

**Speech by The Hon. Justice B J Preston  
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**‘The Australian experience on environmental law’**

to

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**THE ENVIRONMENTAL LAW CONSTRUCTED BY AUSTRALIA**

I have been asked to speak on “The Australian experience on environmental law”. The way this topic is expressed assumes that there exists a body of environmental law which Australia has experienced; that is to say, that the existence and content of environmental law is independent of, but experienced by, Australia and Australians. That assumption is not correct, whatever jurisprudential theory one subscribes to. From a legal positivist viewpoint, environmental law, like all law, is a social construct: environmental law is part of the laws of the legal system that Australia has recognised as authoritative. In this sense, the environmental law of Australia is formed by the Australian experience. From a Dworkinian viewpoint, the environmental law of Australia is the law that follows from a proper interpretation of the institutional history of the legal system and its legal practices. The law is the set of all considerations that the courts in Australia would be morally justified in applying. From a Dworkinian viewpoint also, the environmental law of Australia is formed by the Australian experience, particularly the decisions of the courts.

My task in this address, therefore, is to identify what is the environmental law that Australia as a society has constructed and how and why that environmental law was so constructed. This is a herculean task. Dworkin called on Judge Hercules to find the right answer in his jurisprudential work.<sup>1</sup> Judge Hercules was an ideal judge, immensely wise and with full knowledge of legal sources. Judge Hercules also had plenty of time to find the right answer. Unfortunately, I am not as omniscient or sagacious as Judge Hercules. I also only have limited time to make my address. So I will need to be economical and discriminating in assaying my task.

I will select some distinguishing characteristics of Australia’s environmental laws and its legal system, give examples of litigation about the laws and discuss how these laws are actually practised. My analysis will be in four parts. I will start with the sources of environmental laws in Australia. These are the legislatures and judiciaries of Australia. The source of law influences the content and the form and structure of the law. I will isolate some distinctive aspects of and influences on the content of Australian environmental laws. Secondly, I will address the structure of Australian

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<sup>1</sup> Ronald Dworkin, *Law’s Empire* (Hart Publishing, 1998) 239, 240, 245, for example.

environmental laws and the statutory approaches to environmental regulation. Thirdly, I will address the judicial institutions that review, uphold and enforce the environmental laws and decision-making under them. Finally, I will recognise the people who have shaped Australia's environmental laws and experience.

## **THE SOURCES OF THE ENVIRONMENTAL LAWS**

The sources are essentially twofold: the legislature and the judiciary. The legislature enacts legislation, including primary legislation (the statutes) and subordinate or delegated legislation (such as the regulations and other statutory rules or instruments). The former are made by the Parliaments of the States and Territories and the Commonwealth of Australia and the latter are made by public bodies or officials, mostly in the executive, under delegated authority from the legislature. Most environmental laws of Australia derive from this legislative source.

The constitutions of Australia and the States making up the federation of Australia also have as their source the legislature, originally the legislature of the colonising country, the United Kingdom, but then, in order to repatriate the constitutions, the legislatures of the Commonwealth of Australia and the individual States.

The judiciary makes the bodies of law known as common law and equity: these laws are judge-made laws. The law of tort is the most relevant to environmental law, especially nuisance and negligence. The judiciary also has a role to play in finding and interpreting the law to be applied in adjudicating the case at hand. As I have explained elsewhere<sup>2</sup>, these steps in adjudication of finding, interpreting and applying the law do involve adjudicative law making, but it is interstitial and incremental. Nevertheless, the adjudicative decisions of the courts are a source of law.

The source of the law influences the content and the form and structure of the law. The legislature chooses the subject matter to be legislated. That subject matter is influenced by the Australian society of the time and the issues with which the Australian society is concerned at the time. What we now refer to as environmental law was not known to Australian society or the legislature until the mid-20<sup>th</sup> Century. The matters that are the subject of environmental law have increased in number, broadened in scope and deepened in detail since that time. I have explored the evolution in the environmental laws of Australia over the last 80 years in an article published in 2007.<sup>3</sup> I will draw on that analysis to identify distinctive aspects of and influences on the content of Australian environmental laws.

### **Town and country planning**

The first distinctive subject matter of Australian environmental law came with the introduction of town and country planning laws in the mid-1940s. In New South Wales, for example, the *Local Government Act 1919* was amended by the *Local*

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<sup>2</sup> Brian J Preston, "The Art of Judging Environmental Disputes" (2008) 12 *Southern Cross University Law Review* 103.

<sup>3</sup> Brian J Preston, "Environmental Law 1927-2007: Retrospect and Prospect" (2007) 81 *Australian Law Journal* 616.

*Government (Town and Country Planning) Amendment Act 1945* to insert a new Part 12A requiring the preparation of town and country planning schemes. These laws were largely modelled on the English *Town Planning Act 1932* (UK). The purpose of introducing such laws was aptly described by the Minister for Local Government, who introduced the New South Wales town and country planning law, in the following terms:

“The need for adequate town and country planning machinery is now so insistent, having regard to the need for the orderly regulation of the post-war development and for the correction of the evils of the largely haphazard and uncontrolled development of our cities, towns and villages in the past, that satisfaction of these needs can no longer be denied...

The principles of town and country planning may be stated simply as an attempt to regulate, in advance, the orderly arrangement and use of land in town and country, so as to promote, for the greatest good and the greatest number, the improvement of community life and of the environment in which our people live; to enable the people to enjoy the benefits of social security, good health, safety, education, recreation, employment and shelter, good communication, public utilities and amenities. It has been said that man is the product of the environment in which he lives. Much has been said but little has been done, to improve the environment. This Bill...will provide the legislative means to effect such improvements.”<sup>4</sup>

The basic architecture of town and country planning established by these laws has largely continued to date. Under these town and country planning laws, development of land is controlled by means of, first, zoning of land and, second, regulating the carrying out of development in the zones.

The town and country planning laws require the preparation of planning schemes or environmental planning instruments. The planning schemes employ the planning tool of zoning. Conventionally, zoning divides an area, such as a local government area, into zoning districts on the basis of the functional incompatibility and compatibility of various types of uses. Generic categories of functionally incompatible types of uses, such as housing, business and industry, are segregated into separate zoning districts which are typically labelled to indicate the generic category of use such as residential, business and industrial zones. The typical generic zoning districts, segregated by the functional incompatibility of types of uses, include: non-urban or rural; residential; commercial or business; industrial; special uses (such as transport infrastructure or institutions including educational or religious institutions); open space and conservation.

Within each zoning district, there may be sub-districts segregating, at a more specific level, the generic categories of uses. For example, within a generic residential zone, there may be specific sub-districts for low density (detached dwelling houses), medium density and high density residential uses. Similar distinctions, based on the

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<sup>4</sup> NSW Parliamentary Debates Vol 176, 1720, 1767-1768.

intensity of use, are often found in business and industrial zoning districts (such as light industry versus heavy industry).

Often the planning scheme will include one or more specific purpose zones addressing the particular characteristics of the environment, such as hazard areas (flood, geotechnical or foreshore hazards), scenic landscape areas and heritage areas. These special purpose zones are often applied as “overlays” so that the particular land subject to special overlay zones is also within an underlying zoning district. For example, land within a residential zone might also be located within a flood hazard zone. The land would be subject to the controls and development of both the underlying zone (in the example, residential) and the overlay zone (flood hazard).

Having segregated blocks of land on the basis of the functional incompatibility of types of uses, the planning scheme typically prescribes the rules that apply in each zoning district or sub-district. These rules typically establish a list of developments permitted in each zoning district or subdistrict. The permitted developments are those that are functionally compatible with one another. Developments that are inherently compatible with one another and involve predictable and confined impacts, are typically permitted without the consent of a regulatory authority being required. Developments that are functionally compatible with one another, depending on the particular form of development proposed and the impacts likely to result, are typically permitted but only with the consent of the regulatory authority being first obtained. Functionally incompatible developments are prohibited.

The rules in the planning scheme also typically specify the standards and requirements in relation to the carrying out of permitted development, such as lot size; built upon area; location, siting and set-backs; and bulk, scale, shape, size, height, design, density or external appearance of the permitted development. These standards also have as their aim the fostering of compatibility between permitted developments.<sup>5</sup>

The town and country planning laws specify the process for applying for and obtaining development consent to carry out development that is permitted only with consent. This involves making a development application. The laws specify the information that must be included in or accompany the development application. The information may include what is referred to as environment impact assessments. The laws also specify what public notification needs to be given of the making of the development application. The laws specify the regulatory authority vested with the power to determine the development application by the granting or refusal of development consent. The laws specify the matters that the consent authority must take into consideration in determining the development application. The relevant matters to be considered have evolved over time, both by express enumeration in the legislation and by judicial interpretation. For example, the principles of ecological sustainable development (ESD) have been held to be relevant matters to be considered in determining a development application to carry out development.<sup>6</sup>

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<sup>5</sup> See *Retirement by Design Pty Ltd v Warringah Council* (2007) 153 LGERA 372 at 381-382.

