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## Environmental and Resource Law in Australia

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## Environmental and Resource Law in Australia

### Abstract

This article outlines the development of environmental and resource law in Australia and explores its constitutional and political setting. The need for a national approach to the environment within the context of Australia as a federally organized country is recognized, particularly with regard to Australia's international obligations and the fact that environmental issues span state, territory, and/or national boundaries. It is argued that, to date, federal action with respect to the environment does not satisfactorily demonstrate the emergence of a national environmental strategy. However, the recent Intergovernmental Agreement on the Environment, signed by the state and federal governments in 1992, and the development of ecologically sustainable strategies for Australia are acknowledged for their potential to overcome the federal-state conflicts, which have inhibited an adequate national approach.

### Keywords

Environmental law; Australia

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# ENVIRONMENTAL AND RESOURCE LAW IN AUSTRALIA<sup>©</sup>

BY BEN BOER\*

This article outlines the development of environmental and resource law in Australia and explores its constitutional and political setting. The need for a national approach to the environment within the context of Australia as a federally organized country is recognized, particularly with regard to Australia's international obligations and the fact that environmental issues span state, territory, and/or national boundaries. It is argued that, to date, federal action with respect to the environment does not satisfactorily demonstrate the emergence of a national environmental strategy. However, the recent Intergovernmental Agreement on the Environment, signed by the state and federal governments in 1992, and the development of ecologically sustainable strategies for Australia are acknowledged for their potential to overcome the federal-state conflicts, which have inhibited an adequate national approach.

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## I. INTRODUCTION

This article explores the evolution of Australian environmental and resource law and its related administrative and institutional processes over the past two decades. It indicates that there is an increasing recognition of the federal government's powers to influence environmental policy in the states and territories, as well as an increasing need to do so. The trend is examined in the areas of world heritage, Aboriginal matters, environmental impact assessment, resource allocation and resource security, the establishment of the Commonwealth Environment Protection Agency and the National Environmental Protection Authority, the conclusion of a comprehensive *Intergovernmental Agreement on the Environment*,<sup>1</sup> and the development of ecologically sustainable development strategies. The article is written in the light of an increasingly vital international debate on environmental issues, the influence of that debate on domestic politics, and legal expressions of federal environmental policy. A number of comparisons are made with Canada in relation to the way in which resource allocation and environmental protection is organized in a federal system.

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<sup>1</sup> Commonwealth of Australia, 1992.

## II. THE DEVELOPMENT OF ENVIRONMENTAL LAW IN AUSTRALIA

### A. *Environment as an International Issue*

Any examination of legal perspectives on environmental and resource law in the 1990s cannot be done without being aware of the international dimensions. This decade has been declared by the United Nations as the Decade of International Law,<sup>2</sup> but it is already clear that the decade will be remembered specifically for its development of international *environmental law*.<sup>3</sup>

The decade has also been dubbed the *turn-around* decade by Gordon and Suzuki, who maintain that we do not have much more than ten years to address the world's environmental problems before it is too late to reverse the cycles of degradation:

More than any other time in our history, the 1990s will be a turning point for human civilisation. Not only are we facing ecological disasters that could affect our ability to survive, but the crisis is forcing us to re-examine the value system that has governed our lives for at least the past 2000 years.<sup>4</sup>

It is in this sense that environmental law cannot ignore the international obligations cast upon each country to do all they can to address the problems of the planet.

The United Nations Conference on Environment and Development (UNCED), also known as the *Earth Summit*, which was held in Brazil in 1992,<sup>5</sup> is clearly illustrative of the international scope of

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<sup>2</sup> United Nations Decade of International Law Res. No. 44/23. "Resolutions adopted by the General Assembly during the first part of its forty-fourth session from 19 September to 29 December 1989." Press Release GA/7977 (22 January 1990) at 40.

<sup>3</sup> International environmental law has been considerably strengthened in recent years, with some 300 multilateral treaties and agreements and about 900 bilateral treaties and agreements having been concluded on the environment since the Stockholm Conference on the Human Environment in 1972; see V. Koester, "From Stockholm to Brundtland" 20:1-2 (1990) *Envl. Pol'y & L.* 14 at 15. See also N. Robinson, "A Legal Perspective on Sustainable Development" in J.O. Saunders, ed., *The Legal Challenge of Sustainable Development* (Calgary: Canadian Institute of Resources Law, 1990) 15 at 26; L.K. Caldwell, *International Environmental Policy* (London: Duke University Press, 1990) c. 3; and I. Rummel-Bulska & S. Osafo, eds., *Selected Multilateral Treaties in the Field of the Environment*, vol. 2 (United Nations Environment Programme, Grotius, 1991).

<sup>4</sup> A. Gordon & D. Suzuki, *It's a Matter of Survival* (Sydney: Allen & Unwin, 1990) at 1; see also L.R. Brown et al., *State of the World 1989* (Washington: Worldwatch Institute) forward.

<sup>5</sup> United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 8 - 14 June 1992.

environmental obligations. The Earth Summit was attended by some 10,000 official delegates from 178 countries, including about 120 heads of state. In addition, around 20,000 representatives attended the Global Forum, held at the same time for non-governmental organizations.

As a result of the Earth Summit negotiations, conventions on biological diversity<sup>6</sup> and climate change<sup>7</sup> were adopted. In addition, a global environmental *action plan* for the twenty-first century, *Agenda 21*,<sup>8</sup> was devised to be read in conjunction with the *Rio Declaration*.<sup>9</sup> The *Rio Declaration* purports to establish the basic principles for the conduct of peoples and nations to ensure sustainability of the planet. *Agenda 21* is meant to provide the basis for a "global partnership for sustainable development."<sup>10</sup> It comprises forty chapters developing a comprehensive strategy for action in all areas relating to the implementation of sustainable development.

Australia and Canada are signatories to all the agreements reached at the Earth Summit. The question now is in what manner they will fulfil their obligations to implement domestically the principles of sustainable development to which they have committed themselves internationally.

## B. *Environment and the Constitution*

When the Australian Constitution was being drafted in the 1890s, the word *environment* was not in common use, and no thought could have been expected to be given to the development of national policies in relation to environmental management at that time. Until the past two decades, it seems to have been assumed that the federal government's role was and should be limited in this area. It was further assumed that only the state governments had the formal power over land

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<sup>6</sup> *Convention on the Conservation of Biological Diversity* 31 I.L.M. 822 (1992); and 3 Y.B. Int'l Env. L. 663 (1992).

<sup>7</sup> *Framework Convention on Climate Change*, Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, 5th Sess., 2d Part, A/AC.237/18 (Part II)/Add.1 (1992), reprinted in 31 I.L.M. 849 [hereinafter *Climate Change Convention*].

<sup>8</sup> 7. U.N. Cont. Doc A/Conf. 151/26 [hereinafter *Agenda 21*].

<sup>9</sup> *Rio Declaration on Environment and Development*, UNCED, A/CONF.151/5/Rev.1 (1992), reprinted in 31 I.L.M. 874 [hereinafter *Rio Declaration*]. A set of forestry principles were also agreed to: *Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*, UNCED, A/CONF.151/6/Rev.1 (1992), reprinted in 31 I.L.M. 881 (1992). This is a non-binding accord.

