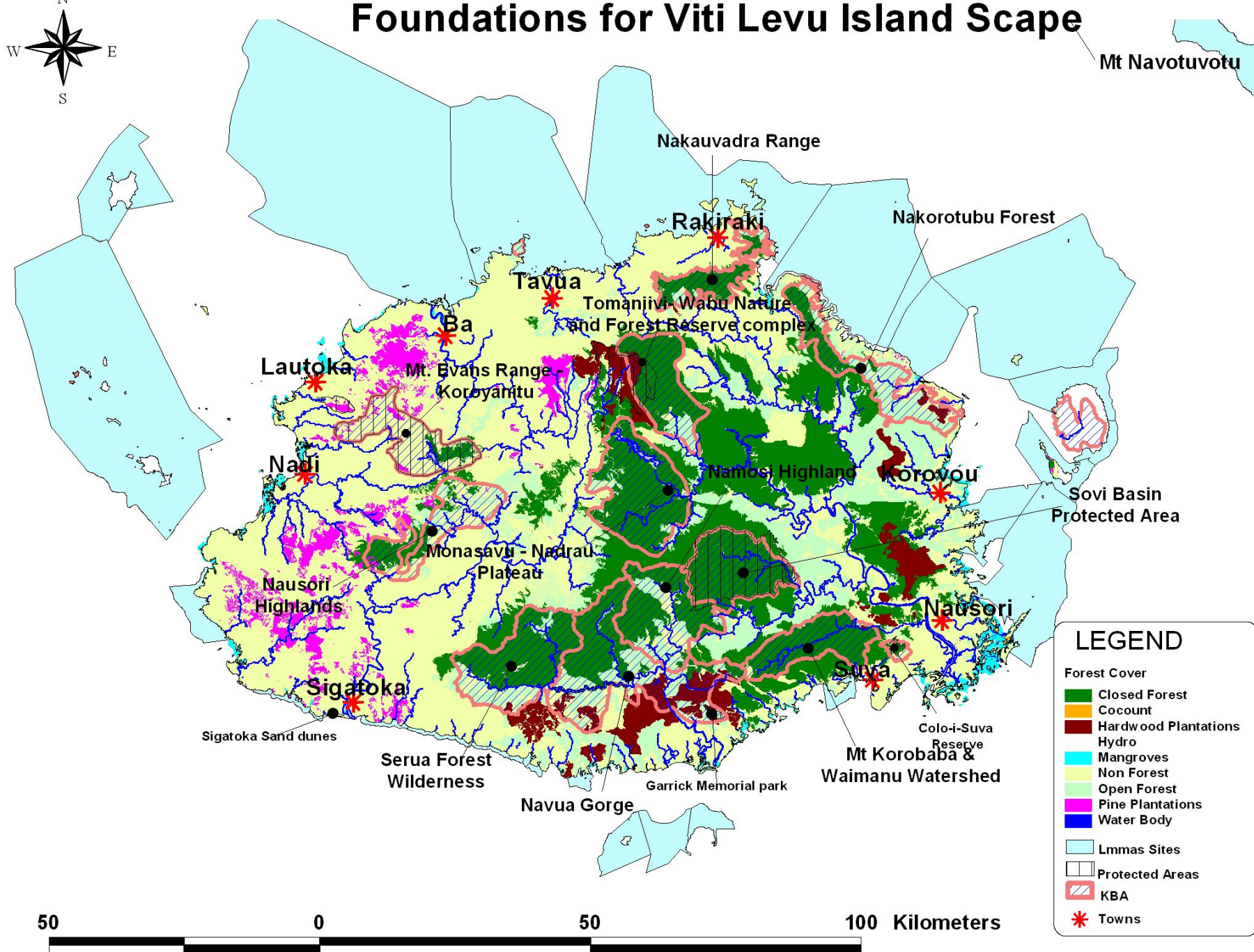
The concerns

- Development pressure
- Climate change
- Damage to the pristine environment





Foundations for Viti Levu Island Scape



How does EMA intend to protect?

