THE STRUCTURE AND NATURE OF AUSTRALIAN ENVIRONMENTAL LAW[1]

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Constitutional authority over resources and environmental questions resides principally in the States in Australia, but there are many powers which the Federal Government can develop, either alone or together with the States, in working out national policies in these areas. Although the constitutional issues are important, resolution of land use problems is fundamentally a matter of competition for power and authority within the political system.

Professor Whalan suggests four stages in the development of environmental law: (a) totally resource-oriented statutes with possible overlaps and clashes between separate uses; (b) integration of the separate codes and the introduction into those codes of environmentally oriented protective provisions; (c) the enactment of statutes directed towards a specific environmental problem or problems; and (d) the development of overview bodies with advisory and supervisory functions to which the protective responsibilities may be added.

In these statutory moves towards macro-environmental law in Australia, the Courts have been given a very limited role and it is argued that much of the law is not normative in character but procedural, administrative and discretionary. In very many cases, ultimate control is political rather than judicial.

Introduction

There are difficulties even in a unitary state in establishing an appropriate pattern for the use, and conservation, of land resources. There can be problems in deciding whether to dam a river or raise the level of a lake to store water for a water reticulation scheme, or for irrigation purposes, or for hydro-electric power for industry; for to do so will change the local environment—may be for the worse. There can be competition between towns for industry; one region's valuable industry on a river may be another's polluted water supply downstream.

There are greater difficulties in establishing national patterns in a federal state where, as is the case in Australia, fundamental consti-

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[1] A shorter version of this paper was delivered to the First Canberra Law Workshop on the Law of Property held in the Department of Law, Research School of Social Sciences, Australian National University, on 28 May 1977. I want to say thanks very much to Douglas Fisher, with whom I have shared the teaching of Environmental Resources Law since 1975, and to our classes of 1975, 1976 and 1977. Geoffrey Lindell was also kind enough to read parts of the article for me. Shall I just say that, if there are any useful ideas in the paper, they all helped me to develop them—the mistakes are all my own?

tutional authority over land resides in most respects with the States. It is interesting to compare and contrast the solutions that we are adopting in Australia with those in the United States of America. Although there is similarity in some environmental aspects, we have tried to avoid some of the American pitfalls.

However, important as the constitutional issues are in Australia, recourse to this aspect should not be allowed to obscure the fundamental reason for difficulty in resolution of land use problems. It is my thesis that, in essence, it is a question of power and authority, or competition for power and authority, within a political system. This competition is present in all facets of a legal system but with land, the ultimate source of sustenance, this competition is particularly acute. This is so, of course, whether a given country is unitary or federal; a federal structure adds another tier to the difficulties.

This element of competition, where control of land is part of power (and at times an overwhelming source of power), is present in almost all societies. But I believe that there has been a cycle in the English common law. Under the feudal system in its classical form, the hierarchy of the holdings of interests in land was complete in the land tenure pyramid. Even if this model never existed in a perfect form in England (or, if it did exist, did so for a relatively short time), it is clear that, as the system and its incidents decayed, the chain of interests in land became fewer, the pyramid flattened and eventually disappeared, and the effective control of power over land passed from the centre into the hands of those holding those interests. Of course, the ultimate right of the Crown over land remained: technically there was tenure, quit rents existed and occasional escheats occurred. But in some sense political power and the exercise of effective authority over land became severed.[2]

Ultimately, the holder of the fee simple interest in a parcel of land effectively held something that was close to allodial ownership of that land. Admittedly, there were often difficulties in the way of a person wishing to exercise an unfettered control. For instance, there often existed a strict settlement which prevented those presently in possession of the land from exercising many of the elements of this "ownership".[3] However, in most respects, the holder of, or collective holders of the various interests in, the fee simple interest in land could do as he or they wished with the land.

Then the scene began to change. Custom or the general law through doctrines such as nuisance began to exercise a minimal form of land

[2] This is not to say that the great individual landowners did not wield enormous political power as well.

[3] See, *e.g.*, Whalan, "Immediate Success of Registration of Title to Land in Australasia and Early Failures in England" (1967) 2 New Zealand Universities Law Review 416, 424 and 436, where it is suggested that in the middle of the nineteenth century at least two-thirds of land in England was subject to settlements.

use control. Statutory incursions such as the Inclosure Acts of the last half of the eighteenth and first half of the nineteenth centuries often concentrated land "ownership" in fewer hands,[4] and the pendulum towards government, sometimes central, sometimes local, as opposed to individual proprietors', control began to swing back.

Certainly, eminent domain was used at first to provide for roads and railways but then gave way to statutory provisions; land subdivision provisions were introduced as were drainage, nuisance, health, noxious weeds and animal control measures. The natural evolution of these was to overall control of land use and planning; the fast-changing face of our society hurried this evolution and, through statutory intervention, the near absolute nature of the fee simple holder's interest has been rapidly eroded.

In short, the centrifugal force spent, there was a reversal and the centripetal force became overwhelming. Just how far this ramification should, or will, go, is very much a matter of politics. Whether or not recent developments have changed the concept of a fee simple interest in land is a matter for argument.

Constitutional Structure of Australian Environmental Law

Constitutional authority over land resides in most respects in the States in Australia and not in the Federal Government. The Federal Government has complete authority only in the Territories and over off-shore areas.[5] But there are ways in which the Commonwealth may influence environmental matters either directly or indirectly. Indeed, there is an imposing array of constitutional powers upon which the Commonwealth may perhaps be able to rely in enacting environmental legislation.

In recent years several Commonwealth statutes have been enacted which deal directly with the environment and these would seem not fully to exhaust the potential constitutional powers in the environmental area. Commonwealth Acts that deal directly with environmental matters include the Environment Protection (Impact of Proposals) Act 1974, the States Grants (Soil Conservation) Act 1974, the States Grants (Nature Conservation) Act 1974, the National Parks and Wildlife Conservation Act 1975, the Australian Heritage Commission Act 1975 and the Great Barrier Reef Marine Park Act 1975. Indeed, the Seas and Submerged Lands Act 1973 could also be added to the list.

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[4] There were more than 4000 Acts between 1760 and 1845. Most were private Acts but from 1801 onwards there was a series of public Acts which culminated in the Act of 1845 which abolished the need for private legislation.

[5] In *New South Wales* v. *Commonwealth* (1975) 8 A.L.R. 1 the validity of the Seas and Submerged Lands Act 1973 (Cth) was upheld by the High Court. The Court was unanimous so far as the continental shelf was concerned and a majority upheld the Act's validity so far as the coastal sea was concerned.

Some of these Acts envisage close cooperation between Commonwealth and States;[6] others very clearly demonstrate a very strong Commonwealth assertion of power.[7] Each of the Acts is carefully drawn in an endeavour to ensure that only power within Federal constitutional power is conferred; furthermore, they are all so drawn that, if they are found to be beyond power in some respect, they may well be valid in other respects.