<sup>10</sup> Preamble, *Agenda 21*, *supra* note 8.

use, environmental protection, and resource allocation. This can be said to arise partly from the perception that "there is a certain distinction between the Australian Constitution as a legal document and the Constitution as it is popularly conceived," which can be seen as the *imagined*, as opposed to the *real* constitution.<sup>11</sup> In Canada, this idea has been expressed as the difference between the *legal* and the *political* constitution.<sup>12</sup> These characterizations help to explain the history of environmental matters in the context of constitutional interpretation in each country. In Australia, the role of the High Court in this context has been crucial:

Constitutional power is one thing, political will another. The High Court determines the actual or potential power of the Commonwealth in this and other areas; whether it is utilised is a matter for Government and Parliament.<sup>13</sup>

Tensions between the states and the Commonwealth in relation to the legislative reach of each level of government have been very clearly manifested in Australia in the past two decades over resource allocation and environmental protection. In the 1980s, this debate became increasingly virulent and divisive. One locus of discontent over the exercise of federal power has been in the World Heritage listing of wilderness areas. The legal actions between the state<sup>14</sup> and federal governments over the past two decades relating to wilderness areas have highlighted the difference between the legal and the political constitution. The actions have indicated that the federal power to influence environmental matters has been much wider than was previously thought.<sup>15</sup> The trend of increasing intervention in environmental matters was sparked by the Franklin Dam dispute in the late 1970s and early 1980s. As a result, the Australian Labor Party, then in opposition federally, adopted the position that the proposed hydro dam on the Gordon River in South West Tasmania ought not to go ahead. This dam was to be placed within an area which had been

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<sup>11</sup> See J. Crawford, "The Constitution and the Environment" (1991) 13:1 Sydney L. Rev. 11.

<sup>12</sup> See A.R. Lucas, "Harmonisation of Federal and Provincial Environmental Policies: The Changing Legal and Policy Framework" in J.O. Saunders, ed., *Managing Natural Resources in a Federal State* (Toronto: Carswell, 1986) 33; see also Boer & Craig, *infra* note 144 at 303.

<sup>13</sup> D. Solomon, "Towards a National Environment Policy" (Paper presented to the Annual Conference of the National Environmental Law Association, August 1990) [unpublished].

<sup>14</sup> In this article, a reference to state governments normally includes the Northern Territory and the Australian Capital Territory.

<sup>15</sup> See further Crawford, *supra* note 11, and B.W. Boer, "Natural Resources and the National Estate" (1989) 6 E.P.L.J. 134.

nominated to the World Heritage list by a Liberal/National Party Government in the late 1970s. The nature of the debate was such that by the 1983 election, the Liberal/National Party Government refused to interfere in what it chose to regard as the internal workings of the Tasmanian state government. Australia is virtually the only country in the world to have had serious and long-term disputes over the listing of World Heritage items.<sup>16</sup>

The *Franklin Dam case*<sup>17</sup> and subsequent legal actions relating to world heritage initiatives have made it transparently clear that certain constitutional provisions are able to be used by the federal government to restrict activities within, or in relation to, World Heritage areas that come under the formal jurisdiction of the states and territories. In particular, section 51(i), the trade and commerce power; section 51(xx), the corporations power; sections 51(xxvi), the "people of any race power"; and section 51(xxix), the foreign affairs power,<sup>18</sup> have all been traversed by these cases.<sup>19</sup> They have been shown, not only to support any initiative which the federal government wishes to introduce in relation to the listing and management of World Heritage areas, but that these powers can form the basis of any other environmental management initiative by the federal government:

The lesson of a careful study of the last 15 years experience is that the Commonwealth has, one way or another, legislative power over most large-scale mining and environmental matters.<sup>20</sup>

In a recent High Court case, *The Council of the Municipality of Botany v. Federal Airports Corporation (the Third Runway Case)*,<sup>21</sup> it was resolved by the full Court that a federal authority was not bound by New South Wales environmental and planning legislation.<sup>22</sup> Although the

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<sup>16</sup> Certain aspects of the listing of Quebec City have created problems between the Canadian and Quebec governments; however, this dispute has never been publicly aired. The former Yugoslavia is the only other country which has had some public disputation over listing.

<sup>17</sup> *Commonwealth of Australia v. Tasmania* (1983), 158 C.L.R. 1.

<sup>18</sup> *Commonwealth of Australia Constitution Act 1900* 63 & 64 Victoria, c. 12 (U.K.).

<sup>19</sup> See *Cohen v. Peko-Wallsend* (1986), 68 A.L.R. 394; *Peko-Wallsend v. Minister for the Arts, Heritage and Environment* (1986), 70 A.L.R. 523; *Richardson v. Forestry Commission of Tasmania* (1988), 62 A.L.J.R. 158; *State of Queensland v. The Commonwealth of Australia* (1988), 62 A.L.J.R. 143; and B.J. Richardson, "A Study of Australian Practice Pursuant to the World Heritage Convention" 20:4-5 (1990) *Envtl. Pol'y. & L.* 143.

<sup>20</sup> Crawford, *supra* note 11 at 30.

<sup>21</sup> (1992), 175 C.L.R. 453.

<sup>22</sup> *The Environmental Planning and Assessment Act 1979* (N.S.W.).



substance of the decision was not particularly innovative, the precise issue had not previously been brought before the Court. Its effect was significant; the decision allowed for the unequivocal federal implementation of a national objective (*i.e.*, the building of a third runway at the Sydney Airport), in spite of local discontent.

The perceived expansion of the federal power as a result of these disputes has prompted some basic rethinking about the federal-state relationship with regard to environmental and resource allocation matters. Given the increasing awareness of Australia's environmental problems, many of which affect more than one state or territory,<sup>23</sup> a coherent national approach can clearly be justified. It seems important in this decade to address the major environmental problems facing Australia without being bogged down in the long-standing dilemmas of federal-state constitutional conflicts. This is particularly necessary where the federal government has put forward national positions in the negotiation of international conventions relating to the environment. This occurred in the *Convention on the Conservation of Biological Diversity* and in the *Climate Change Convention*.<sup>24</sup>

Notwithstanding the recognition of wide powers at the Commonwealth level, the insertion of a specific head of power in section 51 of the Constitution relating to the conservation of natural resources and environment protection has been mooted at various times in the past few years. Serious consideration was given to such proposals by the Advisory Committees of the Constitutional Commission,<sup>25</sup> but they were not taken any further by the Commission in its final report in 1988.<sup>26</sup> Given the arguments put forward above, namely that the federal Parliament already has sufficient scope under the various heads of

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<sup>23</sup> The salinization of the Murray-Darling River system, in which Queensland, New South Wales, Victoria, South Australia, the Australian Capital Territory and the Commonwealth all have an interest, is commonly cited as the epitome of the need for consistency in federal-state policies on the environment. The River Murray Commission (established by the *River Murray Waters Act 1983*), a joint federal-state body set up to deal with this has been fraught with political problems. See B.W. Boer & I. Hannam, "Agrarian Land Law in Australia" in W. Brussard & M. Grossman, eds., *Agrarian Land Law in the Western World* (Oxford: CAB International, 1992); see also R.J.L. Hawke, *Our Country Our Future: Statement on the Environment* (Canberra: Australian Government Publishing Service, July 1989) at 43-44.

<sup>24</sup> See *supra* notes 6 and 7.

<sup>25</sup> Constitutional Commission, *Advisory Committee on the Distribution of Powers Report* (Canberra: Commonwealth of Australia, 1987) at 73-74 and Advisory Committee on Trade and National Economic Management, *Report to the Constitutional Commission* (Canberra: Australian Government Publishing Service, 1987) at 127-134. See also Boer, *supra* note 15 at 138-139.