EMA [in force 1 January 2008] protects by:

1. Enshrining important principles – underpin and guide all decision makers and anyone applying EMA
2. Authorising or regulating development including creating a process for developers to follow – EIA – Note this process must take into account principles in 1. above
3. Providing institutions to regulate and enforce and other legal means - take into account principles in 1. above

Protect - Principles, Process, Push / Penalties

[Note: this is how EMA intends to protect]

1. EMA important principles

Principle 1 - Sustainable development

““sustainable development” means development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs, and implies using resources to improve the quality of human life within their carrying capacity”. – section 2 of EMA

EMA important principles cont...

Principle 2 – Purpose of EMA

“(a) to apply the principles of sustainable use and development of natural resources; and
(b) to identify matters of national importance for the Fiji Islands...” – section 3(2) EMA

Important principles cont...

Principle 3 – things that must be considered

When decisions are being made that relate to “use” of natural resources there are compulsory things that have to be taken into account. These include:

- Preservation of coastal environment, wetland, lakes, rivers etc
- Protect outstanding landscape features etc
- Protect indigenous plants / habitat
- Protect relationship between indigenous Fijians and their important cultural areas
- Protect human life and health
- Have regard to Traditional owners or guardians of resource
- Have regard to the maintenance and enhancement of amenity values
- Have regard to the Intrinsic value of ecosystems
- Maintaining and enhancing quality of environment
- Consider Natural resources are finite

Sections 3(3) and 3(4) of EMA

2. Authorising or regulating development

- It may be said – EMA is primarily designed to regulate “development” proposals [Note Waste is not included here – this is another principal point behind EMA]
- “development proposal” – “a proposal for a development activity or undertaking submitted to the approving authority for approval under any written law” – section 2 EMA

Introduces 2 concepts

- “Development activity”
- “Approving authority”
- 3rd concept is EIA’s – not defined by EMA

Authorising or regulating development cont...

Development activity or undertaking:

“any activity or undertaking likely to alter the physical nature of the land in any way, and includes the construction of buildings or works, the deposit of wastes or other material from outfalls, vessels or by other means, the removal of sand, coral, shells, natural vegetation, sea grass or other substances, dredging, filling, land reclamation, mining or drilling for minerals, but does not include fishing” – section 2 EMA

Authorising or regulating development cont...

- Environmental impact assessment (EIA) is:
- *“a tool used to identify the environmental, social and economic impacts of a project prior to decision-making. It aims to predict environmental impacts at an early stage in project planning and design, find ways to reduce adverse impacts, shape projects to suit the local environment, and present the predictions and options to decision-makers.”*
- *This definition is not in EMA - UN*

Authorising or regulating development cont...

Who authorises the “development proposal”? – The approving authority (AA)

AA in respect of a development proposal, means a Ministry, department, statutory authority, local authority or person authorised under a written law to approve the proposal” – section 2 EMA

- Q. So who authorises? A. It depends on what the development activity is
- Whoever AA is, “screens the proposal” - determines whether the proposal will have a “significant environmental impact” – section 2 EMA requires this [**handout**]

Authorising or regulating development cont...

Various AAs assess development proposal and ultimately decide whether to provide permission – for example:

- Town & Country Planning – Local authority
- State Land Act – Director of Lands
- Mining Act – Director of Mines
- Water Supply Act – Commissioner of Water
- Forest Decree – Licensing Officer
- Native Lands Act – NLTB/Conservator of forests
- EMA – Waste and Pollution Control Administrator

Whether there is an EIA as part of this process depends on whether there will be “significant environmental impact”

EIA report is then taken into account by AA in decision whether to grant permission – permission can be made subject to conditions

Authorising or regulating development cont...

- If it will have significant environmental impact – PART 4 of EMA applies – then EIA process – EIA unit section 12 of EMA – generally examines and processes development proposal (referred, comes to its attention or Minister thinks “public concern”)
- Therefore once AA decides “significant env impact” **EIA process starts**
- Note: AA will undertake the EIA process for certain developments – those in Part 2 of Sch 2 (more town planning related)
- Otherwise any proposal in part of Sch 2 of EMA to DOE for processing by EIA Administrator, if part 3 of Sch 2 to EIA administrator to determine if EIA required [**handout**]
- Note: Ultimately the AA decides whether to grant permission for the development and takes into account the EIA

Authorising or regulating development cont...