Some possible heads of constitutional power that might be relied upon by the Commonwealth are now briefly considered.[8]

Clearly, the Commonwealth does have constitutional authority over certain territorial areas by virtue of sovereignty over those areas. The most explicit illustration of this is the Commonwealth's authority given by section 122 of the Constitution to legislate for the government of any Territory. Section 122 gives a total power by itself, so that the Commonwealth Parliament can, generally speaking, pass the kinds of laws in a Territory that can be passed by the Parliaments of the States in regard to their States.[9] Thus there is total environmental authority vested in the Commonwealth for the Territories. Furthermore, applying the extra-territorial doctrines of the majority of the High Court in *Lamshed* v. *Lake*,[10] it is possible that some effective extension of geographical jurisdiction might accrue to the Commonwealth. This could perhaps apply, for example, to water or air pollution which affected a Territory, even although the source may be outside the Territory concerned.

After considerable debate, especially over the last decade, the High Court has now decided in *New South Wales* v. *Commonwealth*[11] that the Commonwealth has constitutional authority over the coastal sea and the continental shelf. As international law continues to confer more powers, and impose more duties, on littoral countries, this must be a growing area of Commonwealth concern. Not only will exploitation of resources in these areas be subject to environmental safeguards of which the Commonwealth has oversight, but land-based sources of environmental hazard could come under Commonwealth regulation and control.

Of less, but nevertheless of some, significance, is the plenary power that accrues in relation to land "acquired by the Commonwealth for

[6] The States Grants (Soil Conservation) Act 1974 is a good example of this.

[7] The Environment Protection (Impact of Proposals) Act 1974 and the Great Barrier Reef Marine Park Act 1975 tend to illustrate this characteristic.

[8] A much more comprehensive consideration of potential authority for Commonwealth intervention to deal with industrial pollution is to be found in a recent most enlightening article which came into my hands when the seminar paper predecessor to this article was in draft: Opie, "Commonwealth Power to Regulate Industrial Pollution" (1976) 10 Melbourne University Law Review 577.

[9] *Teori Tau* v. *The Commonwealth* (1969) 119 C.L.R. 564.

[10] (1958) 99 C.L.R. 132.

[11] (1975) 8 A.L.R. 1.

public purposes" under section 52(i). Geographical areas covered are not great[12] compared with areas of total Australian jurisdiction. However, not only will they continue to grow, but here, too, the extra-territorial effect of the applicable Commonwealth laws could have a significant environmental impact.

One of the constitutional pegs upon which Commonwealth jurisdiction over the coastal sea and continental shelf was hung was the external affairs power in section 51(xxix). Although the external affairs power can be used to extend the range of Commonwealth power by the passage of legislation to implement an international treaty obligation, there is considerable doubt as to just how far the High Court will go in upholding such Commonwealth Acts.

The High Court today may very well not go as far as the majority of judges (Latham C.J., Evatt and McTiernan JJ.) in *R.* v. *Burgess; ex parte Henry*[13] would have had the Court go, and uphold Commonwealth power to legislate to implement any treaty, international agreement or (in the opinion of Evatt and McTiernan JJ.) even draft international conventions or their recommendations. Nevertheless, there certainly is a legitimate and growing area of jurisdiction that should properly be attributable to the national government under this head. The matter could be of very great significance in relation to any international agreements made in relation to nuclear safeguards and disposal of nuclear wastes. Already the Commonwealth is party to international treaties dealing with such environmental matters as prevention of pollution by oil spillage, the protection of whales, seals, plants, waterfowl habitats, migratory birds and endangered species of wild fauna and flora. Several of these could impinge in some measure upon areas that might have once been thought to be primarily matters of State jurisdiction.

With the overturning of *Huddart Parker and Co. Pty Ltd* v. *Moorehead*[14] in *Strickland* v. *Rocla Concrete Pipes Ltd*[15] the corporations power in section 51(xx) is seen as opening up many possibilities for the development of commonwealth power. Certainly there is some potential for environmental control even if the power remains somewhat limited, but it need not remain so limited. It now seems clear that the trade of foreign corporations, trading corporations or financial corporations formed within the Commonwealth is subject to regulation by

[12] The Report of the Committee of Inquiry into the National Estate (1974), 224 states that the Commonwealth owns about one million hectares in the States.

[13] The matter is discussed in *R.* v. *Burgess; ex parte Henry* (1936) 55 C.L.R. 608 by Latham C.J. and Starke, Dixon, Evatt and McTiernan JJ., in *Airlines of New South Wales Pty Ltd* v. *New South Wales (No. 2)* (the *Second Airlines Case*) (1965) 113 C.L.R. 54 by Barwick C.J., and in *New South Wales* v. *Commonwealth* (1975) 8 A.L.R. 1 by Barwick C.J. and McTiernan, Gibbs, Stephen and Murphy JJ.

[14] (1908) 8 C.L.R. 330.

[15] (1971) 124 C.L.R. 468.

the Commonwealth and no distinction needs to be maintained between intrastate trade and other trade. Perhaps it is but a small step to hold that, if Commonwealth environmental standards are not complied with by such companies, they will be forbidden to trade.

Again, the potential power in section 51(xx) would be considerably enhanced if manufacturing and mining corporations were to be classed as "trading corporations"[16] and if the Commonwealth is held to have power over incorporation.

Section 51(ii) of the Constitution gives the Commonwealth power with respect to "taxation; but so as not to discriminate between States or parts of States"; section 51(iii) gives the Commonwealth power to provide for "bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth"; customs and excise and the granting of bounties are exclusively within Commonwealth power by section 90; and section 99 provides that "the Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof".

This set of provisions comprises a very powerful tool in the hands of the Commonwealth. For instance, it could grant depreciation allowances on appropriate environmental protection developments; it could similarly give bounties for products that complied with certain standards, or which were produced by pollution free means or which replaced high polluting alternative products; or, possibly, tax disincentives could be applied where there were environmentally destructive activities carried on—the more the environmental degradation, the higher the tax.

There are at least two problems with the use of these very potent weapons.

There could possibly be that thrown up by *R.* v. *Barger*[17] under which the Commonwealth may face the challenge of characterisation that its taxation law or its bounty statute is not really a taxation or bounty law at all but a statute concerning environmental protection upon which it has no right to legislate. It is suggested that ever since *Amalgamated Society of Engineers* v. *Adelaide Steamship Company*

[16] The possibility that such companies were not trading corporations was suggested by Isaacs J. in *Huddart Parker and Co. Pty Ltd* v. *Moorehead* (1908) 8 C.L.R. 330, 393 when he said that a distinction must be drawn between trading corporations and corporations constituted for "municipal, mining, manufacturing, religious, scholastic, charitable, scientific, and literary purposes". It is, however, possible that the High Court will not follow that view. In *Strickland* v. *Rocla Concrete Pipes Ltd* (1971) 124 C.L.R. 468 the assumption that companies such as Rocla and Monier, which manufacture concrete products, were trading corporations does not appear to have been questioned in the judgments of their Honours. See further *R.* v. *Trade Practices Tribunal; ex parte St George County Council* (1974) 130 C.L.R. 533 the judgments of Menzies J., 552-553, and Gibbs J., 562.