<sup>26</sup> Constitutional Commission, *Final Report of the Constitutional Commission* (Canberra: Australian Government Publishing Service, 1988).

power to do a great deal in the environment and resource allocation area, it is unlikely that there will be a move to include such a power in the Constitution in the near future.

### C. *Public Interest Litigation and Locus Standi*

One feature of Australian environmental cases which deserves special mention is the development of standing to sue. The tradition of public interest litigation in Australia has not been strong, in contrast to the United States and Canada. This has probably had more to do with the lack of adventurousness on the part of lawyers and restraints on private and government sector funding of public interest litigation than with any particular legal obstacle. The *Australian Conservation Foundation (ACF) case*<sup>27</sup> of 1980 can be regarded as the beginning of the debate on standing in public interest environmental litigation in Australia. The ACF challenged the validity of decisions in relation to a resort development in Queensland, under the *Environment Protection (Impact of Proposals) Act 1974* (Cth). The ACF attempted to establish standing on the basis that it had a well-known concern for the environment, which was indicated by its various activities and the objects of the organization. It had made a submission on the environmental impact statement and it had objected to the carrying out of the proposed development. The ACF was denied standing on the basis that the organization could not demonstrate an appropriate special interest in the subject matter of the action. This finding was based on the traditional test as expounded in *Boyce v. The Paddington Borough Council*.<sup>28</sup> The majority in the High Court held that the ACF had no more than a "mere emotional or intellectual concern" in the subject matter of the proceedings and, thus, could not challenge the decision of the minister. Over the 1980s, the arguments on standing became more sophisticated as public interest litigation around the country grew, not

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<sup>27</sup> *Australian Conservation Foundation v. The Commonwealth of Australia* (1980), 146 C.L.R. 493.

<sup>28</sup> [1903] 1 Ch. 109. The test in this case is that the plaintiff can sue without joining the Attorney-General where either the interference with the public right is such as that some private right of the plaintiff is at the same time interfered with, or, where no private right is interfered with, the plaintiff, in respect of his or her public right, suffers special damage peculiar to him or her from the interference with the public right. See generally B.J. Preston, *Environmental Litigation* (Sydney: Law Book, 1989) at 24-35.

only in the environmental area.<sup>29</sup> Ten years after the original ACF case, the Federal Court in *Australian Conservation Foundation and Another v. Minister for Resources and Another*,<sup>30</sup> a challenge to a decision of the federal minister to issue wood chip licences, decided that the ACF did have the relevant interest in the subject matter of that action. The Court considered the following matters in granting standing: the ACF was partially funded by Commonwealth and state governments; the forests proposed to be logged were listed on the Register of the National Estate;<sup>31</sup> public perceptions on the need to protect and conserve the natural environment had changed; and there was a need for public bodies such as the ACF to act in the public interest.<sup>32</sup>

### III. ENVIRONMENT AS A NATIONAL ISSUE

#### A. *Federal Environmental Initiatives*

Australia is often called the "Lucky Country"<sup>33</sup> for its natural beauty, allegedly vast mineral wealth, spectacular rain forests, deserts, waterways and coastlines, and its relatively stable government. As a result, until recently, there was a naïve belief in the unlimited supply of its natural resources. However, Australia's apparent physical richness, combined with a human population which, on an area basis is very thinly spread, has obscured the fact that Australia's fragile ecosystems face increasingly urgent problems.

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<sup>29</sup> The activities of the Public Interest Advocacy Centre and the Environmental Defender's Office in Brisbane, Melbourne, and Sydney have contributed a good deal to this growth. See B.W. Boer, "Legal Aid in Environmental Disputes" (1986) 3 E.P.L.J. 22; and S. Molesworth, "Provision of Legal Aid for Environmental Issues: The Squeeze on Environment Defender's Offices" (1992) 9 E.P.L.J. 286.

<sup>30</sup> (1990), 19 A.L.D. 70.

<sup>31</sup> Pursuant to the *Australian Heritage Commission Act 1975* (Cth). This list does not give direct protection to the items on the Register of the National Estate; however, an obligation is put on federal ministers and federal authorities not to take any action which adversely affects the item as a part of the National Estate, unless no "feasible and prudent alternative" exists to the taking of that action (see section 30). See further Boer, *supra* note 15 at 139-141.

<sup>32</sup> It might be noted here that, under the *Environmental Planning and Assessment Act 1979* (N.S.W.), standing has always been open. Section 123 allows "any person" to bring an action to remedy or restrain a breach of the Act. Four other pieces of environmental legislation in New South Wales include similar provisions.

<sup>33</sup> The term was originally coined by Donald Horne, *The Lucky Country: Australia in the Sixties*, 3rd ed. (Sydney: Penguin, 1971).

Since the 1970s, there has been a steady growth in the federal legislative scheme relating to environmental matters, concerning environmental impact assessment and the protection of Aboriginal, national, and world heritage.<sup>34</sup> This growth has been accompanied by the various court battles referred to above, which established the constitutional validity of various pieces of this new legislation. Despite the increasing knowledge of environmental degradation around the world, Australia has, by and large, been slow to act at a national level in relation to the environmental crises which affect the country. Federal involvement has often been *ad hoc*, more in response to specific resource allocation proposals than to international pressures. Reactive federal decisions on resource projects have been highly controversial and have exacerbated federal-state political rivalry. The mechanism of *cooperative federalism* has meant minimal intervention by the Commonwealth in what have traditionally been regarded as state concerns. Thus, until the last three years, there has been little in the way of effective *national* policies of environmental management.

Thus, it is still true to say that the approach to specific matters of environmental protection, such as air and water pollution, environmental impact assessment, and resource allocation, is fragmented. There thus exists a wide range of legislative instruments and administrative policies at the federal level and within the states and territories, with little consistency to be found between them.

A national approach was called for in a major statement by the former Australian Prime Minister, Mr. Hawke:<sup>35</sup>

Many of the environmental problems we face today do not respect State and Territory boundaries, and cannot be resolved piecemeal. Increasingly the Australian community and investors are demanding national approaches to major environmental issues. They need to be certain that the Commonwealth can respond quickly to national or global

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<sup>34</sup> *Environment Protection (Impact of Proposals) Act 1974* (Cth), *Australian Heritage Commission Act 1975* (Cth), *Great Barrier Reef Marine Park Act 1975* (Cth), *National Parks and Wildlife Conservation Act 1975* (Cth), *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), *World Heritage Properties Conservation Act 1983* (Cth), and *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).

<sup>35</sup> The need for a national approach to environmental matters was first comprehensively canvassed in the Parliament of the Commonwealth of Australia, *National Estate: Report of the Committee of Inquiry* (Canberra: Australian Government Publishing Service, 1974), which examined the potential powers of the Commonwealth Government in relation to environmental and heritage matters (at 203-291). The Report recommended the establishment of what became the Australian Heritage Commission (see *Australian Heritage Commission Act 1975* (Cth)), which remains a crucial body in environmental decision making in Australia and is likely to maintain that role.

environment problems. They do not want as many systems for dealing with these problems as there are States and Territories.<sup>36</sup>

In the same document, Hawke stated:

Under the Australian Constitution, the States and Territories have primary responsibility for protecting and regulating the environment. But because of its constitutional powers relating to such matters as foreign affairs, trade and commerce and foreign investment, the Commonwealth also has a role in relation to the use of resources. Both past and present Governments have used these powers to protect the environment and to set conditions controlling resource use.<sup>37</sup>

Thus, the potential Commonwealth role can be seen as much wider than traditionally has been thought. It need not be assumed that the primary responsibility rests with the states and territories.