- EIA process – enables public participation – advertised – principles of administrative law [CLE 5 will be on the EIA process – note also EIA regulations] – screening, scoping, preparation of EIA report, review of report, decision and other procedures [note accredited consultant must prepare EIA and cost is borne by proponent – section 28(4) of EMA]
- See www.fela.org.fj download “public participation in environmental decisions” – how to take part in the decision making process and make a submission – review stage of the EIA report provides opportunities - section 30 EMA
- Think about the important principles in part 1 – these underpin everything
- Decision at the end of the process – section 31(1) of EMA – can approve with conditions, seek additional study, not approve report
- Note: approval in section 31 comes after review stage in section 30 – which provides for public consultation too (at least one public meeting in the vicinity of the proposal)
- Section 31(4) right of appeal of decision under section 31(1) to Env Tribunal within 21 days
- Once EIA assessment completed must have a public hearing – section 34 EMA

Authorising or regulating development

- Section 55 of EMA created the Environmental Trust Fund
 - EIA approval may be subject to developer paying a bond – section 31(2) of EMA
 - Bond is security for the probable cost of preventing or mitigating any environmental damage to the area or surroundings - effect may be misunderstood
 - Potentially very powerful tool – prevention not cure – principles important
 - Approving Authority monitor's compliance
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- It is working and the funds are going through the trust fund.
 - Funds are from developers who are asked to pay, as well as the application fees received under EMA, and the respective regulations
 - We don't know of any pay outs. If there was a breach of condition the following would happen:
 - Money would go towards rehabilitation of the affected environment
 - It would go to the landowning unit – or the DOE could use to rehabilitate – issues could arise
 - We are unclear about how the payment system will be run – there are no guidelines or rules for payments out
 - We are unsure how the processing fees are used – these could be used to bolster enforcement.

Authorising or regulating development cont...

- Clear, well-drafted conditions are very important for compliance and enforcement.

It is important to ensure that conditions are:

- easy to understand;
- certain and unambiguous; fair, reasonable and practical;
- do not require compliance by a third party;
- within the processing authority's legal powers; and
- drafted in a way that they will stand the test of time.

Authorising or regulating development

- Offences in EMA – some are very significant – Part 6 of EMA
- unlawfully carrying out a development activity without an EIA approval carries a fine of \$750,000 or ten years imprisonment – section 43 EMA;
- contravening the EIA provisions of the Act or breaching an EIA approval condition carries a fine of \$250,000 or three years imprisonment;
- knowingly, intentionally or recklessly causing a pollution incident that results in harm to human health or safety, or severe damage to the environment: \$1,000,000 and/or life imprisonment (individual), \$5,000,000 (body corporate).
- unlawfully causing or contributing to the discharge of a waste or pollutant carries a first offence fine of \$250,000 or three years imprisonment, and a subsequent offence fine of \$750,000 or ten years imprisonment.
- Other remedies – lawyers note section 50 of EMA – a person has a statutory right to bring a claim for damages for a pollution incidence – see definition of pollution incident – section 2 of EMA
“...the introduction, either directly or indirectly, of a waste or pollutant into the environment, which results in harm to living resources and marine life, hazards to human health, hindrance to marine activities including fishing and other legitimate uses of the sea, impairment of quality for use of water, air or soil, reduction of amenities or the creation of a nuisance”
- Nick Barnes

3. Providing institutions to regulate and enforce

- Environmental Tribunal
- National Environment Council
- DOE departments – EIA Unit, Resource Management Unit, Waste Management [note waste disposal regulations] and Pollution Unit
- Environmental Management Committee – section 16 of EMA
- Environmental register
- Inspectors

Institutions to regulate and enforce and other means

- **Environmental Tribunal** – section 56 EMA
- Environment Tribunal – important for regulating development
- hears appeals of improvement notices / stop notices etc.
- appeals of EIA decisions - section 31 of EMA
- Current status: the DOE is working with the CJ to establish the Env Tribunal – they are waiting for the rules and procedures to be drafted and approved and then a chair person will be appointed. They have identified the two other members who will be sitting on the Tribunal – but not the Chairperson
- At present the Regulations provide that an appeal against a EIA goes to the Minister
- We hear ET's coming soon

Institutions to regulate and enforce cont...