[17] (1908) 6 C.L.R. 41.

Ltd[18] it has been unlikely that such a challenge would succeed. I submit that a challenge is even less likely to succeed since the decision in *Murphyores Incorporated Pty Ltd* v. *Commonwealth of Australia*.[19] In that case, Mason J. expressly said that *Barger's* case "can no longer be regarded as having authority. It depended on the now discredited doctrine of reserved powers".[20] Gibbs and Jacobs JJ. concurred in the judgment of Mason J. but, admittedly, this question was not central to the decision. Barwick C.J., McTiernan, Stephen and Murphy JJ. expressed no view on the matter. Nevertheless, I suggest that, for such an argument to have even a remote chance of success now, the Commonwealth would have to have trespassed very greatly indeed upon State powers.

The second problem is of more account; it concerns uniformity. Given the pattern of powers outlined above, uniformity between States and areas is essential in the applicability of all of the devices suggested.

A statute that purported to apply throughout the Commonwealth might very well escape the effect of the discrimination prohibitions; it may very well also operate unfairly because of the uniformity of operation. There may be environmentally degrading activities being undertaken in some States or in some areas of a State, which it would be appropriate for economic or social reasons to phase out over a period rather than suddenly halt. Yet it may be appropriate to ensure that these activities be completely prevented from being started elsewhere. Possibly the most appropriate and fair solution would be to have graded disincentive levels for the different States or areas; there could be some doubt as to whether this would be legislatively possible under the Commonwealth's legislative powers.

One way in which the desired objective could be achieved, provided the particular State or States agreed, is by the use of another Commonwealth power—the tied grant power provided for in section 96. Given the overwhelming financial strength of the Commonwealth, this power to "grant financial assistance to any State on such terms and conditions as the [Commonwealth] Parliament thinks fit", is a very powerful weapon indeed. Of course, the weakness is that this authority can only be used where the State (or States) concerned agrees; but, subject to that, it is an almost absolute power.

There are other miscellaneous Commonwealth powers which may be of some use for aspects of environmental control. For instance, the defence power in section 51(vi) might be invoked in connection with

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[18] (1920) 28 C.L.R. 129. In *Fairfax* v. *Federal Commissioner of Taxation* (1965) 114 C.L.R. 1 Kitto and Taylor JJ. were of the clear opinion that *Barger's* case was wrongly decided; but, although Barwick C.J., and Menzies and Windeyer JJ. fell short of expressing the same opinion, the approach they adopted cast doubt on the correctness of that decision.

[19] (1976) 9 A.L.R. 199; 50 A.L.J.R. 570.

[20] *Id.* 215; 579.

uranium production and the census and statistics power in section 51(xi) has been called in aid in the Great Barrier Reef Marine Park Act 1975, section 5. Again, the so-called inherent national power raised in *Attorney-General for Victoria (at the relation of Dale)* v. *The Commonwealth* (the *Pharmaceutical Benefits Case*)[21] and endorsed in *State of Victoria* v. *Commonwealth*[22] was called in aid in the National Parks and Wildlife Conservation Act 1975, section 6(1)(a). However, the final substantial power to be mentioned is the "trade and commerce" power in section 51(i). That it does give considerable potential for the Commonwealth to become involved in environmental matters will be seen later when the case of *Murphyores Incorporated Pty Ltd* v. *Commonwealth of Australia*[23] is considered; but, it is suggested that the power is definitely not infinitely extendable.

I turn now to survey the way in which the Federal Parliament has thrown the constitutional net in recent legislation.

First, I consider the National Parks and Wildlife Conservation Act 1975. The Constitution confers no specific power on the Commonwealth Parliament to create national parks. But, relying on the full plenitude of powers principle, Federal Parliament enacted section 6 of the National Parks and Wildlife Conservation Act 1975 and in so doing established the objects of the Act and the constitutional basis claimed for the Act. Section 6(1) provides as follows:

> The object of this Part is to make provision for the establishment and management of parks and reserves—
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> (a) appropriate to be established by the Australian Government, having regard to its status as a national government;
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> (b) in the Territories;
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> (c) in the Australian coastal sea;
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> (d) for purposes related to the rights (including sovereign rights) and obligations of Australia in relation to the continental shelf of Australia;
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> (e) for facilitating the carrying out by Australia of obligations under, or the exercise by Australia of rights under, agreements between Australia and other countries; or
>
> (f) conducive to the encouragement of tourism between the States and between other countries and Australia,
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> and this Act shall be administered accordingly.

I have already suggested that section 6(1)(a) calls in aid the inherent national power to which may be added the strength of section 61 of the Constitution and the incidental power in section 51(xxxix). Section 6(1)(b) is a clear application of the Territories

[21] (1945) 71 C.L.R. 237.
[22] (1975) 7 A.L.R. 277.
[23] (1976) 9 A.L.R. 199; 50 A.L.J.R. 570.

power in section 122[24] and section 6(1)(c) and (d) apply the decision in *New South Wales* v. *Commonwealth*[25] giving the Commonwealth jurisdiction over the coastal sea and the continental shelf. Section 6(1)(e) would seem clearly to be based on the external affairs power in relation to international treaties.[26] Also section 69(1) of the Act permits the making of regulations "for and in relation to giving effect to an agreement specified in the Schedule" and the scheduled agreements refer to Conventions on wetlands as waterfowl habitat, for the conservation of Antarctic seals, for the protection of the world cultural and natural heritage and on international trade in endangered species of wild fauna and flora and the agreement between the Government of Australia and the Government of Japan for the protection of migratory birds and birds in danger of extinction and their environment. Finally, section 6(1)(f) would appear to rely on the trade and commerce power and, no doubt, it would be argued that tourism comes within the power since interstate transport is so within power.[27] It is suggested that this is probably the provision that is most at risk in the section.

It is noted that, having set out these objects, section 6(1) provides that the Act is to "be administered accordingly". This clearly envisages that the Act is to be read down if some part of the Act's provisions is held to be beyond power. This is emphasised by section 71(4) which provides, in part, that "[r]egulations with respect to a matter shall be regulations applicable to that matter only so far as that matter may be dealt with under the powers of the Parliament . . .". The sub-section then goes on to enumerate action under possible heads of power, adding to those in section 6(1) the powers in relation to "places acquired by Australia for public purposes",[28] "fisheries in Australian waters beyond territorial limits"[29] and "statistics relating to animals and plants".[30]

The Great Barrier Reef Marine Park Act 1975, section 5 handles the constitutional issues somewhat similarly to the way they are handled in the National Parks and Wildlife Conservation Act 1975, although in that section there are specific references to "external affairs", "trade and commerce with other countries, including the

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[24] S. 71(4)(a), which provides that regulations may be made under powers with respect to "the government of a Territory" is also based on s. 122 as is s. 7(1)(a).