The combination of problems caused by decision making in world heritage matters, and national and international pressures brought by the debate on sustainable development, has resulted in new institutional arrangements being set up, such as the federal Resource Assessment Commission<sup>38</sup> and the Ecologically Sustainable Development Working Groups. There has also been an increasing willingness on the part of the Australian and New Zealand Environment and Conservation Council<sup>39</sup> to suggest more uniform policies among the States and the Commonwealth on matters such as air and water pollution. In addition, there is a substantial interest in ensuring that more consistent arrangements on environmental impact assessment are put in place.<sup>40</sup>

The states are also beginning to recognize that there is a need for an enhanced federal role, at least in environmental matters which are

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<sup>36</sup> Hawke, *supra* note 23 at 10.

<sup>37</sup> *Ibid.* at 9.

<sup>38</sup> Established by the *Resource Assessment Commission Act 1989* (Cth).

<sup>39</sup> The Australian and New Zealand Environment and Conservation Council (ANZECC) is composed of the ministers for the environment and conservation of all Australian states and territories, the Australian federal government and the New Zealand government. It meets regularly to discuss and formulate policy on environmental matters, with a view to maintaining some consistency among the various jurisdictions.

<sup>40</sup> See D.E. James & B.W. Boer, *Economic Analysis in Environmental Impact Assessment* (Canberra: Australian Environment Council, 1988). ANZECC commissioned a major study on environmental impact assessment in Australia in 1990; see ANZECC, *A National Approach to Environmental Impact Assessment in Australia* (Canberra: ANZECC, October 1991). See also the Environment Institute of Australia, *Environmental Impact Process in Australia* (Discussion Paper) by A. Martyn, M.-L. Morris & F. Downing (Canberra: Environment Institute of Australia, 1990), which points out the differences between the jurisdictions and explores a more uniform approach.

clearly of national importance.<sup>41</sup> The suggestion of enacting uniform enforcement legislation, particularly for pollution regulation, came from the Australian and New Zealand Environment and Conservation Council (ANZECC). The move was initiated by New South Wales and South Australia. In introducing the idea, the then New South Wales Environment Minister stated:

The philosophical underpinning of our proposal was a series of simple propositions. The first of these is that industrial pollution and community protections from it knows no party ideology. The second is the ecosystems whether local or multiregional such as the Murray-Darling River System are not fettered or divided by lines of convenience drawn by colonial rules. Finally, the New South Wales Government also took the view that Australia, as a nation, could not hope to play a significant part in international standard setting if, within our own nation, we were unable to agree upon and pursue unified intranational goals in matters of environmental significance.<sup>42</sup>

A special Premiers Conference held in October 1990 reiterated this approach and set out the terms of a proposed *Intergovernmental Agreement*.<sup>43</sup>

## 1. The Intergovernmental Agreement on the Environment

The *Intergovernmental Agreement on the Environment (IGAE)* was signed in May 1992 between the federal government, the state governments, the territories, and the Australian Local Government Association. It is meant

to provide a mechanism by which to facilitate:

- (1) a cooperative national approach to the environment;
- (2) a better definition of the roles of the respective governments;
- (3) a reduction in the number of disputes between the Commonwealth and the States and Territories on environmental issues;

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<sup>41</sup> New South Wales has been a frequent exponent of the cause of a greater federal role; however, with that advocacy has also been an expectation that the Commonwealth will foot the bill. See Australian Conservation Foundation & Greenpeace Australia, *Proposal for a Federal Environment Protection Agency*, by R.J. Fowler (Fitzroy, Victoria: Australian Conservation Foundation, January 1991) at 9. See also P. Rutherford, "National Strength: Establishing a Federal Environment Protection Agency" (1992) 20:1 *Habitat* 22.

<sup>42</sup> T. Moore, "An Australian Response: Towards Truly National Environmental Law Enforcement and Operational Standards" (1990) 3 *Australian Env'tl. L. News* 8.

<sup>43</sup> Special Premiers Conference, Brisbane, Queensland, Communiqué, "Towards a Closer Partnership" (30-31 October 1990 Press Release).

- (4) greater certainty of Government and business decision making; and
- (5) better environmental protection.<sup>44</sup>

The Agreement also recognizes that the states and territories have an important role to play in the development of national and international policies on the environment. The concept of ecologically sustainable development is seen to provide the potential for the integration of economic and ecological considerations in decision making, and balancing the interests of current and future generations (if that is possible!). The Agreement seeks to avoid the duplication of functions between different levels of government and to set up effective mechanisms for cooperation on environmental issues.<sup>45</sup> In achieving these various ends the parties have committed themselves to a number of principles, including the precautionary principle, intergenerational equity, conservation of biological diversity, ecological integrity, and improved valuation, pricing, and incentive mechanisms.<sup>46</sup>

The *IGAE* attempts to define the roles and responsibilities of the different levels of government and the accommodation of their respective interests. It acknowledges the integral responsibility of the states and territories for environmental concerns within their own borders while allowing for Commonwealth involvement in such issues where it has a demonstrated interest.<sup>47</sup> In the instance of Commonwealth involvement in a state issue, or vice versa, the *IGAE* provides that the parties shall agree upon cooperative procedures, ideally via the collaborative development of environmental practices, or alternatively, by the accreditation of existing state environmental

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<sup>44</sup> Preamble, *Intergovernmental Agreement on the Environment* [hereinafter Agreement], *supra* note 1. The Agreement acknowledges that, although the Australian Local Government Association is a party to the Agreement, it cannot bind local government bodies to observe its terms. It was included because the federal and state governments wished to recognize the responsibility and interests of local government in environmental matters.

<sup>45</sup> *Ibid.* Preamble.

<sup>46</sup> *Ibid.* at s. 3. The precautionary principle is quickly becoming accepted in the environmental literature and now forms an integral part of the *Rio Declaration*, *supra* note 9 (see Principle 15). The Australian version of the principle states that "where 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." Section 3 of the Agreement, *ibid.* states that in the application of the principle, public and private sector decisions should be guided by careful evaluation to avert, wherever practicable, serious or irreversible damage to the environment and an assessment of the risk-weighted consequences of various options (Section 3.5.1, *IGAE*; see also National Strategy for Ecologically Sustainable Development, *infra* note 71 at 8).

<sup>47</sup> *Ibid.* at s. 2.5.3.

practices by the Commonwealth and vice versa.<sup>48</sup> There is, however, no procedure for resolving a disagreement between the parties in the event that existing practices are unsatisfactory, other than an assertion that the parties "will endeavour to agree."<sup>49</sup>

The schedules to the Agreement specify all the matters which are subject to the principles and cooperative mechanisms established by it. They include data collection and handling, resource assessment, land use decisions and approval processes, environmental impact assessment, national environment protection measures, climate change strategies, biological diversity, national and world heritage and nature conservation.