<sup>6</sup> *Telstra Corp Ltd v Hornsby Shire Council* (2006) 146 LGERA 10 at 35-38.

The town and country planning laws importantly provide for appeals by a person (mostly by an applicant for consent) who is dissatisfied with a decision or a failure to make a decision on the development application. The appeal characteristically is to a person or body external to the government body which made the original decision. The appellate person or body re-exercises the power of the original consent authority to determine, on the merits of the case, the development application. This type of appellate review is referred to as merits review. It is a distinguishing characteristic of Australian administrative law.

In New South Wales, there have been various courts and tribunals which have undertaken merits review of decisions under town and country planning laws, the latest of which is the Land and Environment Court of NSW (since 1 September 1980). In other States too, various courts and tribunals have been vested with jurisdiction to conduct merits review of local and State government decisions under town and country planning laws. Currently, the major ones are the Planning and Environment Court (Queensland), the Victorian Civil and Administrative Tribunal, the Resource Management and Planning Appeal Tribunal (Tasmania), the Environment, Resources and Development Court (South Australia) and the State Administrative Tribunal (Western Australia). The availability of external merits review by courts and tribunals of planning and environmental decisions is a distinguishing characteristic of Australian environmental law. I will return to this characteristic later.

This discussion of the process of applying for development consent to carry out development leads me to identify two more characteristic subject matters of Australian environmental laws: environmental impact assessment and public participation in environmental decision-making.

### **Environmental impact assessment**

Environmental impact assessment involves the assessment of policies, programmes and projects likely to affect the quality of the environment. The first statutory implementation of environmental impact assessment was in the *National Environmental Policy Act 1969* of the United States. NEPA (as it is known) required federal agencies to undertake environmental impact assessment for “major Federal actions significantly affecting the quality of the human environment” (s 102(2)(c)). The *Environmental Quality Act 1970* shortly followed creating the Office of Environmental Quality to assist federal agencies to carry out their functions concerning environmental issues. The requirements of NEPA were quickly duplicated at State and local levels across the United States. One example is the Californian *Environmental Quality Act 1970*.

The development of the environmental impact assessment process in the United States in the early 1970s created substantial interest in Australia. New South Wales was the first jurisdiction to adopt an environmental impact assessment policy. In January 1972, the government adopted a policy that “before any action which could significantly affect the quality of the environment is undertaken, its implications shall

be expressly identified and evaluated”.<sup>7</sup> At the federal level, in 1972 and again in 1973, different Commonwealth governments adopted environment impact policies which required Commonwealth Ministers submitting development projects to provide an environmental impact assessment. These policy statements were replaced by legislative requirements upon the enactment of the *Environment Protection (Impact and Proposals) Act 1974* (Cth). This became the first legislative requirement in Australia for environmental impact assessment. Consistent with the constitutional thinking of the time, the scope of the Act was limited to Commonwealth Ministers and government agencies and Commonwealth land. The object of the Act, defined in s 5, was 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 in relation to the formulation of proposals, the carrying out of works and other projects, and other actions of the Commonwealth.

The new nature of the legislation, requiring upfront consideration of environmental impacts, and, more importantly, the introduction of the Commonwealth Government into the environmental assessment process, generated opposition. The first constitutional challenge was in *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1. Murphyores was undertaking mineral sandmining on Fraser Island. Conservation groups had staged active campaigns against the mining owing to the high environmental qualities of Fraser Island.<sup>8</sup> The mineral concentrates extracted by Murphyores were exported overseas. This required a grant of export licences by the Commonwealth Minister for Minerals and Energy. The Minister ordered the holding of a public inquiry under the *Environment Protection (Impact and Proposals) Act* as to the environmental impacts of the mining on Fraser Island. The Commonwealth Minister intended to take into account the report of the public inquiry in determining whether to grant export licences for mineral concentrates extracted by Murphyores on Fraser Island. Murphyores brought proceedings against the Commonwealth arguing that the Commonwealth Minister for Minerals and Energy was not entitled to take into account the report of the public inquiry in determining whether to grant the export licences and further that the *Environmental Protection (Impact and Proposals) Act* and the inquiry directed under it were invalid. The High Court of Australia rejected Murphyores’ argument.

Subsequently, the High Court of Australia further considered the Act in *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493. The High Court held that a breach of the rules of conduct prescribed in the Administrative Procedures made under the Act raised a justiciable issue. That case, of course, is also famous for establishing the scope of the standing rules in Australia.

The Commonwealth *Environment Protection (Impact and Proposals) Act 1974* was ultimately repealed and replaced with wider environmental impact assessment legislation in the form of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

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<sup>7</sup> State Pollution Control Commission, *Handbook of Environmental Control in New South Wales* (EC-2, 1975) 55-56.

<sup>8</sup> Fraser Island was subsequently listed on the World Heritage List in 1992 in recognition of its outstanding natural heritage values.

There have been numerous cases challenging the environmental assessment of controlled actions under the Act. An example is *Minister for Environment & Heritage v Queensland Conservation Council Inc* [2004] FCAFC 190; (2004) 139 FCR 24. An environmental non-governmental organisation judicially reviewed decisions of the Commonwealth Minister to approve a controlled action, namely, the construction of a dam, to be called the Nathan Dam, on the Dawson River in central Queensland. The Dawson River joined the Mackenzie River to become the Fitzroy River, which flowed into the Great Barrier Reef World Heritage Area. Some public submissions expressed concern about the cumulative impacts of the proposed action resulting from downstream irrigation of agricultural land. The submissions suggested that irrigation of land adjacent to river-beds had the potential to increase nutrient concentrations and other agricultural pollutants downstream of the dam, including in the Great Barrier Reef World Heritage Area. However, the Minister determined that potential impacts of the irrigation of land by persons other than the proponents, using water from the dam, were not impacts of the proposed action.

The Full Court of the Federal Court of Australia held (at 38-40) that the primary judge was correct in determining that the Minister had construed 'all adverse impacts' too narrowly in not taking into account downstream impacts. The Court held that the consideration of impacts was not confined to direct physical effects of the action, and included effects which were 'sufficiently close to the action to allow it to be said...that they are, or would be, the consequences of the action on the protected matter'. The phrase 'all adverse impacts' included impacts which could 'reasonably be imputed as within the contemplation of the proponent of the action'. The Court determined that the use of water downstream from the dam, including its use for growing and ginning cotton, was within the contemplation of Sundaw as the proponent of the action.

There have also been instances of civil proceedings to restrain the carrying out of actions that would have an adverse upstream or downstream impact on a protected area under the Act. One such example is *Booth v Bosworth* [2001] FCA 1453; (2001) 114 FCR 39. The applicant applied for a prohibitory injunction restraining lychee farmers from killing Spectacled Flying Foxes on or near their lychee fruit farm near the Wet Tropics World Heritage Area, in North Queensland. The farmers had erected an electric grid to electrocute flying foxes coming to eat the lychee fruit. The Federal Court of Australia held (at 56) that the Spectacled Flying Foxes contributed to the world heritage values of the Wet Tropics World Heritage Area. An action leading to a significant impact on the population of the Spectacled Flying Foxes was likely to have a significant impact on the world heritage values of the Wet Tropics World Heritage Area, constituting a contravention of s 12 of the Act. The Court granted an injunction restraining the respondents from killing the flying foxes (at 66, 68).

Although New South Wales was the first to adopt an environmental impact assessment policy, the honours for the first State to enact environmental impact assessment legislation went to Victoria when it enacted the *Environmental Effects Act 1978* (Vic) which came into effect on 1 August 1978. Ultimately, New South Wales took until 1979 before environmental impact assessment was given a statutory basis under the *Environmental Planning and Assessment Act 1979* (NSW). The Act commenced on 1 September 1980 and New South Wales became the second State to adopt environmental impact assessment legislation.

The New South Wales *Environmental Planning and Assessment Act* was innovative in a number of ways.

First, Part 5 of the Act required the State Government to be subject to the legislative requirements for environmental impact assessment. Whilst there had been policies, there had been no legislative requirement for the State Government to undertake environmental impact assessment. State Government had not been subject to the town and country planning regulatory system under Pt 12A of the *Local Government Act 1919*. Part 5 of the *Environmental Planning and Assessment Act* was modelled on the *National Environmental Policy Act 1979* of the United States. It required ministers and government agencies in their consideration of an activity to examine and take into account to the fullest extent possible all matters affecting the environment by reason of the activity (s 111). Furthermore, there was a requirement for the determining authority to consider an environmental impact statement if the proposed activity was likely to significantly affect the environment (s 112).