[25] (1975) 8 A.L.R. 1. This decision also provides a constitutional base for the definition of "area" contained in s. 7(1)(b) and (c).

[26] So, too, is s. 7(1)(d).

[27] *Australian National Airways Pty Ltd* v. *The Commonwealth* (1945) 71 C.L.R. 29.

[28] S. 71(4)(b) bringing into play s. 52(i) of the Constitution.

[29] S. 71(4)(f) bringing into play s. 51(x) of the Constitution.

[30] S. 71(4)(g) bringing into play s. 51(xi) of the Constitution. It is interesting to note that a provision in the Bill was dropped from s. 71 of the Act which provided for the use of the Federal Parliament's power with respect to "external affairs, including the implementation of agreements between Australia and other countries".

import or export of animals and plants" and "matters incidental to the execution of the powers of the Government of Australia".

However, a totally different approach is taken in the Australian Heritage Commission Act 1975. Very few direct administrative or executive powers are given or claimed in this Act. The principal functions of the Commission as set out in sections 7 and 8, apart from preparing and keeping the Register of the National Estate, are to furnish advice to the Minister on a whole range of matters, to encourage public interest in, and understanding of, issues relevant to the national estate, to further training and education in relation to the national estate, to make arrangements for the administration of bequests to the Commission, and to consult with Departments and authorities of the States, local government authorities and community and other organisations. The Act does not purport to confer direct constitutional authority to do anything in relation to the environment. Of course, if advice given by the Commission were to be acted upon by the Minister, then the Minister may well seek to use constitutional authority, but this does not flow from the Act or the acts of the Commission; its role is overwhelmingly an advisory one.

The States Grants (Nature Conservation) Act 1974 envisages even closer Commonwealth-State cooperation. Under section 4 there is to be a programme of land acquisition, but it is only to be effected through agreements between the Commonwealth Minister and a State Minister. In both the Australian Heritage Commission Act 1975 and the States Grants (Nature Conservation) Act 1974 (and the same is also true of the States Grants (Soil Conservation) Act 1974) there is no claim by the Commonwealth to exercise constitutional powers in relation to the environment—all that is used is the Commonwealth's financial strength.

The only reported High Court decision on the recent group of Commonwealth environmental statutes is *Murphyores Incorporated Pty Ltd* v. *Commonwealth of Australia.*[31] In this case the constitutional validity of perhaps the most interesting and, certainly, through its use in the Fraser Island sand-mining inquiry and the Fox uranium inquiry, the most publicised of the Commonwealth statutes, the Environment Protection (Impact of Proposals) Act 1974, was upheld. The decision is dealt with only briefly here as it has already been the subject of comment in this *Review.*[32]

The plaintiffs were carrying on mining on Fraser Island in Queensland under leases granted to them under the Queensland Mining Act. Control of export of minerals is governed by Regulation 9 of the Commonwealth Customs (Prohibited Exports) Regulations. The

[31] (1976) 9 A.L.R. 199; 50 A.L.J.R. 570.

[32] See Austin, "Murphyores Incorporated Pty Ltd v. The Commonwealth of Australia" (1977) 8 Federal Law Review 242; and Fisher, "The Federal Environment Protection Procedures" (1977) 8 Federal Law Review 164, 185.

Minister administering the Environment Protection (Impact of Proposals) Act 1974 directed an inquiry into environmental aspects of the making of decisions relating to export of minerals from Fraser Island, and the Minister for Minerals and Energy informed the plaintiffs that he intended to consider the report of the inquiry before reaching a decision about their application for export approval. After some preliminary matters had occurred, eventually the plaintiffs sought an injunction to prevent the commissioners holding the inquiry from presenting their report to the Minister administering the Act and a declaration that the Minister for Minerals and Energy was not entitled to consider the report in determining an application under Regulation 9.

Regulation 9 was held to be constitutionally valid. The Court also said that, in determining the application for export approval, the Minister for Minerals and Energy was entitled to have regard to environmental aspects of mining. As the Minister had said that he intended to consider the report of the inquiry under the Environment Protection (Impact of Proposals) Act 1974, the Court moved to look at the Act.

Barwick C.J. and Murphy J. were unequivocally of the opinion that the Act was (in the words of the learned Chief Justice) "a valid law of the Commonwealth"[33] and the clear implication is that McTiernan J. was of this opinion too. Gibbs J. expressed his view more narrowly and said only that section 11 under which the inquiry was set up was valid and that the constitutionality of the remainder of the Act did not fall for consideration. In that an inquiry under section 11 can only have life breathed into it through the operation of other sections, I wonder, with respect, whether it is quite enough to rely upon section 11 alone. Interestingly enough, it is perhaps the views of the other three members of the Court (Stephen, Mason and Jacobs JJ.) which catch the eye even more in the environmental context. In essence, Stephen, Mason and Jacobs JJ. all said that it was not necessary to look at the validity of the Act, as the Minister for Minerals and Energy was entitled to take environmental factors into account in making his determination under Regulation 9. Perhaps this suggests the possible injection of the environmental element into many other aspects of Commonwealth Ministerial decision-making. I do not want to make too much of this, for there will need to be some constitutional peg upon which to hang the environmental question; but there are many Regulation 9-type pegs to be found.

Nevertheless, it is suggested that this decision does emphasise the indirect manner which the Commonwealth must of necessity adopt if it is to be involved in the environmental field other than in the Territories and off-shore areas. Only Queensland had the constitutional

[33] (1976) 9 A.L.R. 199, 201; 50 A.L.J.R. 570, 571.

authority to grant sandmining leases on Fraser Island. The Commonwealth, by virtue of its power to control exports, was able to exert economic pressure because only overseas sales rendered mining there a viable proposition; thus effective environmental control by the Commonwealth was quite fortuitous. The principal constitutional authority in environmental matters resides with the States and, if a comprehensive national policy on the environment is to be developed in Australia, it is quite vital that State powers as well as Commonwealth powers be used.

Although principal responsibility does reside with the States, it is suggested that this does not dispose of all difficulties. Not only is there competition between the Commonwealth and the individual States, but there can be competition between States. There has been substantial competition between States in attracting industry, particularly since World War II. This interstate competition can be won or lost depending upon the kind of bargain the State can offer to an industry. There may be many elements in the equation—land or other resource availability, tax or transport subsidies and many others. One of the terms in the equation in recent times has been environmental considerations. The environmental term is a relatively new one and it is almost certainly a negative one so far as industry is concerned. It is thus easier in such a circumstance for a State Government to do as little as possible consistent with what public opinion requires. Such a Government may, indeed, specially exempt the particular enterprise from the provisions of the general environmental legislation. This may be done even although the impact of the new project may, in environmental terms, have consequences much greater than those of many more smaller enterprises.