- **National Environment Council** – section 7 of EMA
- Approve report, strategy, facilitate discussion, advise etc – prosecution function
- Current status: NEC is operating and going well. They direct the DOE regarding issues that they raise. The PS send in their representatives. This is an issue.
- ELA has made submissions in relation to a proposed review of EMA – we had specifically requested the amendment to enable the Council to approve reports, guidelines or policies that the relevant ministries formulate. The NEC has powers to appoint certain sub-committees, but they don't have powers to approve reports. For instance – there is the coastal zone management committee – they are putting together a national framework for coastal management –another example is a code of logging practice – this is from the Ministry of Forests. This is something that is not taken into account by EIA administrator because it does not have the required status.

Institutions to regulate and enforce cont...

- **DOE departments** – DOE has wide functions – specific departments in EMA are established
- **EIA Unit** – established. Current status: the main point of receiving applications for EIA – both screening and the process of the applications – they work with the Approving authorities. The Approving Authorities know to go to them. Approving Authorities only process the Sch 2 part 2 – that's more town and country planning related
- The EIA administrator or approving authority may conduct inspections at the development site to monitor compliance

Institutions to regulate and enforce cont...

- **Resource Management Unit** – national resource management plan – co-ordinate national resource activities. Current status: established it is co-ordinating the National Resource Inventory (NRI) – the NRI enables Fiji to see the resources that it has, the number and types and therefore better provide for protection. NRI feeds into the rest of the process – last time it was done 1992 (State of Env Report), and strategy was in 1993.
- NRI was completed by a consultant and utilised USP students
- After NRI:
- National State of the env report – under section 23 of EMA DOE publish every 5 years – that will be published this year – it is late. It was supposed to be done 24 from the date of the Act. Not done because the NRI was supposed to be done.
- National env strategy – section 24 of EMA – this is supposed to be prepared within 12 months of the National State of the env report
- National resource management plan – section 25 – this will also be done – it all flows from the NRI

Institutions to regulate and enforce cont...

- Waste management and pollution control unit in DOE – section 14 – established – and working
- Environmental register – section 17 – kept by the DOE – we don't think one has been created. We need it to show all the applications for EIA and Waste –and public can come and search. Watchdog role – did they get a permit? they can find out by searching register
- Inspectors – section 18 and powers section 19 and section 20 – improvement notices or prohibition notices section 21 – appeal to the Tribunal aggrieved by prohibition notice – but no tribunal – failure to comply an offence – DOE has identified and appointed inspectors.

Institutions to regulate and enforce cont...

Other institutions

- Env Management Committees – section 16 of EMA – these are to be set up by businesses / commercial – to be set up within their businesses that will manage their environmental responsibilities – Current status: these are under the directive of the Minister – so no directions so far. Some companies have set up voluntarily
- Environmental management units – section 15 of EMA – in various departments, ministries, statutory authorities or local authorities – some are in existence – the town and country planning dept – approving authority – look after the EIA processing within that dept. co-ordinate it – under the directive of the CEO
- Environment audit – section 22 of EMA – Nothing on that – it is a new area – To find out the value of the environment. DOE is supposed to come up with it. Its supposed to put a \$ value on the environment and could be used to put \$ value on bonds etc.

Commercial approach to EMA

- Suggest a commercial approach to environmental protection
- Duties of lawyers
- Aware of enforcement issues
- Status of Environmental Tribunal
- EIA requirement
- Pollution offences and other offences in part 6
- Go back to and apply the principles in EMA

Join ELA

- Please

Acknowledgements

- Thank you for attending
- Maria for organising
- All photography by Matt Capper
- Next presentation is on Wednesday 20 April 2011 by Mr. Nicholas Barnes “Opportunities for public interest litigation”