The State Government's obligations to undertake environmental impact assessment and to consider an environmental impact statement if the proposed activity was likely to significantly affect the environment was soon tested in the courts. Environmentalists and environmental organisations challenged decisions and actions by government agencies, such as the then named Forestry Commission, Electricity Commission and Roads and Traffic Authority, for failing to undertake environmental impact assessment at all or in the form of an environmental impact statement, or the adequacy of any environmental impact assessment, including an environmental impact statement, that was undertaken. In particular, the public interest litigation against the Forestry Commission, which was undertaking logging of rainforests and old growth forests with high conservation value, established legal precedents concerning the need for and adequacy of environmental impact assessment of activities undertaken and approvals granted by government.<sup>9</sup>

Secondly, the *Environmental Planning and Assessment Act* required environmental impact assessment for private development. The Act did this by classifying private development into two categories: designated development and other development. Designated development was development that had been prescribed in the Regulations to be designated development. This was largely development involving the types of industries and activities that had been identified as scheduled premises under previous pollution legislation and were therefore considered to be likely to significantly affect the environment. Designated development required the preparation of an environmental impact statement. The environmental impact statement was required to be submitted with the development application seeking development consent for the carrying out of the development. Furthermore, there

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<sup>9</sup> See, for example, *Kivi v Forestry Commission of NSW* (1982) 47 LGRA 38; *Prineas v Forestry Commission of NSW* (1983) 49 LGRA 402; *Prineas v Forestry Commission of NSW* (1984) 53 LGRA 160 (Court of Appeal); *Jarasius v Forestry Commission of NSW (No 1)* (1988) 71 LGRA 79; *Bailey v Forestry Commission of NSW* (1989) 67 LGRA 200; *Jarasius v Forestry Commission of NSW (No 2)* (1989) 69 LGRA 156; *Corkill v Forestry Commission of NSW* (1990) 71 LGRA 116; *Corkill v Forestry Commission of NSW* (1991) 73 LGRA 126; and *Forestry Commission of NSW v Corkill* (1991) 73 LGRA 247 (Court of Appeal).

was a lesser form of environmental impact assessment in the form of a statement of environmental effects which was required to accompany development applications for other developments. This requirement for environmental assessment for private development went further than previous environmental impact assessment legislation in the United States and at the Commonwealth level, which only applied to public decision-making and in particular major governmental actions.

The prescription of certain types of development to be designated development had another consequence. The development application for designated development, which was required to be accompanied by an environmental impact statement, was required to be publicly notified and exhibited and the public had to be given the opportunity to make submissions objecting to the proposed development. Any person who made a submission objecting to the development, during the public exhibition period, became entitled to appeal against a subsequent decision of a consent authority to grant development consent to the carrying out of the designated development. This appeal was to the new specialist court, the Land and Environment Court, which was established by cognate legislation to deal with the appeals under the *Environmental Planning and Assessment Act*.

Thirdly, the *Environmental Planning and Assessment Act* required strategic environmental impact assessment as part of the process of planning and zoning of land. Part 3 of the Act brought forward and modernised the town and country planning provisions of the previous Pt 12A of the *Local Government Act 1919*. It required, as a step in the process of preparing draft environmental planning instruments, the preparation of an environmental study. This involved a form of strategic environmental impact assessment.

### **Public participation in environmental decision-making**

Fourthly, the *Environmental Planning and Assessment Act* was ground breaking in the extent to which it allowed and encouraged public participation. One of the objects of the Act was expressly stated to be “to provide increased opportunity for public involvement and participation in environmental planning and assessment” (s 5(c)). Various provisions of the Act ensured this could occur. There were requirements for the public exhibition of, and opportunity for the public to comment on, environmental studies and draft environmental planning instruments under Pt 3 of the Act, development applications and environmental impact statements for designated development under Pt 4 of the Act, and environmental impact statements and activities under Pt 5 of the Act. In addition, there was the open standing provision in s 123 of the Act which allowed any person, whether or not any right of that person had been or may be infringed by or as a consequence of a breach of the Act, to bring proceedings to remedy or restrain the breach. The new specialist court, the Land and Environment Court, was established to deal with these new citizen suits.

The open standing provision in s 123 of the *Environmental Planning and Assessment Act* had first appeared in the *Heritage Act 1977* (NSW), itself an innovative statute intended to preserve not only cultural heritage but also natural heritage. One of the sources of inspiration for the open standing provisions in NSW legislation was the Michigan *Environmental Protection Act 1970*. That Act was

pioneering in a number of respects. One was the recognition that air, water and other natural resources are held in trust by the government, reviving the Roman law concept of the public trust. Another was allowing the beneficiaries of that public trust, the citizens, to have standing to bring proceedings against any other person “for the protection of the air, water and other natural resources” and the public trust therein from pollution, impairment or destruction. This liberal standing approach in the Michigan Act paved the way for the open standing provisions in New South Wales, such as in s 153 of the *Heritage Act 1977* and s 123 of the *Environmental Planning and Assessment Act 1979*. Open standing provisions were soon to be included in most environmental legislation in New South Wales. This has facilitated public interest litigation to uphold and enforce the environmental laws of the state.

The liberal approach to standing in New South Wales has, however, not been replicated in the environmental laws in other states or the Commonwealth of Australia. Standing has continued to be a barrier to public interest litigation. Environmentalists and environmental organisations have sought to widen the rules of standing, but have had only limited success. The High Court of Australia’s decision in *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 still limits the standing afforded to environmental non-government organisations to those that have a special interest in the subject matter of the litigation. The Australian Conservation Foundation (ACF) challenged the validity of decisions of the Commonwealth concerning a proposed tourist resort at Yeppoon on an environmentally sensitive stretch of the Capricorn coast of Queensland. The ACF asserted that it had standing because of its well-known interest in the conservation of the environment. The High Court held that the ACF had no standing and dismissed ACF’s action.

As a consequence of this decision, environmentalists and environmental organisations need to establish their special interest in the subject matter of the litigation. This might be by active use of the land the subject of the litigation; spiritual or cultural relationship to the subject land; adverse impact on the amenity of the plaintiff’s land; protection of statutory participation rights; or because the government decision or conduct challenged relates particularly to the objects and activities of the plaintiff organisation.

I have noted that Australia’s town and country planning laws were based on the English *Town Planning Act* and that environmental impact assessment laws were based on the United States *National Environmental Policy Act*. This evidences another distinguishing characteristic of Australian environmental laws: the incorporation into Australian law of selected laws of other countries, as well as of international law.

### **Adoption of environmental laws of other countries**

There are many areas of environmental law where Australia has looked to, and been influenced by, the lead of other countries in legislating to address environmental problems but then adapted the laws to suit Australian needs and conditions. One example concerns pollution regulation.

From the 1960s onwards, Australia, like other industrialised countries, experienced severe pollution of the air and waters with concomitant devastating effects on human health and the environment. Up until the 1960s, the legal means to control pollution had largely been by the common law causes of action, such as trespass, private nuisance and public nuisance. The increased scale and nature of industrialisation and development in the post-war period led to more diffuse, pervasive and chronic effects. This posed at least two problems for a successful common law action: first, identifying the person responsible for the diffuse, pervasive and chronic effects and, second, the persons who suffer are the public at large and not just individual property owners. The common law was not up to the task of adequately controlling this type of pollution.

In the United States, United Kingdom and Australia, the legislatures responded to the spill over effects of industrialisation and development by enacting pollution control statutes. These statutes of the time had three characteristics. First, pollution control was seen as an adjunct to the responsibility of government for maintaining public health. Polluted air and water were harmful to human health as was excessive or nuisance noise. Second, these pollution statutes were focused on the specific environmental media polluted: the air, by pollution or noise, and the waters. Third, the pollution statutes implemented end pipe solutions; that is to say, they controlled waste and regulated pollution that was being discharged into the environmental media of air or water. The regulatory system under these statutes identified the activities (such as factories or industries) that were the source of the waste or pollution and brought these sources under the licensing arrangements. This was done by the means of licence conditions which controlled the quality and quantity of waste or pollutants being discharged.

In the United States, the first federal air pollution legislation was passed in 1955. This legislation and subsequent efforts in 1960 and 1962 placed responsibility for reducing air pollution at the state and local level, while beginning research and training at the federal level with the Public Health Service. The United States Federal Government began taking a more active role in controlling air pollution with the *Clean Air Act 1963*. This Act provided for more research and education, a federal enforcement authority to abate interstate problems and the development of air quality criteria. The State and local jurisdictions continued to be the primary enforcement and monitoring agencies. After other amendments, the *Clean Air Act 1970 (US)* was passed. This Act became the primary statute for controlling clean air and established the Environment Protection Agency.