Intrastate questions also loom large. Within the jurisdiction of a State there is also very considerable competition for power and authority just as there is at the other levels. Of course there is competition between local authorities responsible for general matters. If an industry can be attracted perhaps the rates will be helped. Or, conversely, if a particularly polluting industry can be kept away the amenity can be more easily sustained. Or I take this analogy. I have become accustomed, through watching (only very occasionally because I would rather spend my time writing papers such as this!) some "cops and robbers" television shows, to thinking that not only does the particular local police force wish to catch the criminal, but they also want to make sure that their "patch" is kept clean, even if, occasionally, someone else's "patch" will perhaps "enjoy" a visit because of the cleansing process! One of the problems is that geographically bounded local authorities sometimes act the same way. Ideally, a particular local authority would like to catch all the sewage but, as long as it does not foul up its own jurisdiction and cost the ratepayer money, and the

politician votes, then it is happy to let someone else inherit the problem. Perhaps I overdo my illustration, but not by very much.

In addition to these there will be State authorities, or entities acting under State authority, with competing particular rather than general responsibilities. Each *ad hoc* or particular purpose authority may have objectives which conflict not only with the general authority but also with those of other *ad hoc* authorities. The authority that is charged with responsibility for electricity reticulation is concerned to provide the best possible electricity coverage at least possible cost. This may mean that a line of electricity pylons marches unbeautifully across the countryside; but they do the job satisfactorily. The water reticulation authority wants to ensure that the best possible water supply is given. This may mean that the tops of hills are laden with reservoirs or that people or animals may be excluded from areas that are of value for forestry, or pastoral, or mining, or tourist exploitation.

A need has developed to integrate these various conflicting uses and to attempt to evolve a consistent environmental protection pattern.

The Development of Environmental Law

I shall argue a progressive evolution which is not totally chronological, but which is partly chronological and partly conceptual. Briefly, I suggest that traditionally the various land use codes that have been developed have tended to be exclusive rather than inclusive or integrated; this has changed in more recent times by the infusion of environmental considerations mostly through statutory changes but also through some judicial development; but the changes have not been extensive or rapid enough to overcome the need for comprehensive liaison or overview type legislation to link the various aspects of environmental concern together.

In the first stage of this development there was simply a situation where environmental consequences were not considered: legislation was totally oriented towards exploitation of resources.

Mining legislation is a good illustration of this policy of resources exploitation. The legislation was geared to facilitating mining. It might or might not conflict with other codes; at best it overlapped other land use codes such as pastoral use or forestry exploitation legislation. No complete endeavour was made to resolve these conflicts. Certainly there was no concern in the mining legislation to consider the possibility of degradation of the environment.

Another simple illustration of legislation lacking in environmental protection provisions in this first stage is that concerned with the provision of roads. For instance, the Public Roads Act 1902 in New South Wales[34] is concerned with opening up roads. Its emphasis has

[34] New South Wales is used for illustration often in this paper. It is suggested that other Australian jurisdictions also follow the pattern outlined here.

always been on getting the land upon which to build roads. The same was basically true of the Main Roads Act 1924. For instance, it would be difficult to find a better and more draconian illustration of the principle "the roads, like the mails that go on them, must go through" than section 8(8) of the Main Roads Act 1924 which states:

> It shall not be necessary to proclaim any correction of a route of a main road, or any relocation of or alteration to the route of any portion of a main road adopted by or with the approval of the Board for the purpose of securing better alignment or gradients, or making better provision for public service.

Certainly, during this first stage, there were criminal sanctions, but they were directed towards support of the object of the Act. The general thrust may be seen in section 32 of the Public Roads Act 1902 which provides:

> Whosoever wilfully obstructs or damages any road whether opened and dedicated under this Act or not shall be liable to a penalty not exceeding [Two hundred dollars].

Then we pass to the second stage and there are perhaps two aspects here. First, we find some endeavours to integrate the areas of potential conflict between the various codes; and, secondly, we begin to find the intrusion of positive environment protection provisions in the previously totally development oriented statutes. Sometimes both of these purposes overlap.

A very simple and recent illustration of integration is the provision in section 55 of the National Parks and Wildlife Act 1974 (N.S.W.) which simply states that the Forestry Act 1916 (N.S.W.) does not apply to lands within a nature reserve, although existing licences and permits under that Act are preserved. The Forestry Act 1916 itself, which started off almost entirely as a resource exploitation statute but has been softened a little,[35] contains provisions for integrating forestry and mining activities. Section 21 of the Forestry Act 1916 gave primacy to the Mining Act (and the Petroleum Act) by making the land within State forests, flora reserves and catchment reserves subject to those Acts unless the Minister administering the Forestry Act, with the concurrence of the Minister for Mines, by Gazette notice took any part of those entities out of the operation of the Mining Act and Petroleum Act provisions.

On the second aspect of intrusion of environmental protection provisions, the Forestry Act 1916 includes some such provisions,[36] but the Mining Act 1973 (N.S.W.) more readily demonstrates the trend,

[35] *E.g.*, by the Forestry Amendment Act 1935, s. 5(1)(f), s. 19A was added to the Forestry Act 1916 and it permitted national forests to be taken out of the operation of the Act. Again, s. 3 of the Forestry Amendment Act 1935 added s. 25A to the principal Act thus providing for a flora reserve for the preservation of native flora.

[36] Two of them are mentioned in the immediately preceding footnote.

for its predecessor, the Mining Act 1906, contained no similar provisions. Part VII of the Mining Act 1973 is designated Protection of Environment. Section 117 directs the Minister administering the Act, or the Governor, in deciding whether or not to grant an authority under the Act to "take into account the need to conserve and protect the flora, fauna, fish, fisheries and scenic attractions, and features of architectural, archaeological, historical or geological interest, in or on the land over which the authority is sought, and may cause such studies (including environmental impact studies) to be carried out as he may deem necessary to enable him to decide whether or not to grant an authority". Section 118 permits the inclusion in an authority of conditions for "the conservation and protection of the flora, fauna, fish, fisheries and scenic attractions, and features of architectural, archaeological, historical or geological interest, in or on the land subject to the authority". Section 119 provides that a mining lease may include conditions as to rehabilitation of areas damaged by mining. Section 120 gives the Minister power to enforce sections 118 and 119 conditions where an authority is cancelled or otherwise ceases to have effect.[37] Although of significance as demonstrating a change in attitude towards environmental matters, it is to be noted that these provisions are still matters within the purview of the Minister's (or Governor's) powers. The courts are not involved and there is no means by which individuals can trigger the operation of the provisions.

However, the High Court in *Sinclair* v. *Mining Warden at Maryborough*[38] did open up another possibility for the injection of an environmental protection element into mining decisions. Under the Mining Act 1968-1976 (Qld) and the regulations made under it, a warden considers applications for mining leases and recommends to the Minister who then grants or refuses to grant the lease. The warden is required to recommend rejection of an application if it is his opinion that the public interest or right will be prejudicially affected by the granting of the application.