Schedule 4 of the Agreement provides for the establishment of a National Environmental Protection Authority (NEPA) constituted by a Ministerial Council. NEPA is to comprise one representative from each of the Commonwealth, state, and territorial governments and is to be chaired by the Commonwealth Minister for the Environment. Decisions are to be made on a two-thirds majority. NEPA is intended to be established by Commonwealth legislation with complementary legislation in each state and territory. NEPA is to be charged with:

establishing national environment protection standards, guidelines, goals and associated protocols ... with the object of ensuring:

- (i) that people enjoy the benefit of equivalent protection from air, water and soil pollution and from noise, wherever they live;
- (ii) that decisions by business are not distorted and markets are not fragmented by variations between jurisdictions in relation to the adoption or implementation of major environment protection measures.<sup>50</sup>

In other words, NEPA is to be an independent body primarily concerned with the development of a national environmental approach, through collaboration with the states and territories, to pollution and environmental protection generally.<sup>51</sup>

It is thus clear that both the federal and state governments are beginning to see the environment as a responsibility to be shared. It should be noted that a number of specific environmental matters are already being addressed on a national and state basis. They include land

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<sup>48</sup> *Ibid.* at s. 2.5.1.

<sup>49</sup> *Ibid.* at s. 2.5.1.1.(iii).

<sup>50</sup> *Ibid.* at Schedule 4, s. 1.

<sup>51</sup> See "The Commonwealth Environment Protection Agency," Facts Sheet (Canberra: CEPA, June 1992).



degradation,<sup>52</sup> the logging of old-growth forests,<sup>53</sup> ozone depletion,<sup>54</sup> greenhouse gas emissions, protection of World Heritage areas, and the introduction of ecologically sustainable development.

Of course there will continue to be an element of political opportunism and competition between the states and the Commonwealth in the various moves to seize the environmental initiative. The debate on resource security legislation<sup>55</sup> and the Commonwealth's determination to introduce endangered species legislation<sup>56</sup> are prime examples. This competitive element is unlikely to disappear in the short term, despite the *IGAE*. Nevertheless, the Agreement is potentially one of the most far-reaching initiatives to be taken by the Australian federation in recent times. It may fundamentally reshape the way in which the various levels of government interact, not only in environmental matters but perhaps also more generally.

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<sup>52</sup> Land degradation is seen as Australia's primary environmental problem. Up to 50 per cent of rural land in some states is in need of soil conservation measures. Salinization of agricultural land through the lowering of the water table (mainly caused by land clearing) has been the subject of a good deal of effort, much of which has borne very little fruit. See further R. Beale & P. Fray, *The Vanishing Continent: Australia's Degraded Environment* (Sydney: Hodder & Stoughton, 1990) c. 3. The National Landcare Programme, a Decade of Landcare, was launched in 1989; see World Commission on Environment and Development (WCED), *Our Common Future*, Australian ed. (Melbourne: Oxford & Commission for the Future, 1990) at 41; and Hawke, *supra* note 23 at 42. See also J. Bradsen, "Perspectives on Land Conservation" (1991) 8 E.P.L.J. at 16 for historical background on land degradation in Australia and Boer & Hannam, *supra* note 23. The One Billion Trees Programme was also launched in 1989; see Hawke, *supra* note 23 at 48.

<sup>53</sup> See *Our Common Future*, *ibid.* at 44-48. The Resource Assessment Commission completed a major inquiry into Australia's forestry industry in April 1992; see Resource Assessment Commission, *Forest and Timber Inquiry Final Report* (Canberra: Australian Government Publishing Service, 1992). This inquiry is dealt with further below.

<sup>54</sup> Australian people are seen to be particularly affected by ozone depletion because of the country's proximity to Antarctica; however, recent evidence indicates that the northern hemisphere may also be seriously affected because of a similar rate of ozone depletion over the Arctic. The federal government and some of the states have now passed legislation importing measures for the protection of the ozone layer (for example, *Ozone Protection Act 1989* (Cth), *Ozone Protection Act 1989*, (N.S.W.)).

<sup>55</sup> The extensively debated resource security legislation, *The Forest Conservation and Development Bill* (Cth), was defeated in the Senate in May 1992. This issue is dealt with further below.

<sup>56</sup> See now, the *Endangered Species Protection Act 1992* (Cth).

## 2. Ecologically sustainable development and the ESD Working Groups

The preparation of the National Conservation Strategy for Australia in 1983 was Australia's first tentative foray into the realm of sustainable development. That strategy was largely based on the *World Conservation Strategy* of 1980.<sup>57</sup> A 1989 report underlined the urgency of developing and implementing sustainable strategies in Australia, arguing that many current practices in farming, forestry, and fishing are not sustainable:

Controversy still surrounds the sustainability of current practices for some primary industries. This is to a large extent because there is insufficient knowledge for many aspects to be evaluated for their sustainability. The relatively short period that some activities have been practiced also precludes reliable prediction of their long-term sustainability ...

There is sufficient evidence, even now, that some current practices are not sustainable, and that many practices which have been shown to produce environmental degradation in the past are still widely practiced. Irreparable losses of environments and species are continuing despite an ever-improving technology and knowledge base in our society.<sup>58</sup>

The report goes on to note that the solutions to the deteriorating conditions identified will lie in a mixture of economic, social, technical, and legal approaches.<sup>59</sup>

In the past three years, the federal government has introduced a range of initiatives to bring it up to speed in the global debate on sustainable development. A number of documents published by it set out the progression in thinking on these matters. The first was the much heralded statement by the Prime Minister, *Our Country, Our Future*,<sup>60</sup> and one year later, a discussion paper on ecologically sustainable development,<sup>61</sup> followed by a policy statement on foreign aid and

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<sup>57</sup> International Union for the Conservation of Nature and Natural Resources (now known as IUCN, the World Conservation Union), World Wildlife Fund (now known as World Wide Fund for Nature) & the United Nations Environment Programme, *World Conservation Strategy: Living Resource Conservation for Sustainable Development* (Gland, Switzerland: IUCN/WWF/UNEP, 1980).

<sup>58</sup> Bureau of Rural Resources, Department of Primary Industries and Energy, *Sustainability: Physical and Biological Considerations for Australian Environments* (Working Paper No. WP/19/89, rev. ed.) by A.P. Hamblin (Canberra: Bureau of Rural Resources, Department of Primary Industries and Energy, 1991) at 36.

<sup>59</sup> *Ibid.*

<sup>60</sup> Hawke, *supra* note 23.

<sup>61</sup> Commonwealth of Australia, *Ecologically Sustainable Development (A Commonwealth Discussion Paper)* (Canberra: Australian Government Publishing Service, June 1990).

ecologically sustainable development.<sup>62</sup> The federal government also established the Resource Assessment Commission in 1989, a body intended to contribute to the development of federal environmental and resource policy by undertaking public inquiries and research on resource uses and options.

Shortly after the establishment of the Resource Assessment Commission, the Working Groups on Ecologically Sustainable Development (ESD) were established as a separate process. They were to investigate the possibility of introduction of sustainable development policies for each major economic sector.<sup>63</sup>

One of the initial difficulties in setting up the ESD Working Groups was the problem of ensuring that the major conservation organizations were able to take part. While each individual industrial sector, such as tourism or mining, only had to provide one or two representatives each, the participating conservation groups were obliged to cover the field and supply representatives for each Working Group. The difficulty was more or less solved when the federal government agreed to grants for the conservation groups to ensure that they could participate.<sup>64</sup>

When the ESD Working Groups were being set up in mid-1989, the question of whether or not the conservation organizations should be involved was heavily debated among the principal conservation groups. In early 1991, the announced intention to introduce resource security legislation put the ESD process into doubt for a time due to the threatened withdrawal of some of the major environmental groups. In the end Greenpeace withdrew. The Australian Conservation Foundation and the World Wide Fund for Nature decided that they would achieve more by staying within the process.