In England, the *Clean Air Act 1956 (UK)* was adopted. This was designed to control particulate pollution, or smoke. A major catalyst for the legislation was the great smog of 1952 in London. The smog lasted for 5 days during which the death rate more than doubled: 4000 deaths occurred above the number that prevailed in normal circumstances.

In New South Wales, the *Clean Air Act 1961* commenced on 1 May 1962. The regulatory scheme was to identify certain types of industries and activities that typically cause air pollution, as scheduled premises. Occupiers of scheduled premises were required to obtain a licence. Licence conditions could then be

imposed regulating the quantity and quality of air emissions from scheduled premises. Occupiers of scheduled premises were not to exceed prescribed standards of air impurities. In addition, occupiers were required to maintain and operate control equipment in a proper and efficient manner and not carry out work on scheduled premises without a pollution control approval.

In relation to pollution of waters, the United States led the way with the federal *Water Pollution Control Act* in 1948. This was amended throughout the 1950s and 1960s. It was wholly replaced by the *Clean Waters Act 1972* (US).

In New South Wales, the *Clean Waters Act 1970* was enacted. This Act was a response to the public outcry in the 1960s to the effects of the unregulated industrialisation in Sydney where waterways were used as disposal sites for factory waste.<sup>10</sup> Another statute of the time was the *Pollution Control Act 1970* (NSW).

In the 1990s, the regulation of pollution became more streamlined. There was an increased recognition that the segmental approach that had characterised prior phases of environmental law needed to be reformed so as to instead take a more holistic approach to pollution control. New South Wales provides an illustration. First, there was the consolidation of the various offences and penalties for pollution. The *Environmental Offences and Penalties Act 1989* introduced tiering of offences: Tier 1 being *mens rea* offences, Tier 2 being strict liability offences and Tier 3 being absolute liability offences. Offences under environmental media-specific pollution statutes were classified into these tiers, depending on the mental element, Parliament's view of the seriousness of the offence and other factors. Next, a single Environment Protection Authority was established to provide integrated administration of the multifarious environmental protection statutes. This was achieved by the *Protection of the Environment Administration Act 1991* (NSW). This body had broader environmental functions than its predecessor, the State Pollution Control Commission. One of the core functions is to protect, restore and enhance the quality of the environment in New South Wales having regard to the need to maintain ecologically sustainable development. Finally, the most comprehensive rationalisation occurred with the enactment of the *Protection of the Environment Operations Act 1997* (NSW) which consolidated all of the previous environmental media-specific legislation into one consolidated pollution statute.

The end result was that pollution legislation, which drew its inspiration from the pollution legislation of the United Kingdom and the United States, evolved to suit Australian needs and conditions.

Another example of the influence of the laws of other countries on Australian environmental law concerns endangered species. Early wildlife laws in Australia regulated the taking and killing of protected or endangered fauna. An example is the former ss 98 and 99 of the *National Parks and Wildlife Act 1974* (NSW). The action to "take" protected or endangered fauna was defined to include an action that

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<sup>10</sup> Jennifer Norberry, "Australian Pollution Laws – Offences, Penalties and Regulatory Agencies" in Neil Gunningham, Jennifer Norberry and Sandra McKillop (eds) *Environmental Crime* (Australian Institute of Criminology, 1995) 2.

caused direct physical injury to the fauna as well as an action that disturbed the fauna.

In *Corkill v Forestry Commission of NSW* (1991) 73 LGERA 126, an environmental activist challenged the actions of the Forestry Commission of NSW to approve logging of old growth forests with the highest density of arboreal marsupials and frequency of owls in south-east Australia. The plaintiff claimed that the Forestry Commission was breaching provisions of the *National Parks and Wildlife Act* that prohibited the taking or killing of protected or endangered fauna. The Land and Environment Court of NSW sought assistance as to the meaning of “take” in the United States *Endangered Species Act 1973*. Under the United States legislation, it was unlawful to “take” any endangered species. “Take” was defined to include “harm”. The Land and Environment Court cited numerous US decisions that held that “harm” included actions other than direct physical injury, such as the destruction or modification of the habitat of an endangered species. If habitat modification prevented a population of a species from recovering, this caused harm to the species. The Land and Environment Court applied this reasoning in the US decisions to hold that “take” in the NSW *National Parks and Wildlife Act*, which included “disturb”, included:

“indirect action as well as direct physical injuries. It covers conduct which modifies habitat in a significant fashion thus placing the species of fauna under threat by adversely affecting essential behavioural patterns relating to feeding, breeding or nesting. In other words, it includes habitat destruction or degradation which disturbs an endangered or protected species by adverse impact upon it leading either immediately or over time to reduce the populations” (at 137-140).

The Court found that the Forestry Commission was taking protected or endangered fauna, in breach of the statutory prohibition, and restrained future logging.<sup>11</sup>

Subsequently, the NSW Parliament enacted the *Endangered Fauna (Interim Protection) Act 1991* to address the conservation of endangered fauna. The legislation drew significantly on the United States *Endangered Species Act*, including for the requirements for a special form of environmental impact assessment (a fauna impact statement) to accompany applications for a licence to take or kill endangered fauna and for the declaration of critical habitat for endangered fauna. The *Endangered Fauna (Interim Protection) Act* was subsequently replaced by the more comprehensive *Threatened Species Conservation Act 1995* (NSW). This Act, although largely based on the modern approaches to the conservation of biological diversity heralded by the Convention on Biological Diversity, done in Rio de Janeiro in 1992, still was influenced by the early approaches in the United States *Endangered Species Act*. Just recently, this Act was replaced by the *Biodiversity Conservation Act 2016* (NSW).

## **Incorporation of international law and principles**

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<sup>11</sup> The decision was upheld on appeal in *Forestry Commission of NSW v Corkill* (1991) 73 LGRA 247 (Court of Appeal).

Australian environmental law has also incorporated international law and international norms and principles. Australia has statutorily adopted the multilateral environmental agreements to which it is a party, such as the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention), Convention on International Trade on Endangered Species of Wild Fauna and Flora (CITES), Convention concerning the Protection of World Cultural and Natural Heritage (World Heritage Convention) and Convention on Biological Diversity (Biodiversity Convention). The current statutory incorporation of these conventions is the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth).

Australia's incorporation of the World Heritage Convention is illustrative of the influence of international environmental law on Australia's environmental law.<sup>12</sup> After Australia became a party to the World Heritage Convention, it moved to protect an area of outstanding natural heritage value, the Great Barrier Reef, firstly, by enacting the *Great Barrier Reef Marine Park Act 1975* (Cth) and, secondly, by nominating and having the World Heritage Committee accept in 1981 the Great Barrier Reef for inscription on the World Heritage List.

The Commonwealth also nominated and the World Heritage Committee accepted in 1982 a wilderness area in south-west Tasmania for inscription on the World Heritage List. The area was threatened with being flooded by a proposed dam on one of the wild rivers in the area, the Franklin River. Civil society had been increasingly disturbed at the proposals for the development of south-west Tasmania's wilderness areas. Lake Pedder had earlier been flooded in 1974. This loss led to the establishment in 1976 of the Tasmanian Wilderness Society, an environmental non-governmental organisation dedicated to the protection of wilderness areas. The society campaigned first in Tasmania, then nationally, to stop the flooding of the Franklin and Gordon Rivers.

On 19 December 1982, just after the World Heritage Committee listed the area on the World Heritage List, hundreds of anti-dam protestors descended on the Franklin River in a blockade to fight the proposed dam. The protests spread to the mainland. It became a key election issue in the lead up to the federal election in 1983. On 6 March 1983, the Australian Labor Party swept to power.

Responding to the electoral mandate, the new Commonwealth Government enacted the *World Heritage Properties Conservation Act 1983*. Proclamations made under the Act prevented the Tasmanian Government from constructing the dam and thereby damaging the World Heritage listed property of the Tasmanian Wilderness National Park.

The Tasmanian Government immediately challenged the validity of the *World Heritage Properties Conservation Act* and various proclamations and regulations. The case was expedited and, on 1 July 1983, the High Court of Australia delivered

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<sup>12</sup> More generally, see Brian J Preston and Charlotte Hanson, "The Globalisation and Harmonisation of Environmental Law: An Australian Perspective" (2013) 16 *Asia Pacific Journal of Environmental Law* 1.

its historic judgment in *Commonwealth v Tasmania* (1983) 158 CLR 1 (Tasmanian Dam Case). The High Court upheld the constitutional validity of the *World Heritage Properties Conservation Act* and the proclamations made thereunder.