In the present case, Sinclair objected for himself and a conservation group in relation to an application for four leases. The mining warden said that, although it was clear that Sinclair was representing the views of a section of the public, he was unable to conclude from this evidence that the interests of the public as a whole would be prejudicially affected by the granting of the leases. The warden considered that until it could be shown to be against the public interest as a whole the applicant was entitled to a recommendation from the warden that the leases be granted. Nevertheless, the warden concluded that the evidence presented a strong case for care in the use to which land in the area be

[37] Very similar provisions to these are enacted in ss. 93-96 of the Coal Mining Act 1973 (N.S.W.) also comprising Part VII Protection of the Environment.

[38] (1975) 5 A.L.R. 513.

put. Sinclair sought, and the High Court gave, a direction that, because the warden had not heard the applications and objections according to law, he should do so. Among other grounds for so requiring was that the warden had proceeded on the basis that a formally correct application must be recommended unless there was proof that the grant would be prejudicial to the public interest. Of course, if the warden's view was correct, there would be a bias in favour of mining and against preservation of the existing environment; or at least the onus of proof would lie on those seeking preservation.

Barwick C.J. opined that the warden was wrong to

> have drawn the irrelevant distinction between the views of a section of the public and the public interest as a whole . . . [H]e has not considered the real question which it was his duty to consider, namely, whether the granting of the application would prejudicially affect the public interest. . . . The interest, of course, must be the interest of the public and not mere individual interest which does not involve a public interest. Clearly enough, the material evidenced by the appellant did relate to a public interest not limited to the interests of a less than significant section of the public.[39]

For Jacobs J. the issue was a little more complex, for he said:

> The public interest is an indivisible concept. The interest of a section of the public is a public interest, but the smallness of the section may affect the quantity or weight of the public interest so that it is outweighed by the public interest in having the mining operation proceed. It does not, however, affect the quality of that interest. The warden looked for what he described as the public interest as a whole and he did so in contradistinction to the interest of a section of the public. Moreover, he limited the area of public interest to the section of the public who propounded the views expressed by the objector. This was not permissible. The views may have been propounded by a section of the public, but the matters raised went to the question of the interest of the public as a whole.[40]

Jacobs J. thus recognised that there were competing interests and the question must be resolved by weighing those up and deciding in favour of that which is of greater public benefit. Indeed, he says later that

> the public interest may tell against the grant of a mining lease, even though the particular interests of an individual are the only interests primarily affected. It may thus be in the public interest that the interests of that individual be not overborne. However,

[39] *Id.* 519.
[40] *Id.* 524-525.

> all the objections can be and should be related to the public interest.[41]

Stephen J. developed the idea of the need to weigh up the competing views even further. He said:

> Any consideration of the public interest for the purposes of [the regulation in question] should, I think, involve the weighing of benefits and detriments. . . . In some special contexts questions of the public interest may not involve this process of weighing against each other conflicting merits and demerits; where however the concept of the public interest occurs as a factor in the grant or refusal by the Crown of a mining lease it can, I think, have only this meaning.[42]

It seems that, at the very least, the scales are evened up a little between an applicant for a mining lease and an objector on environmental protection grounds. However, it must be remembered that, whatever may be the warden's recommendation, it is still for the Minister to accept it or reject it and to grant or refuse to grant the lease. Ultimately then it is a matter for political decision.

I now come to the third phase of the development of environmental law, or, perhaps, there could be a further breaking up into a third and fourth level.

If there is a third separate phase this would include specifically oriented legislative enactments to preserve or conserve aspects of the environment. In some ways these enactments are not truly liaison enactments but they do have some aspects of this nature. The planning legislation could be seen as having something of this character but it is not specifically directed towards environmental considerations. Another illustration, again in New South Wales, is the Soil Conservation Act 1938. This legislation is environmentally oriented almost by implication rather than directly. There are clear provisions for fighting soil erosion, for livestock limitation and for carrying out protective projects. There are prohibitions on destruction of flora unless permission is granted by an administrative decision. The mainspring of the Act is largely administrative in character; the courts do not come into the operation of the legislation except at the point of imposing fines and then only in a very minor way. Other specific legislative provisions in New South Wales include the Clean Air Act 1961, the Clean Waters Act 1970, and the Noise Control Act 1975, recently brought into force. All of these have common law notions in the background and make legislative provisions where the common law has proved inadequate. But, again, in all cases, they are predominantly administrative Acts, although, here too, the courts do come in at the sanction level.

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[41] *Id.* 525.
[42] *Id.* 523.

The final category is the overview type of legislation. In this kind of legislation the object seems to be to interrelate conflicting policies by having a body that steps outside any particular function such as soil conservation or water control or forestry management. The administrative body under this legislation does not make direct decisions as does, say, the group administering the forestry legislation. It coordinates or directs people to work together, although it can step in over the heads of other bodies. But the final arbiter is the Minister; he has the final control; thus the ultimate control here is political.

An early illustration is the Conservation Authority of New South Wales Act 1949. The New South Wales State Pollution Control Commission Act 1970 is also such a statute, but it is a general statute rather than a specific one and the Commission is charged with a wide ranging administrative and advisory role over environmental matters in the State. However, the State Pollution Control Commission now has not only these functions, but has also acquired considerable executive authority through reference to it of the authority and enforcement responsibilities of other Acts.[43]

All other States also now have general environmental statutes.[44] In Queensland and South Australia, the Councils remain overview advisory bodies only without back-up executive powers. The Victorian and Tasmanian environmental entities are similar to the New South Wales Commission in having both overview and executive functions, but, in both cases, the same statute that gives them oversight and coordination authority also confers executive functions over environmental risk areas. The Western Australian statute does also confer both types of function, but the risk area functions are less marked than those conferred in Victoria and Tasmania. Nevertheless, the Western Australian statute does give the general public an opportunity to come in at an early stage of a particular development and, in other respects too, it has advantages over the other Australian statutes as an environmental protection statute.

In summarising this argument on the development of environmental law, I would say that at first there is merely enabling or exploitative legislation with little or no environmental concern or protection built in; then we find controlling or protective legislation being enacted and sometimes these provisions intrude into the developmentally oriented legislation; and, thirdly, we have advisory, supervisory, managerial or

[43] For instance, the Commission is now responsible for administering the Clean Air Act 1961 (see New South Wales Planning and Environment Commission Act 1974, s. 22 and Schedule), the Clean Waters Act 1970 (see New South Wales Planning and Environment Commission Act 1974, s. 22 and Schedule) and the Noise Control Act 1975 (by the terms of the Noise Control Act 1975 itself).

[44] Environment Protection Act 1970 (Vic.); Environmental Protection Act 1971-1975 (W.A.); State and Regional Planning and Development, Public Works Organization and Environmental Control Act 1971-1974 (Qld); Environmental Protection Council Act 1972 (S.A.); and Environment Protection Act 1973 (Tas.).

investigative legislation of an overview type with the final stage being reached with the body responsible for these functions also being charged with administering and enforcing the controlling or protective legislation.