The general principles of ecologically sustainable development, as set out in the Commonwealth government's discussion paper on ESD have been stated as follows:

- (1) Integrating economic and environmental goals in policies and activities;
- (2) Ensuring that environmental assets are appropriately valued;

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<sup>62</sup> Australian International Development Assistance Bureau, *Ecologically Sustainable Development in International Development Cooperation: An Interim Policy Statement* (Canberra: Australian Government Publishing Service, 1990).

<sup>63</sup> The working groups covered the areas of agriculture, fisheries, forestry, manufacturing, mining, tourism, transport, energy use and energy production.

<sup>64</sup> For example, the Australian Conservation Foundation was granted some \$800,000 to fund its participation in the process.

- (3) Providing equity within and between generations;
- (4) Dealing cautiously with risk and irreversibility; and
- (5) Recognizing the global dimension.<sup>65</sup>

Within a short period after the Commonwealth discussion paper on ESD was published, the peak conservation groups produced a combined document, which analyzed the Commonwealth's paper and argued that it was conceptually flawed:

The discussion paper assumes that only marginal changes to economic policy will be needed to achieve ecological sustainability. There is a strong sense throughout the paper that ecological considerations are an optional "add on extra" to economic policy. Ecological considerations are secondary to traditional "growth" objectives. The government's discussion paper confuses economic means with social and ecological ends.<sup>66</sup>

Apart from determining precisely what ecologically sustainable development means for each economic sector, the major question is just how any agreed principles of sustainable development are supposed to be implemented. The Brundtland Report<sup>67</sup> itself argues that institutional and legal changes will be necessary:

The ability to choose policy paths that are sustainable requires that the ecological components of policy be considered at the same time as the economic, trade, energy, agricultural, industrial and other dimensions—on the same agendas and in the same national and international institutions. That is the chief institutional challenge of the 1990s.<sup>68</sup>

The broad changes required clearly need to be introduced in legislative and administrative policy within a coherent philosophical and practical framework; at a federal level, the *Resource Assessment Commission Act 1989* was one such attempt. In New South Wales, the *Protection of the Environment Administration Act 1991* was another. The latter act specifically incorporates ecologically sustainable development into its provisions and sets out the basic principles by which it is to be

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<sup>65</sup> *Supra* note 61 at 2.

<sup>66</sup> W.L. Hare, ed., et al., *Ecologically Sustainable Development (A Submission)* (Greenplace, Australia: Australian Conservation Foundation, Greenpeace (Australia), the Wilderness Society & World Wide Fund for Nature (Australia), August 1990); see also B. Hare & F. Grey, "Growth vs. Development: What's the difference?" (1992) 20:1 *Habitat* 4.

<sup>67</sup> *Our Common Future*, *supra* note 52.

<sup>68</sup> *Ibid.* at 357.

achieved.<sup>69</sup> In New Zealand, the *Resource Management Act 1991* includes comprehensive principles for sustainable management, which set the framework for decision making in the areas of environment and heritage protection, planning, and resource allocation.

The ESD Working Groups have now reported their findings. Eleven volumes of reports and a *National Strategy for Ecologically Sustainable Development* were produced.<sup>70</sup> Unfortunately, the reports of the Working Groups' findings were handed down during a period of political turmoil for the Australian federal government, which resulted in a change of Prime Minister. Consequently, the surviving political momentum behind reports of the Working Groups became ambiguous. Nonetheless, the content of the reports is now on the table, together with the National Strategy for Ecologically Sustainable Development, and the debate will continue to ferment, particularly in the vat of the *IGAE*.<sup>71</sup>

### 3. Public environmental inquiries in Australia

One of the significant features of environmental and resource decision making in Australia in the past two decades has been the use of public inquiries to advise the government at both the federal and state levels. For at least some of these inquiries it would be true to say that they have been used as a means for government to avoid or delay the making of politically difficult decisions. In the last few years, these inquiry processes have come under some scrutiny at the federal level, in terms of their ability to deliver answers that give the government an objective basis on which to make those decisions.<sup>72</sup> The establishment of

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<sup>69</sup> Section 6 of the *Protection of the Environment Administration Act 1991* (N.S.W.) recognizes that, for the purposes of maintaining ecologically sustainable development, the effective integration of economic and environmental considerations in decision-making processes is required. The Act states that this can be achieved through the following principles and programmes: the precautionary principle, intergenerational equity, the conservation of biological diversity and ecological integrity, and the improved valuation and pricing of environmental resources. These elements are derived from the *IGAE* on the Environment, *supra* note 1.

<sup>70</sup> Ecologically Sustainable Development Working Groups, *Final Reports of the Ecologically Sustainable Development Working Groups* (Series of 9 Final Reports) (Canberra: Australian Government Publishing Service, 1991).

<sup>71</sup> Commonwealth of Australia, *National Strategy for Ecologically Sustainable Development* (Canberra: Australian Government Publishing Service, 1992).

<sup>72</sup> See generally J. Carew-Reid, "Public Environmental Inquiries" (Paper presented to the Environmental Law Association Annual Conference, 1982), and B.W. Boer, "Public Inquiries in Resource Use Decisions" (1992) *Australian Mining & Petroleum L.A.Y.B.* 1.

the Resource Assessment Commission was one major result of this scrutiny.

#### 4. The Resource Assessment Commission

The Resource Assessment Commission is a unique body which was set up in 1989 as a result of the federal government's need to approach more rationally the process of allocation and conservation of natural resources. Its establishment followed a particularly difficult dispute in Tasmania. The Lemonthyme and Southern Forests Commission of Inquiry<sup>73</sup> was a legal and political minefield relating to the World Heritage listing and protection of two major forest areas in South Western Tasmania.

The Commission was established by the *Resource Assessment Commission Act 1989* (Cth). Its functions are to hold inquiries and make reports to the Prime Minister on specific resource use matters referred to it by the federal government. It was established as an independent body to give objective advice in relation to resource matters, both natural and otherwise, by way of reports published as a result of the inquiries. The initiative was clearly the most interesting development at the federal level in the area of public inquiries in recent years.<sup>74</sup> In the federal budget of 1993, the government announced that the Commission would be wound down and that no further references were to be given to it. The legislation will remain in place for the foreseeable future. The following remarks should be read in light of this development.

The *Resource Assessment Commission Act* sets out the way in which inquiries should be run and the matters to be taken into account within those inquiries.<sup>75</sup> In the performance of its functions in relation to a resource matter, section 8 of the *Resource Assessment Commission Act* provides that the Commission must, as far as is practicable, and subject to the terms of the referral of the matter:

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<sup>73</sup> Australia. Commission of Inquiry into the Lemonthyme and Southern Forests. Report of Commission of Inquiry into the Lemonthyme and Southern Forests, vols. 1 & 2 (Canberra: Australian Government Publishing Service, 1988); see also B.W. Boer, "Lemonthyme Inquiry Act Valid" (1988) 5 E.P.L.J. 173; Boer, *supra* note 15; and B.M. Tsamenyi, J. Bedding, & L. Wall, "Determining the World Heritage Values of the Lemonthyme and Southern Forests: Lessons from the Helsham Inquiry" (1989) 6. E.P.L.J. 79.

<sup>74</sup> The reconstituted Industry Commission is another permanent federal inquiry body with a broad brief, which has carried out a number of significant environment-related inquiries in the last few years.