The extent of the Commonwealth's power to implement domestically the World Heritage Convention continued to be explored in subsequent cases concerning potential world heritage areas. In *Richardson v Forestry Commission* (1988) 164 CLR 261 (Tasmanian Forest Case), the High Court held that the *Lemonthyme and Southern Forest (Commission of Inquiry) Act 1987* was valid. The Act had established a Commission of Inquiry to inquire as to the world heritage values of the Lemonthyme and Southern Forests and whether any areas should be included in the adjoining Western Tasmania Wilderness National Park World Heritage Area. The decision of the High Court went further than that in the Tasmanian Dam Case. In the Tasmanian Dam Case, the Western Tasmanian Wilderness National Park had already been listed on the World Heritage List. In the Tasmanian Forest Case, however, the Lemonthyme and Southern Forest area had been nominated for World Heritage status but had not yet been listed. The High Court upheld the Federal Government's power under the *World Heritage Properties Conservation Act* to protect an area in these circumstances. Subsequent to the High Court's decision, the nominated extension was inscribed on the World Heritage List in December 1989.

In *Queensland v Commonwealth* (1989) 167 CLR 232 (Daintree Rainforest Case), the State of Queensland sought to restrain the Commonwealth from submitting to the World Heritage Committee a proposal that the wet tropic rainforests in the Daintree region of Queensland were suitable for inclusion in the World Heritage List. The High Court declined to issue an interlocutory injunction, so that the Commonwealth submitted the nomination and, on 9 December 1988, the World Heritage Committee listed the wet tropics of Queensland on the World Heritage List. On 15 December 1988, the property was claimed to be property to which the *World Heritage Properties Conservation Act* applied. The High Court of Australia held that the inclusion by the World Heritage Committee of the area in the World Heritage List was conclusive of the validity of the proclamation under the *World Heritage Properties Conservation Act*. The inclusion of the area in the World Heritage List was conclusive of its status in the eyes of the international community and accordingly of Australia's international duty to protect and conserve it.

Australia has also integrated international norms and principles into its domestic laws. One example is the adoption of sustainable development in Australia. In partial fulfilment of its promise entered into upon signing the various instruments of the United Nations Conference on Environment and Development in Rio de Janeiro in 1992<sup>13</sup>, Australia finalised the National Strategy for Ecologically Sustainable Development (ESD). The ESD strategy was launched in December 1992 and has been adopted by the Commonwealth and each of the States and Territories in Australia. The ESD strategy is a form of intergovernmental agreement that records the public policy commitment of each of the governments and its agencies to implement the measures agreed to in the strategy. It includes as appendices a summary of the Intergovernmental Agreement on the Environment, the Rio

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<sup>13</sup> See, eg, Agenda 21, para 8.7.

Declaration and a Guide to Agenda 21. There has been an incorporation of these international and national soft law instruments as policies by the governments of the Commonwealth and the States and Territories of Australia. This process of incorporation has been consolidated by the soft law principles becoming statutory requirements in Australia, both at Commonwealth and state levels.

Courts and tribunals which undertake merits review of administrative decisions of the executive in relation to the environment have also integrated international environmental law principles in their decision-making. The principles of ESD, for instance, have been considered and applied in many decisions of the Land and Environment Court of NSW. This can be seen in the enforcement and elaboration by domestic courts of the precautionary principle, one of the principles of ESD. In *Telstra v Hornsby Shire Council* (2006) 146 LGERA 10, the applicant telecommunications company had appealed to the Land and Environment Court seeking approval of development of a mobile phone base station. Local residents objected to the development arguing that a precautionary approach was needed due to alleged adverse health and safety impacts caused by the emission of radiofrequency electromagnetic energy from the base station. The Court recognised that the precautionary principle was included in a number of international agreements and domestic statutes and explored its meaning and application. The Court drew on decisions of other jurisdictions and academic literature to explain how the precautionary principle would operate in practice. The court's elaboration on the meaning and application of the precautionary principle has been applied by courts in other jurisdictions in Australia and in other countries.

## **THE STRUCTURE OF THE LAWS**

I have so far been exploring aspects of the sources of law in Australia. I want to now turn to the structure of Australian environmental laws. I will identify statutory approaches that are characteristic in Australia to regulating the use and exploitation or the conservation of the environment. I will identify five aspects of regulation: statutory objects; relevant considerations; burden of proof; substantive rights, duties and obligations; and implementation and enforcement. I will explain these aspects of regulation as well as the ways in which these aspects are deficient.

### **Statutory object clauses**

The first aspect of the structure of laws concerns the objects clause. Virtually all modern statutes in Australia contain an objects clause stating the objects of the statute. This statement can be merely an historical explanation of the background leading up to the passing of the statute, a form of recital, or it can be a statement of the purpose of the statute. The former type of statement will not be particularly helpful, other than perhaps assisting in understanding the motive of the legislature in passing the statute or the mischief which the statute was intended to address.

The latter type of statement is more helpful but is still limited to being an interpretive tool to resolve uncertainty and ambiguity in the meaning of other provisions of the statute. An objects clause does not control clear statutory language or command a particular outcome of exercise of discretionary power under the statute. This was highlighted, to the dismay of the challengers, in the judicial review challenges to the

Bengalla coal mine in the Hunter Valley and to the residential subdivision and development on the flood-constrained coastal plain at Sandon Point on the New South Wales south coast.<sup>14</sup> Both cases held that consideration of a particular object, increased opportunity for public involvement and participation in environmental planning in the first case and encouragement of ecologically sustainable development in the second case, did not command a particular outcome of exercise of the discretionary power in question.

Objects clauses in environmental statutes are often drafted at a high level of generality and are hortatory and aspirational. They are objects for all seasons. An object of conservation, for example, is so wide as to embrace sustained development as much as ecologically sustainable development. It embraces utilitarianism as much as or more likely more than ecocentrism.

The objects enumerated in an objects clause of a statute may also be potentially conflicting, such as by encouraging economic development but also environmental protection. Indeed, even a single object, such as encouragement of ESD, in fact involves multiple objects, because the concept of ESD involves multiple principles which might pull in different directions.

I have suggested elsewhere what can be done to improve the efficacy of objects clauses in environmental statutes.<sup>15</sup> In brief, improvement involves: identifying with greater precision what is the intended purpose of including an objects clause in the environmental statute and then drafting the objects clause to articulate that purpose; ensuring the language used to describe each object in the objects clause is sufficiently specific to identify with precision what falls within and without the ambit of each object; if there is potential for conflict, either within or between objects, stating in the objects clause how the conflict is to be resolved; and making the objects clause influence the exercise of discretionary powers under the statute, such as requiring the decision-maker to consider the objects clause or make a decision that achieves one or more objects in the clause.

### **Relevant matters to be considered**

The second aspect of the structure of Australian environmental laws that I wish to consider is the statement of relevant matters that a decision maker is bound to consider in the exercise of discretionary powers and functions under the statute. The relevant matters a decision maker is bound to consider are determined by statutory construction of the statute conferring the discretionary power or function. Statutes might expressly state the matters that need to be taken into account or they can be determined by implication from the subject matter, scope and purpose of the statute.<sup>16</sup>

There has been a trend for legislatures to reduce both the number of matters expressly stated in the statute to be considered as well as the specificity of the

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<sup>14</sup> *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31 at 78; *Minister for Planning v Walker* (2008) 161 LGERA 423 at 453-454.

<sup>15</sup> Brian J Preston, "Internalising ecocentrism in environmental law" in Michelle Maloney and Peter Burdon (eds) *Wild Law – In Practice* (Routledge, 2014) 76-78.

<sup>16</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40, 55.

matters stated: the expressly stated, relevant matters have become fewer and more general. An illustration of this trend was when the lengthy and detailed list of relevant matters to be considered by a consent authority in determining a development application under the *Environmental Planning and Assessment Act 1979* (NSW) was omitted (from the former s 90) and a smaller and more general list was inserted instead (in s 79C).

The reasons for this trend have not been clearly articulated. One reason may be to increase flexibility and agility in decision-making. Another reason, however, may be to prevent, or at least to make more difficult, judicial review by the courts of the exercise of powers under the statute by the executive. A decision maker commits no reviewable error warranting intervention by the courts by not considering a matter that the decision maker is not bound to consider.

This is what occurred in *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* (2007) 159 LGERA 8 at 20-21, where the particular matter alleged by the challenger (that greenhouse gas emissions resulting from the Anvil Hill coal mine in the Hunter Valley would contribute to the loss of climatic habitat) was held not to be a relevant consideration which the Commonwealth Minister was bound to take into account in making a determination under s 75 of the *Environment Protection Biodiversity Conservation Act 1999* (Cth) of whether the action was a controlled action.