The Nature of Environmental Law

It was argued earlier that, as the feudal system decayed, the holder of the fee simple interest in land came to have almost untrammelled control of the use of his land. The English common law and equity began to develop methods of dealing with problems that could be described as incipient resources or environmental or perhaps merely planning law. The extensive power was delimited by the principle embodied in the maxim *sic utere tuo ut alienum non laedas.* Public nuisance, private nuisance and the principle in *Rylands* v. *Fletcher*,[45] even the doctrine of waste, all began to fetter the use of land to some degree. The rules that were developed by the law for dealing with surface waters, or those concerning riparian rights, placed other rights and obligations on the landholder. The incipient land use control device of the covenant, positive or restrictive, became recognised common law and equitable rights even if covenants never were adequately developed to fulfil the purpose for which they were initiated.

All of these principles were grafted on to a system imbued with a philosophy that land was basically in private control. They were developed by the courts as substantive law rights which diminished this control. In the equity jurisdiction the procedural, as opposed to substantive, device of the injunction was also used in the land law area. But most controls were substantive law rights and enforceable directly in the courts. In many respects they could be described as micro-environmental laws (although perhaps they were rather micro-planning law) enforceable in the judicial domain by writing down the virtually plenary private law powers of the landowner. These elements, growing as they did in the English general law tradition, did not however attract a generic description. Indeed, they drew their sustenance from several branches of the law. Their essential element was that they were a set of normative substantive principles developed in, and enforceable by, the normal courts.

As happens when the development of the general law falls behind the aspirations of society, statutory intervention began to occur.[46] There had been some few statutory interventions early on but they are insignificant and amounted only to proscribing certain specific conduct usually backed up by criminal law sanction for breach.

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[45] (1868) L.R. 3 H.L. 330.

[46] A paradoxical illustration of this has occurred in Papua New Guinea. There has been a move away from the introduced English common law back towards customary law; this is effected in some Papua New Guinea *statutes* which provide that customary law is to be applied in the courts in place of the common law.

However in recent years there has been a drive towards central control which has been directed through statute. I do not limit the meaning of "central control" to that of the Federal Government. Although I have argued that the Commonwealth does have substantial areas of jurisdiction which will need to grow if cohesive national policies are to be developed, I recognise that "the centre" in this instance may mean where most constitutional power over land resides —in the individual States. In practice, under planning legislation (and in some environmental type legislation too) there may be more localised public control in local authorities, and the nature and extent of this varies from State to State. But the ultimate centre of power even here is in the State Government usually acting through the responsible Minister. With resources and environmental protection legislation this is even more marked.

I emphasise that much of what I say about the elements of land use control laws which I designate as environmental, is also true about other aspects and this may raise the question whether I should seek to single out one segment of the total in a jurisprudential analysis. At the moment I develop the arguments with environmental law aspects, but it may well be that they can be extrapolated to cover some other aspects as well. When I do single out those elements of the law that are environmental in nature—the correcting of existing environmental degradation, the evaluation (whether by environmental impact statement or inquiry or otherwise) of future developments, the setting of environmental standards, or the enforcement of standards that are established—we see that the move towards macroenvironmental laws has been almost entirely statutory in nature. Indeed, one of the major questions that arises for solution in the future is just how much of a role the traditional court structure will have in this area; it may be quite small.

This leads me to say that, in the form that much of the legislation takes, there is a major change in the jurisprudential nature of this environmental law developed through the statutes. The basic thesis is that much of this law is not normative in character but procedural and administrative. From time to time standards are set and the criminal law may be invoked; on occasion an environmental protection statute may provide expressly for standing; perhaps from time to time substantive law may be found in the interstices of procedure. But the over-riding character of the legislation, whether Federal or State, is administrative, discretionary and procedural rather than normative. At so many levels the control ultimately is political rather than judicial.

An excellent, if a somewhat exaggerated, illustration of this is the Environment Protection (Impact of Proposals) Act 1974 (Cth). Section 5(1) of the Act states that the

> object of this Act is to ensure, *to the greatest extent that is practicable*, that matters affecting the environment to a *significant*

extent are *fully* examined and *taken into account*[47] in and in relation to—

(a) the formulation of proposals;

(b) the carrying out of works and other projects;

(c) the negotiation, operation and enforcement of agreements and arrangements (including agreements and arrangements with, and with authorities of, the States);

(d) the making of, or the participation in the making of, decisions and recommendations; and

(e) the incurring of expenditure,

by, or on behalf of, the Australian Government and authorities of Australia, either alone or in association with any other government, authority, body or person.

Section 5(2) provides that the objects set out in sub-section (1) apply also to situations where financial assistance is granted, or is proposed to be granted, to the States.

These stated objects themselves demonstrate even at the heart of the Act the building into the Act of administrative discretions. Professor Clark has expressed the view that section 5 "creates neither rights nor duties"[48] and yet it is the strongest provision in the Act, for virtually all of the other provisions are procedural or administrative in nature. The Governor-General *may* approve and vary administrative procedures to achieve the objects of the Act;[49] every Minister is to give directions and do such things as can be done by him for ensuring that the procedures are given effect to and that any final environmental impact statement formulated under, or suggestions or recommendations made in accordance with, the procedures *are taken into account*;[50] the Minister *may* direct that an inquiry be conducted in respect of all or any of the environmental aspects of matters referred to in section 5;[51] and, without prejudice to any other right, power or duty of any authority to take into account matters relating to the environment, regulations *may* be made requiring or permitting a prescribed authority *to take into account* matters affecting the environment.[52] At every point of actual decision by a Minister or Ministers or prescribed authority there is a duty only to take into account environmental aspects. The Act lays down no mandatory standards or, indeed, any standards; an inquiry need not be held nor is an environmental impact statement required to be prepared. All that the Act requires is that the environ-

[47] Italics added.

[48] Clark, "Redcliff and Beyond: The Commonwealth Government and Environmental Planning" (1975) 5 Adelaide Law Review 165, 169.

[49] Environment Protection (Impact of Proposals) Act 1974, s. 6.

[50] *Id.* s. 8.

[51] *Id.* s. 11(1).

[52] *Id.* s. 9.

mental element is placed in the equation. Having taken these matters into account, the final decision is an administrative or political one and, provided the procedures called into play have all been properly followed, is unchallengeable in the courts.

The courts can seldom be part of the regime of environmental law as it is set up in Australia. They have been used as a tool in the United States of America with a little success. But I feel that so much time has been taken up in America on the threshold question of *locus standi* that I doubt the effectiveness of the court structure as an environmental tool. There is a feeling among people that, if only they can get into the court, justice will be done. Of course, there could be statutory intervention to grant standing in the courts and thus get over the threshold. But I just wonder if it could turn out that specialised administrative tribunals to which access is easier could be more effective in the area. Certain it is that in Australian environmental legislation we have set our faces against permitting the courts to have a substantial role.