<sup>75</sup> Schedule 1, *Resource Assessment Commission Act 1989* (Cth).

- (a) identify the resource with which the matter is concerned and the extent of that resource;
- (b) identify the various uses that could be made of that resource;
- (c) identify:
  - (i) the environmental, cultural, social, industry, economic and other values of that resource or involved in those uses; and
  - (ii) the implications for those values of those uses, including implications that are uncertain or long-term;
- (d) assess the losses and benefits involved in the various alternative uses, or combinations of uses, of that resource, including:
  - (i) losses and benefits of an unquantifiable nature; and
  - (ii) losses and benefits that are uncertain or long-term; and
- (e) give consideration to any other aspect of the matter that it considers relevant.

In addition to the functions identified in section 8 of the Act, the schedule to the Act includes three policy principles by which the Commission is supposed to be guided. These principles seek to import into the Act the prescriptions of the World Commission on Environment and Development<sup>76</sup> relating to sustainable development:

- (1) There should be an integrated approach to conservation (including all environmental and ecological considerations) and development by taking both conservation (including all environmental and ecological considerations) and development aspects into account at an early stage.
- (2) Resource use decisions should seek to optimise the net benefits to the community from the nation's resources, having regard to efficiency of resource use, environmental considerations, ecological integrity and sustainability, ecosystem integrity and sustainability, the sustainability of any development, and an equitable distribution of the return on resources.
- (3) Commonwealth decisions, policies and management regimes may provide for additional uses that are compatible with the primary purpose values for the area, recognizing that in some cases both conservation (including all environmental and ecological considerations) and development interests can be accommodated concurrently or sequentially, and, in other cases, choices must be made between alternative uses or combinations of uses.<sup>77</sup>

These principles were put forward as part of the ecologically sustainable development strategy developed by the Commonwealth.<sup>78</sup> The emphasis on an integrated approach to conservation and development required by the policy principles is dependent on the definitions of these terms in the Act. Some key definitions from section 3 of the Act are reproduced below:

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<sup>76</sup> *Our Common Future*, *supra* note 52.

<sup>77</sup> *Supra* note 75.

<sup>78</sup> *Supra* note 71. They were first published in the Prime Minister's Statement on the Environment (see Hawke, *supra* note 23 at 5) as principles for environmental decision making.

"conservation" means the management of the human use of the biosphere so that it may yield the greatest sustainable benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations, and includes the preservation, maintenance, sustainable utilisation, restoration and enhancement of the environment;

"development" means the modification of the biosphere to satisfy human needs and improve the quality of life;

"environment" includes all aspects of the surroundings of human beings, whether affecting human beings as individuals or in social groupings;

"resource" means a biological, mineral or other material component, whether natural or not, of the environment (other than a human being), and includes a permanent or temporary combination or association of such components.

It can be noted that the words "conservation" and "development" essentially comprise the definition of sustainable development found in the Brundtland Report.<sup>79</sup> "Environment" has the same definition as in the federal environmental assessment legislation<sup>80</sup> and includes both physical and social aspects.

Two further important definitions are "resource matter" and "use." A "resource matter" includes the question of the nature or extent of environmental, cultural, social, industrial, economic or other effects of the use of a resource. Significantly, "use" includes proposed use of a resource for conservation *or* development. The breadth of these definitions is important in terms of the range of matters into which the federal government is able to set up an inquiry under the Act.

Implicit in these definitions is an emphasis on the conservation and use of the biosphere for the purposes of sustainable development of *human* generations, both present and future. There is little in the way of any ethical conception of the inherent value of the natural environment; the proper relationship between humans and the environment is not specifically addressed in any sense. The overall thrust of the legislation seems to militate against the development of any ethical exploration of human use and abuse of the biosphere. There is thus little guarantee of any fundamental analysis of the issues relating to an examination of the human domination of nature and the possible reorientation of that relationship in order to recognize the intrinsic values of natural

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<sup>79</sup> "[D]evelopment that meets the needs of the present without compromising the ability of future generations to meet their own needs," *Our Common Future*, *supra* note 52 at 87.

<sup>80</sup> "[E]nvironment includes all aspects of the environment of human beings, whether affecting them as individuals or in their social groupings," *Environment Protection (Impact of Proposals) Act 1974* (Cth) s. 3.



environments, as opposed to their value for the benefit of the human race.<sup>81</sup>

The outcome of the Resource Assessment Commission inquiries, and, in particular, the options and recommendations that are set out by the Resource Assessment Commission for the government to consider, could well be limited by the seemingly anthropocentric nature of the Commission's charter. Of course, there is sufficient room within the legislation, and within the discretion of the Commissioners, for broader issues to be explored. If this is not done, however, there is little guarantee that the Commission will have been any more successful at recommending an appropriate level of environmental protection than the various commissions of inquiry into environmental management at the federal and state levels that we have seen in Australia over the past fifteen years.

In spite of these rather pessimistic comments, one hopeful sign that this inquiry commission was to be different from its predecessors has been the readiness of commissioners and staff to consider new methods of assessing resources and alternative techniques for resolving disputes.<sup>82</sup> The Commission consciously attempted to recruit staff from a broad range of disciplinary backgrounds. This meant that background papers and the reports of the first two inquiries have had economic, sociological, historical, and philosophical input to some degree. In addition, the Commission expended a great deal of effort and money on ensuring that adequate consultancies were carried out in relation to a broad range of aspects of the inquiries. In addition, the inquiry process depends for input on written and oral submissions. The Commission invited participation from every sector of the community by way of

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<sup>81</sup> See generally L.H. Tribe, "Ways Not To Think About Plastic Trees: New Foundations for Environmental Law" (1974) 83 Yale L.J. 1315; B.W. Boer, "Social Ecology and Environmental Law" (1984) 1 E.P.L.J. 233; and M. Bookchin, *Remaking Society: Pathways to a Green Future* (Boston: South End Press, 1990). Bookchin wishes to reorient present industrial societies towards what he calls "ecological" societies. See also B.W. Boer, "Some Legal and Ethical Issues" in B.W. Boer & D.E. James, eds., *Property Rights and Environment Protection* (Griffith University: Environment Institute of Australia, 1990) 43.

<sup>82</sup> See Resource Assessment Commission, *A Survey of the Hedonic Price Technique* (Research Paper No. 1) by M.C. Streeting (Canberra: Australian Government Publishing Service, September 1990); Resource Assessment Commission, *A Survey of the Contingent Valuation Method* (Research Paper No. 2) by L.C. Wilks (Canberra: Australian Government Publishing Service, November 1990); Resource Assessment Commission, *A Contingent Valuation Survey of the Kakadu Conservation Zone* (Research Paper No. 3) by D. Imber, G. Stevenson & L.C. Wilks (Canberra: Australian Publishing Service, February 1991); and B.W. Boer et al., *The Use of Mediation in the Resource Assessment Commission Inquiry Process* (Consultants' Report) (Canberra: Australian Government Publishing Service, January 1991).

newspaper advertisement and by direct solicitation. Commission staff have had an unenviable task in analyzing the hundreds of submissions, some of which are voluminous, together with the various oral submissions that were put during formal and informal sittings.

a) *Forest and Timber Resources Inquiry*

The federal government has been embroiled in various forestry disputes with a number of Australian states in the past decade. Although these disputes have largely centred on the nomination of areas of world heritage under the World Heritage Convention and the logging of national estate forests,<sup>83</sup> (that is, those forests listed on the Register of the National Estate under the *Australian Heritage Commission Act 1975* (Cth)), the debate has become more generalized in the last couple of years. The first reference to the Resource Assessment Commission was to inquire into Australia's forest and timber resources. The scope of the inquiry was to identify and evaluate options for the use of those resources, and specifically to take into account both the existing management strategies and alternative uses for forestry resources.<sup>84</sup>

Unusually, two non-governmental organizations, the Forestry and Forest Products Industry Council and the Australian Conservation Foundation, were both specifically mentioned in the terms of reference. Although this was done primarily because these organizations had put forward alternative plans for the use and conservation of forestry resources around Australia,<sup>85</sup> it is possible that specific mention of these two organizations may have led to their continued participation in the inquiry process. This point is significant when one considers that, for the first six months of the Lemnathyme and South Forests Inquiry of 1987-88, the Tasmanian government and the forest industry sector in

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<sup>83</sup> See text accompanying notes 14-20, *supra*.