Hence, the fewer matters expressly stated in a statute to be relevant matters, the less scope for judicial review.

Expressing the relevant matters at a level of generality, rather than at a level of particularity, also reduces the risk of judicial review being successful. A decision maker is more likely to be found to have had regard to some facts and issues under the rubric of a generally stated relevant matter than a particular one. Again, this was discovered to the challenger's dismay in various challenges to decisions on the ground of failure to consider the relevant matter of the principles of ESD. The principles of ESD are so broad that proving that a decision maker has failed to consider them is difficult in practice.<sup>17</sup>

The reduction in the number of expressly stated matters does not necessarily exclude other matters, not expressly stated, from being relevant matters. As I have said, a matter might be impliedly relevant by reference to the subject matter, scope and purpose of the statute. However, this involves statutory interpretation and there is an increased risk that a matter will not be held to be relevant. An example is the difficulty the challenger encountered in *Minister for Planning v Walker* (2008) 161 LGERA 423 at 454, in implying the principles of ESD to be relevant matters to be considered by the Minister in approving a concept plan under the former Pt 3A of the *Environmental Planning and Assessment Act 1979* (NSW).

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<sup>17</sup> See, eg, *Drake-Brockman v Minister for Planning* (2007) 158 LGERA 349 at 387-388; *Blue Wedges Inc v Minister for Environment, Heritage and the Arts* (2008) 157 LGERA 428 at 447-448.

The solutions to these problems, which I have identified elsewhere<sup>18</sup>, include: expressly and specifically identifying the desired environmental considerations as relevant matters that must be taken into account in the exercise of powers and functions under the statute; if there is potential for conflict within or between relevant matters, stating the priority or weight to be accorded to each matter; and if the relevant matter involves an outcome or standard to be achieved, drafting the statute to require the decision-maker to exercise the power or function so as to achieve that result and not merely to consider the matter in the exercise of the power or function.

### **The burden of proof**

The third aspect under this topic of the structure of Australian environmental laws that I wish to consider concerns the burden of proof. A common regulatory approach under environmental statutes is to prohibit some activity which uses, exploits or harms the environment but then to permit persons to apply for some form of statutory approval enabling them to undertake such activity. The statute may also provide for a dissatisfied applicant for approval to appeal to a court or tribunal which undertakes a merits review of the decision and re-exercises the power to determine whether to grant or refuse approval to the activity.

Typically, the statute is silent as to the burden of proof, both in the original application for approval and on any merits review appeal. Judicial decisions have held that there is no legal burden of proof on an applicant for approval. There is, no doubt, a persuasive burden – the applicant needs to persuade the approval authority to exercise the power to grant the approval – but this falls short of a legal burden. The statutes also typically do not impose a burden on the applicant for approval to establish an absence of a particular type of environmental harm (such as a significant impact on threatened species, populations or ecological communities) or that the proposed activity will achieve some acceptable environmental outcome or standard (such as ESD), or that the economic or social benefits of the proposed activity will outweigh the environmental costs.

In practice, especially for larger, more significant activities, there seems to be a presumption that approvals ought to be granted unless good reason is demonstrated to the contrary. This effects a transfer of the burden to those opposing an activity to prove that the approval should not be granted in the particular circumstances of the case.

The economic cost and inconvenience of taking measures to prevent environmental harm have also been used as reasons for not undertaking or postponing such measures where there is a lack of full scientific certainty as to the efficacy of such measures. This approach has led to the promotion of the precautionary principle. This principle provides that “if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation”.<sup>19</sup> The precautionary principle, once invoked, effects a transfer of the evidentiary burden to a proponent of

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<sup>18</sup> Brian J Preston, “Internalising ecocentrism in environmental law”, above n 15, 80-81.

<sup>19</sup> See, eg, *Protection of the Environment Administration Act 1991* (NSW) s 6(2).

an activity to prove that the threat of environmental damage does not in fact exist or is negligible.<sup>20</sup>

The issue of the burden of proof arises in another way. Persons who consume or exploit the environment will prevail over persons who do not consume or exploit the environment. This is simply because consuming users by exercising their demands foreclose non-consuming users from exercising their demands, but the contrary does not hold true. This results in a loaded system. Even in a system with laws regulating the use and exploitation of the environment, the leverage inherently exerted by consuming users of the environment means that they can continue their consumption until they are sued and restrained by court order. Consuming users will, therefore, be defendants and non-consuming users or persons wishing to preserve the environment will be plaintiffs. In the Australian legal system, plaintiffs bear the burden of proving the defendant's conduct is in breach of the law. In cases of doubt, the plaintiff will not succeed and the use or exploitation of the environment will prevail.<sup>21</sup>

The solutions to these problems concerning the burden of proof, which I have suggested elsewhere<sup>22</sup>, include: allocating the burden of proof to those who propose to use, exploit or harm the environment, including applicants for approval of an activity to use, exploit or harm the environment; specifying that the precautionary principle is to be applicable in the exercise of powers and functions under environmental statutes, including in the assessment and approval of applications to carry out activities; and in court proceedings, allocating the burden of proof to the applicant in merits review appeals to establish that approval of a proposed activity should be granted and to the defendant in civil enforcement proceedings to remedy or restrain a breach of environmental statutes to rebut certain presumptions.

### **Substantive rights, duties and obligations**

The fourth aspect under this topic of the structure of Australian environmental laws I wish to address concerns the substantive rights, duties and obligations under environmental statutes. I will start with statutory duties on regulatory authorities. A striking feature of environmental statutes in Australia is that they prescribe conditional, but not absolute, rules of what can and cannot be used or exploited in the environment. Consider statutes concerning threatened species, populations and ecological communities. These statutes adopt the typical regulatory approach of first prohibiting the harming of listed threatened species, populations and ecological communities but then giving power to the regulatory authority to grant approval to persons who wish to harm a particular threatened species, population or ecological community. The statutes prescribe the process for making, considering and approving the application to harm the threatened species, populations or ecological community. At no point do the statutes state that approval cannot be granted. There is, therefore, no absolute rule protecting all or some particularly significant threatened species, populations and ecological communities in all or particular

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<sup>20</sup> *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 146 LGERA 10 at 43.

<sup>21</sup> Brian J Preston, "Third Party Appeals and Environmental Law Matters in New South Wales" (1986) 60 *Australian Law Journal* 215, 221.

<sup>22</sup> Brian J Preston, "Internalising ecocentrism in environmental law", above n 15, 81-82.

circumstances. The prohibition on harming threatened species, populations and ecological communities is entirely conditional and provisional.

The solution to this problem is for the legislature to enunciate in the statute some absolute rule. This could be identifying those areas or components of the environment that are unconditionally to be prevented from more harm. It could involve identifying environmental outcomes or standards that are not to be compromised or are to be achieved, as the case may be. An ecocentric approach could inform the enunciation of these unconditional outcomes and standards. One example might be to enunciate the outcome of the maintenance of biological diversity and ecological integrity, including ecosystem processing and functioning.<sup>23</sup>

A related feature of environmental statutes in Australia is that they are replete with discretionary powers but rarely burdened by duties and obligations. As I have noted, the typical regulatory approach is to start with a prohibition of an activity causing some environmental harm but then give power to the regulatory authority to relax that prohibition by applications being made, considered and approved. There is rarely a duty on the regulatory authority, either of a positive nature, to achieve some environmental outcome or standard, or of a negative nature, to ensure some environmental outcome or standard is not compromised. Reform could be usefully focused on statutes imposing more duties on regulatory authorities to achieve or to prevent the compromising of specified environmental outcomes or standards.<sup>24</sup>

Next, I will deal with statutory obligations and persons regulated by the statute. Under the typical environmental statute, the obligations imposed on persons are usually of a negative nature, that is to say, obligations that a person not do certain acts. These might be obligations not to carry out an activity at all, not to carry out an activity in a certain way, or not to carry out an activity with a certain consequence such as causing environmental harm of some kind. If persons wish to be relieved of this obligation, they need to apply for some form of approval authorising the activity.

However, positive obligations do exist in some statutes. Land owners might be under positive obligations to conserve land and things on or attached to it. A land owner might be required, in relation to a listed heritage item on the land, to undertake a minimum standard of maintenance and repair to avoid demolition of the heritage item by neglect.<sup>25</sup>

The land owner might enter into a private property agreement, whereby the landowner undertakes to conserve the land and things attached to it. Examples are heritage agreements in relation to heritage items on the land<sup>26</sup>, conservation agreements to conserve the biodiversity on the land<sup>27</sup>, and property vegetation

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<sup>23</sup> Brian J Preston, "Internalising ecocentrism in environmental law", above n 15, 83.