This point is perhaps made very neatly by looking at the standing provisions of the Victorian Environment Protection Act 1970. Much has been made of the fact that section 32(5) of that Act allows a right of appeal to any person who feels aggrieved by a decision of the licensing authority, the Environment Protection Authority.

The provision does widen standing by allowing third parties in; but the sub-section seems to me, by its terms, to be quite circumscribed in its operation. It provides that:

> Where the Authority grants or amends a licence or removes a suspension of a licence under this Act any person who feels aggrieved thereby may within thirty days after the grant, amendment, or removal appeal to the Authority against the grant, amendment, or removal on any one or more of the following grounds, namely—
>
> (a) that the discharge, emission, or deposit of wastes under the provisions of the licence will unreasonably and adversely affect the interests, whether wholly or partly, of that person;
>
> (b) that the discharge, emission, or deposit of wastes under the provisions of the licence will be inconsistent with or will result in conditions inconsistent with State environment protection policy established for the area or, in the absence of any such policy, would result in a condition of pollution;
>
> (c) that the emission of noise above tolerable levels under the provisions of a licence will unreasonably and adversely affect the interests, whether wholly or partly, of that person or would be inconsistent with or will result in conditions inconsistent with State environment protection policy established for the area.

First, by the use of the phrases "will unreasonably and adversely affect the interests, whether wholly or partly, of that person", "will be inconsistent with or will result in conditions inconsistent with State environment protection policy established for the area or, in the absence of any such policy, would result in a condition of pollution" and, in sub-section (5)(c), similar phrases together, it is suggested that the environmental "busybody's" task is made a very difficult one.

Secondly, and more importantly in the present context, there is the fact that the appeal by the third party is made first to the Authority itself (that is, the body that made the decision), then, under section 32(11)(a), to the Environment Protection Appeal Board. Admittedly, under section 36(3), it is possible for a third party to get to the Supreme Court on a question of law. But, basically, these standing provisions do not give *locus standi* before a court; they grant standing within an administrative structure. Consistent with this philosophy of this being an administrative, rather than a court, structure, sections 32(9)(a) and 34(1) provide that the procedure on appeal to the Authority and the Board respectively is to be informal and that they are to decide on the substantial merits of the case without regard to legal forms and technicalities and are not to be bound by the rules of evidence.

Having argued that the structure of environmental law as it is developing is seldom normative, but usually procedural and administrative, often highly discretionary and, very often, directly or indirectly subject to political control whether at local body or State or Federal Government Ministerial level, I make a final short point on separation of powers.[53]

Although technically sustained, there are many respects in which the separation of legislative and executive functions and powers is something of a fiction nowadays. Where a particular political party has a solid majority in Parliament then, for most practical purposes, the will of the Executive is the will of Parliament. But the executive and judicial interface is, I would argue, subject to great overlap and, in recent years, has been subject to considerable erosion of the judicial function. Certainly, in contrast to a country without substantial written constitutional documents, such as New Zealand, we can, through the existence of our[54] written constitution, point to very clear distinctions with the High Court of Australia fulfilling its judicial role of interpretation and thus imposing a very strong actual curb on both the legislative and executive functions. This is so, even if the High Court is

[53] Since delivering the seminar paper version of this note, I have seen Hood Phillips, "A Constitutional Myth: Separation of Powers" (1977) 93 Law Quarterly Review 11 and Dahrendorf, "A Confusion of Powers: Politics and the Rule of Law" (1977) 40 Modern Law Review 1. My arguments seem to coincide with some of the views expressed in those articles.

[54] For these purposes the "our" refers to my domicil of choice.

also seen as a body exercising a "political" role (in the wide sense of the term) in adapting the Constitution. Almost as an aside, perhaps this can be reinforced by citing the recent New Zealand decision in *Fitzgerald* v. *Muldoon*.[55] In that case "the law and the authority of Parliament . . . [were] vindicated",[56] against the express will of the Executive, by the learned Chief Justice, Wild C.J., who called in aid a written part of the New Zealand constitution, the Bill of Rights 1688, section 1.

It is noted that the separation of judicial, executive and, in some senses, legislative, powers is truly imaginary in that the Privy Council, an executive entity, also exercises substantial (but, admittedly, decreasing) ultimate judicial authority. Further, the members who so adjudicate are also members of the House of Lords.

In the resources and environmental protection area this conjunction of powers is demonstrated in *Cudgen Rutile (No. 2) Pty Ltd* v. *Chalk* (the *Cooloola Sands Case*).[57] In the Queensland mining legislation Parliament had set out procedures which, if followed by an applicant, could lead ultimately to the grant of a mining lease. But, at various points in the procedures, discretions had to be exercised by the Minister or Governor in Council. In the instant case, the Minister refused to exercise a discretion in favour of the appellants, who had followed the appropriate procedures, and they claimed a contractual right to have a lease, or damages in lieu thereof. Their claim was unsuccessful, it being said that "the area of discretion left to be exercised by the Minister, related as it was to important considerations of public interest, was greater than could be filled in by the Court . . .".[58] This decision might be said to be a very neat illustration re-emphasising the distinction between judicial and executive function—except that the body finally to determine the matter was the Privy Council, an executive body acting judicially.

Even if I am wrong in my argument that there are conjunctions, rather than separation, of powers which have had practical as well as theoretical applications in the resources and environmental field, it is my contention that a relatively small role is being reserved for the courts in the development of environmental law. Great authority is going to administrative tribunals (incidentally, their development might also be regarded as negativing some senses of the traditional definition of the separation of powers), advisory functions abound, investigative and inquiry procedures are being developed apace and a very great deal of ultimate decision-making authority is being reserved for those exercising political authority. As a result, the device of hard

[55] [1976] 2 N.Z.L.R. 615.
[56] *Id.* 623, *per* Wild C.J.
[57] (1975) 49 A.L.J.R. 22.
[58] *Id.* 26.

law of the traditional normative kind is relatively rarely used; but this is not to say that there is no distinctive, and distinct, body of environmental law. I believe that there is. There are those who may think this attrition of strict normative law is detrimental, as it may result in decisions varying with the length of the Minister's foot.[59] Perhaps this may be so, but those taking the opposite view may argue that these developments may lead to quick responses to societal wishes, for no Minister can "put his foot in it" too often.

[59] When the proposed new Western Australian mining legislation, which has been under consideration by both Liberal-Country Party and Labor Governments since the mining boom of the late 1960s, was postponed in 1975, it was interesting to see a report that one of the most potent extra-parliamentary objections was that the Bill conferred too sweeping Ministerial and departmental discretions. Indeed, it was argued that "most of the powers [should be] subject to judicial decision, as high as the Privy Council, if possible": Australian Financial Review 21.8.75. No one seemed to object to the fact that the Privy Council had functions other than its judicial ones!