<sup>24</sup> Brian J Preston, "Internalising ecocentrism in environmental law", above n 15, 84.

<sup>25</sup> *Heritage Act 1977* (NSW) s 118; *Heritage Regulation 2005* (NSW) Pt 3.

<sup>26</sup> *Heritage Act 1977* (NSW) Pt 3B.

<sup>27</sup> *Biodiversity Conservation Act 2016* (NSW) Pt 5, Div 3.

plans.<sup>28</sup> An owner of land might also be under a positive obligation to control noxious weeds or prescribed pest species of flora and fauna.<sup>29</sup>

Positive obligations may arise by consent authorities, in granting development consent, imposing conditions requiring the preservation or improvement of the environment on the land the subject of the development or requiring the carrying out of works on adjoining land.<sup>30</sup>

I have argued elsewhere that environmental statutes could impose more demanding positive obligations on landowners to use their land in the service of a habitable and ecologically sustainable planet.<sup>31</sup>

Finally, I will deal with statutory rights afforded under environmental statutes. Overwhelmingly, environmental statutes, in so far as they afford rights, afford rights to humans. The environment, and components of it such as flora and fauna, have no rights under the statute. Australian environmental statutes have not yet recognised the intrinsic value of the environment and its biota. This could, however, be done. The constitution of Ecuador recognises that nature has “the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes” (Article 71).

## **Implementation and enforcement**

The fifth and final aspect of this topic of the structure of Australian environmental laws that I want to address is implementation and enforcement of environmental statutes. Implementation involves a relevant regulatory authority exercising powers and functions under the statute. Enforcement involves taking action to ensure compliance with the statute by both the regulatory authority and others whose conduct is regulated by the statute. There are a variety of means of enforcing environmental statutes, including criminal prosecution for offences, civil enforcement proceedings to remedy or restrain breaches, proceedings to impose a civil pecuniary penalty for statutory breaches and administrative orders such as stop work orders and directions for remedial works.

Implementation and enforcement of environmental statutes are critical to good governance. Good governance is itself a component of achieving ESD.<sup>32</sup>

Implementation will be enhanced by having dedicated, competent, knowledgeable and well-resourced regulatory authorities exercising powers and functions under the statute. Imposing more duties and obligations, rather than merely discretionary powers, and specifying desired environmental outcomes and standards to be achieved or not to be compromised in the exercise of powers and functions, will also enhance implementation.

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<sup>28</sup> *Native Vegetation Act 2003* (NSW) Pt 4.

<sup>29</sup> *Noxious Weeds Act 1983* (NSW) s 12; *Biosecurity Act 2015* (NSW) Pt 6; *Local Land Services Act 2013* (NSW) Pt 10.

<sup>30</sup> *Environmental Planning and Assessment Act 1979* (NSW) ss 80, 80A(1)(f).

<sup>31</sup> Brian J Preston, “Internalising ecocentrism in environmental law”, above n 15, 85-86.

<sup>32</sup> *Hub Action Group v Minister for Planning* (2008) 161 LGERA 136 at 141, 157.

Good governance will be assisted by measurement, monitoring and reporting on performance in the implementation of the statute. The primary responsibility for measurement, monitoring and reporting should reside with the regulatory authorities. Accountability, transparency and responsiveness will be promoted by publication of reports on measurement and monitoring. Availability and utilisation, from time to time, of merits review and judicial review of the regulatory authority's conduct and decisions will also improve its performance and good governance.

Enforcement of environmental statutes is enhanced by empowering not only the regulatory authority but also citizens to have access to a court or tribunal to enforce the law. Open standing provisions, such as s 123 of the *Environmental Planning and Assessment Act 1979* (NSW), which allow any person to bring civil proceedings to remedy or restrain a statutory breach, are a hallmark of most environmental statutes in New South Wales. They empower citizens to enforce environmental statutes against individuals in breach, of the statute where the regulatory authority has failed to act and even to bring proceedings against the regulatory authority itself in respect of its conduct and decisions in breach of the statute.

### **THE INSTITUTIONS REVIEWING, UPHOLDING AND ENFORCING THE LAWS**

The third topic I want to address concerns the review of decision-making under environmental statutes and the judicial institutions undertaking such review. In addressing the sources of Australian environmental laws and the structure of the laws, I have focussed on statutory law, not the common law. Overwhelmingly, civil environmental litigation in Australia concerns environmental legislation. First, there are actions to uphold and enforce environmental legislation by restraining and remedying conduct in breach of the legislation. Second, there are actions to judicially review governmental decisions made under the legislation. Third, there are appeals to review on the merits governmental decisions made under the legislation. There has been little other types of environmental litigation.

The first type of environmental litigation, civil enforcement, is primarily undertaken by regulatory authorities against actors in the private sector who have commenced development that is prohibited or without obtaining the required consent or not in accordance with the consent that has been granted. Occasionally, individuals and environmental organisations will bring their own civil enforcement proceedings, especially where the regulatory authority has not brought proceedings against the private actors or where the regulatory authority is itself breaching the legislation. In New South Wales, citizen actions are enabled by open standing provisions, such as s 123 of the *Environmental Planning and Assessment Act 1979*. Examples are the public interest litigation against the Forestry Commission of NSW and logging companies restraining breaches of the *Environmental Planning and Assessment Act 1979* (concerning inadequate environmental impact assessment) and the *National Parks and Wildlife Act 1974* (concerning harm to protected and endangered fauna).

The second type of environmental litigation is judicial review. Judicial review is review of administrative decisions and conduct by the courts to ensure that powers exercised by the executive government are for the purpose for which the powers are conferred and in the manner in which they are intended to be exercised. As Brennan J in *Attorney General (New South Wales) v Quin* (1990) 170 CLR 1 at 35-36 said:

“The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository’s power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.”

The distinction between judicial review and merits review is a fundamental principle of Australian administrative law.<sup>33</sup>

The grounds of judicial review fall into three main categories: illegality, irrationality and procedural impropriety.<sup>34</sup>

The best-known environmental litigation in Australia has mostly involved judicial review of government action or inaction. Recent examples are climate change litigation challenging governmental approval of developments likely to contribute to climate change (such as coal mines) or developments likely to be affected by climate change (such as developments in coastal zones at risk of coastal hazards).<sup>35</sup>

An example of judicial review on climate change grounds is *Gray v Minister for Planning* (2006) 152 LGRA 258. The applicant, a member of an environmental organisation campaigning to reduce Australia’s greenhouse gas emissions, opposed the proposed Anvil Hill coal mine in the Hunter Valley of New South Wales. The applicant challenged the decision of the Director General of the Department of Planning to accept that the environmental assessment prepared by the proponent adequately addressed the environmental assessment requirements of the Director General, including the requirement for a “detailed greenhouse gas assessment”. The applicant argued that a greenhouse gas assessment required consideration of the greenhouse gas emissions not only from sources owned or controlled by the coal miner (scope 1: direct greenhouse gas emissions) and from the generation of purchased electricity consumed by the coal miner (scope 2: electricity indirect greenhouse gas emissions) but also from sources not owned or controlled by the coal miner as a consequence of the activities of the coal miner (scope 3: other indirect greenhouse gas emissions). In that case, scope 3 emissions could include potential greenhouse gas emissions from the burning of coal originating from the coal mine by third parties (mostly overseas) outside the control of the coal miner. The coal miner’s environmental assessment report included a study of scope 1 and scope 2, but not scope 3, greenhouse gas emissions. Hence, the applicant submitted that the environmental assessment failed to address the Director General’s environmental assessment requirements. So too, the Director General, in

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<sup>33</sup> James Spigelman, “The Integrity Branch of Government” (2004) 78 *Australian Law Journal* 724 at 730.

<sup>34</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 at 410.

<sup>35</sup> For a summary of climate change litigation in Australia, see Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, Cambridge, 2015); Brian J Preston, “Climate Change Litigation (Part 1)” (2011) 5 *Carbon and Climate Law Review* 3 and “Climate Change Litigation (Part 2)” (2011) 5 *Carbon and Climate Law Review* 244.

deciding to accept the environmental assessment, failed to take into account the principles of ESD.

The Land and Environment Court held that the Director General was under an implied obligation to take into account the principles of ESD, including the precautionary principle and the principle of intergenerational equity. The Court held that scope 3 greenhouse gas emissions should have been included in the environmental assessment. Climate change is a global environmental issue to which the coal from the project will contribute.<sup>36</sup>

The third type of environmental litigation is merits review. The availability of merits review of administrative decisions is a distinctive aspect of Australian administrative law. As I have noted earlier, external merits review is commonly available under planning laws in Australia. Mostly, merits review is able to be sought by applicants for development consent who are dissatisfied with a governmental decision to refuse their development application, or to approve it but on conditions with which they are dissatisfied. Occasionally, other persons who have objected to a proposed development may be entitled to appeal seeking merits review of a governmental decision to approve a development. In New South Wales, this right of appeal is available to a person who objected to a designated development during the public exhibition period of the development application.

Merits review involves the re-exercise of the power of the original decision maker. As I have noted, mostly in Australia, merits review is undertaken by a body external to, and independent of, the regulatory authority which was the original decision maker. This body is either a court or a tribunal, usually a specialist environmental court or tribunal. These environmental courts and tribunals are a distinctive characteristic of the Australian legal system. They have been responsible for developing environmental jurisprudence, notably concerning the meaning and application of the principles of ESD and dealing with the contribution of developments to climate change and the consequences of climate change on developments.<sup>37</sup>

The decision of the Land and Environment Court of NSW in *Bulga Milbrodale Progress Association Ltd v Minister for Planning and Infrastructure and Warkworth Mining Ltd* (2013) 194 LGERA 347 is a good example of merits review by an environmental court. Residents of the local village of Bulga in the Hunter Valley, which was threatened by the extension of an open cut coal mine, appealed against the State Government's approval of the extension of the coal mine. The Land and Environment Court upheld the residents' appeal and refused approval because of the significant, adverse biological diversity, noise and dust, and social impacts of the extension.

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<sup>36</sup> *Gray v Minister for Planning* (2006) 152 LGERA 258 at 291.

<sup>37</sup> See, on the ECTs in Australia, Brian J Preston, "Benefits of Judicial Specialisation in Environmental Law: The Land and Environment Court as a Case Study" (2012) 29 *Pace Environmental Law Review* 396 and Brian J Preston, "Characteristics of Successful Environmental Courts and Tribunals" (2014) 26 *Journal of Environmental Law* 365 and more generally on ECTs, George Pring and Catherine Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (The Access Initiative of the World Resources Institute, 2009) and George Pring and Catherine Pring, *Environmental Courts and Tribunals: A Guide for Policy Makers* (UNEP, 2016).

In relation to biological diversity, the Court found that the project would be likely to have significant adverse effects on biological diversity, including on four endangered ecological communities, but in particular on the endemic Warkworth Sands Woodland, which impacts would not be mitigated by the project or by the proposed conditions of approval. The Court was not persuaded that the biodiversity offsets and other compensatory measures proposed by the coal miner were appropriate or feasible or would be likely to compensate for the significant biological diversity impacts. The Court found that the project would have significant and unacceptable impacts on biological diversity that were not able to be avoided, mitigated or compensated.

In relation to noise, the Court found that the noise criteria proposed in the conditions of approval were not appropriate. The noise impacts of the project on the residents of Bulga would be intrusive and adversely affect the reasonable use, enjoyment and amenity of the residents of the village of Bulga and the surrounding countryside. The noise mitigation strategies were unlikely to reduce noise impacts to levels that would be acceptable. Undertaking greater noise mitigation strategies may result in greater social impacts.

In relation to dust, the Court found that the cumulative air quality impacts of the coal mine (as extended by the project) with an adjoining coal mine were unacceptable and unlikely to comply with proposed conditions of approval.

In relation to social impacts, the Court found that the project's impacts in terms of noise, dust and visual impacts and the adverse change in the composition of the community by reason of the acquisition of noise and air quality affected properties were likely to cause social impacts on individuals and the community of Bulga. The project's impacts would exacerbate the loss of sense of place, and materially and adversely change the sense of community, of the residents of Bulga and the surrounding countryside.

In making its decision, the Court considered the three pillars of equity: intergenerational, intragenerational and interspecies justice. The Court noted that distributive injustice would be caused by the distribution of the burdens of the project in several ways: first, on local residents by limiting their ability to live in a clean and healthy environment (intragenerational equity); second, on future generations by not maintaining the heath, diversity and productivity of the local environment (intergenerational equity); and third, on components of biological diversity, such as endangered ecological communities and threatened fauna, by disturbing the integrity, stability and beauty of the biotic community (interspecies equity).

## **THE PEOPLE WHO HAVE SHAPED THE LAWS**

I have spoken of the sources of Australia's environmental laws, the structure of the laws and the judicial institutions that review, uphold and enforce the laws. I have endeavoured to explain how these laws have been constructed and applied in practice; the experience which has shaped the laws and the experience of the laws. In some of my explanations, I have referred to the people and groups that have been influential in these experiences.

They include the environmental activists, environmental organisations and community groups who have taken strong stands against policies and projects that damage and destroy the environment and in favour of good governance and environmental justice. These people and groups have availed themselves of the opportunities, in a democratic country, for freedom of expression, protest and civil disobedience. Examples are the large-scale campaigns to save the wilderness areas of Tasmania and the rainforests and old growth eucalypt forests in New South Wales and other States, as well as the smaller-scale campaigns to save local communities and the places that they love. These campaigns have shaped Australia's environmental laws and how the laws have been applied in practice.

These people and groups have also worked within the law and legal system, such as by availing themselves of the opportunities for public participation in environmental decision-making and for appeal and review of decisions and conduct in the courts, which the statutes permit. The environmental litigation brought by these people and groups has sometimes been successful in achieving their immediate goals, such as to prevent harm to the environment or to the community. However, even if the litigation was not successful in that regard, it may still have yielded benefits. Climate change litigation, for example, has not always been successful in Australia. Nevertheless, the litigation has had an influence on later decisions and conduct of the legislature, executive and judiciary.<sup>38</sup>

More generally, public interest litigation can deliver many benefits to law, democracy and society. About a decade ago, I suggested that environmental litigation can: help to realise a truly democratic process; enforce legality in governance, maintain institutional integrity and ensure executive accountability; assist in the progressive and principled development of environmental law and policies; expose weaknesses in the law and suggest law reform; improve the quality of executive decision-making; explicate and give force to environmental values; promote environmental values by putting a price on them; ensure rational discourse on environmental issues and disputes; encourage society to debate public values, national identity and sense of place; have positive social effects; foster environmentalism and environmental consciousness in society; and promote achievement in other areas of endeavour such as the arts.<sup>39</sup>

Public interest environmental litigation is rarely possible or successful without professional assistance, particularly of the experts who advise and give evidence and the lawyers who advise and appear for the plaintiffs. Australia has a fine tradition of lawyers assisting citizens and citizen groups, often without fee. In all States and Territories of Australia, there are public interest legal centres providing legal advice, assistance and advocacy to citizens and citizen groups concerning environmental matters. The most active are the Environmental Defenders Offices, the longest established, best-known and most successful of which is the Environmental Defenders Office NSW. Many of the cases that have shaped environmental law in

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<sup>38</sup> See, for example, Brian J Preston, "The Influence of Climate Change Litigation on Governments and the Private Sector" (2011) 2 *Climate Law* 485.

<sup>39</sup> Brian J Preston, "The Role of Public Interest Environmental Litigation" (2006) 23 *Environmental and Planning Law Journal* 337.

New South Wales have been brought by people and groups for whom EDO NSW has acted.

Lawyers have also played other influential roles, apart from advising and acting for people and groups. Lawyers have served on the management boards of environmental organisations in Australia (such as peak conservation groups) and legal professional organisations (such as environmental law associations). These lawyers include Murray Wilcox QC and Hal Wootten QC (who each served as President of the Australian Conservation Foundation and Chair of the EDO NSW) and Simon Molesworth QC (who has served as President of various state, national and international National Trust organisations). Through these organisations, lawyers have contributed to the conservation of the environment and the development of good environmental laws and good governance.

Academic environmental lawyers have also been highly influential. Through their teaching and writings, academic lawyers have exposed weaknesses in environmental laws and governance and made constructive suggestions for reform. The legislature, executive and judiciary have responded to these suggestions. Eminent Australian academic lawyers who have had a powerful influence on Australian environmental law include Professors Gerry Bates, Ben Boer, Tim Bonyhady, David Farrier, Douglas Fisher and Rob Fowler. Standing on the shoulders of these giants of environmental law (to borrow Isaac Newton's words) are the current crop of Australian academic environmental lawyers, including Professors Donna Craig, Alex Gardner, Lee Godden, Amanda Kennedy, Rosemary Lyster, Paul Martin, Jan McDonald, Andrew Macintosh, Jacqueline Peel, Ben Richardson and Erica Techera, all working in Australia, and Liz Fischer and Eloise Scottford working in the United Kingdom. Their work continues, and continues to develop, the Australian experience on environmental law.