<sup>84</sup> See Resource Assessment Commission, *Australia's Forest and Timber Resources* (Background Paper) (Canberra: Resource Assessment Commission, March 1990); see also Australian Conservation Foundation, *The Wood and the Trees: A Preliminary Economic Analysis of a Conservation-oriented Forest Industry Strategy* by J.I. Cameron & I.W. Penna (Melbourne: Australian Conservation Foundation, 1988), and Forestry & Forest Products Industry Council, *Forest Industries Growth Plan: A Submission to the Australian Government* (Canberra: Forest and Forest Products Industry Council, 1987).

<sup>85</sup> The Forestry & Forest Products Industry Council (FAFFIC), "Growth Plan" (Plan presented as a submission to the Forest & Timber Resources Inquiry, 1990); and the Australian Conservation Foundation (ACF), "Alternative Strategy" (Strategy presented as a submission to the Forest & Timber Resources Inquiry).

Tasmania refused to participate in any direct way. The ostensible reason was that the *Lemonthyme and Southern Forests Inquiry Act* was argued to be invalid.<sup>86</sup> In addition, there was public debate within the conservation groups as to whether the Tasmanian government and the forest industry sector in Tasmania ought to participate in the inquiry processes of the Resource Assessment Commission, with organizations such as the Wilderness Society preferring not to do so until a later stage, when the draft and final reports became available. This seemed essentially to be a matter of political judgment on the part of the various organizations as to when they considered their involvement and critique would be most effective.

Because of the broad range of the Commission's forestry inquiry and because of the vast amount of information collected through submissions and hearings in the two years of the inquiry, there is little doubt that the submissions and the Final Report of the Commission will be used as the basis for policy making and analysis in forestry for some years to come.<sup>87</sup>

#### b) *The Kakadu Conservation Zone Inquiry*

The declaration of the various stages of the Kakadu National Park has been the subject of controversy since the late 1960s. Kakadu National Park is an extensive federal park situated in the Northern Territory. It is important for reasons of ecology, Aboriginal heritage, and aesthetics. The park is now owned by the traditional Aboriginal owners but is leased to the federal government for use as a national park. The park is inhabited by various Aboriginal communities.

In the 1970s, the area was subjected to a major inquiry to assess the impact of uranium mining. The Ranger Uranium Environmental Inquiry<sup>88</sup> recommended that while uranium mining could go ahead within a confined area, a corollary should be that a national park be

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<sup>86</sup> See Boer, "Lemonthyme Inquiry Act Valid," *supra* note 73; and Australia, Commission of Inquiry into the Lemonthyme and Southern Forests, *Report of the Commission of Inquiry into the Lemonthyme and Southern Forests* (Canberra: Australian Government Publishing Service, May 1988) at 12.

<sup>87</sup> Resource Assessment Commission, *Forest and Timber Inquiry Final Report*, vols. 1, 2A & 2B (Canberra: Australian Government Publishing Service, March 1992).

<sup>88</sup> R.W. Fox, presiding commissioner, G.G. Kelleher & C.B. Kerr, commissioners, *Ranger Uranium Environmental Inquiry* (Report No. 1 & 2) (Canberra: Australian Government Publishing Service, 1977).

established, together with a consideration of Aboriginal land rights.<sup>89</sup> Subsequent to the declaration of Kakadu National Park in 1979, stage one of the park was nominated to the World Heritage List. Stage two of the park was nominated to that list in 1987. In the past six years, there was a good deal of controversy about the addition of the third stage of Kakadu to the list. The area that was the subject of the stage three declaration included within it a mineral-rich area, which has been declared as the Kakadu Conservation Zone. The conservation zone, though surrounded by the park, was not part of it.

The declaration of conservation zones comes under the *Australian National Parks and Wildlife Act 1975* (Cth). The Act states that the object of the provision relating to conservation zones is to protect and conserve the wildlife and the natural features of the area until it is practicable to declare any such area a park or reserve. However, the Act also provides that regulations may be made to provide for mining, fishing, pastoral, and agricultural purposes.<sup>90</sup> The area proposed to be mined, particularly for gold, platinum, and palladium, is known as Coronation Hill. Coronation Hill was the subject of a mining tenement many years ago, but has not been mined in recent years. The area is of great significance to the Jawoyn Aboriginal people, its traditional owners. The zone is subject to a claim by the Aboriginal traditional owners under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

In 1987, the conservation zone was declared by the federal government, with a view to allowing mining to go ahead, subject to an environmental impact assessment being carried out. An environmental impact statement was subsequently prepared and published pursuant to the *Environment Protection (Impact of Proposals) Act 1974* (Cth). In 1989, the federal government reduced the size of the zone from 2,245 square kilometres to 47.5 square kilometres. Effectively this confined the zone to the immediate area of Coronation Hill. It then announced that a decision on the conservation zone would be delayed until "the Resource Assessment Commission had conducted a single, coherent assessment of the economic, environmental and cultural considerations relating to land uses in the whole of the new Conservation Zone."<sup>91</sup> The Commission was required to report within a year. In addition to the

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<sup>89</sup> Report No. 2, *ibid.* at 328-330.

<sup>90</sup> Section 8A, *Australian National Parks and Wildlife Act 1975* (Cth).

<sup>91</sup> Resource Assessment Commission, *Kakadu Conservation Zone* (Draft Report Vol. 1) (Canberra: Australian Government Publishing Service, February 1991) at 231.

inquiry under the *Resource Assessment Commission Act 1989* (Cth), the chairperson of that inquiry was also required to conduct an inquiry under the *Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984* (Cth) in order to address Aboriginal concerns more directly, and in particular, whether or not the Minister should make a declaration under the latter Act to protect the area.

In the 1990 federal election, the Labor Government perceived that the environment vote would deliver sufficient preferences to allow them to squeak back in. Consequently, Kakadu and the conservation zone (not then a part of the park) was heavily promoted as part of its election campaign.

The final report of the inquiry stated that there would not be major environmental effects on the values of the national park. However, the Commission also indicated that allowing mining to go ahead would have a very significant impact on the Jawoyn people.<sup>92</sup> It became clear that, notwithstanding the possibility that environmental effects could be minimal, it would have been politically very difficult for the federal government to have allowed mining in the future. Since the issue was decided, the whole nature of the Aboriginal land rights debates has changed because of the decision of the High Court in *Mabo v. State of Queensland and the Commonwealth of Australia*.<sup>93</sup>

## 5. The use of mediation

In the past few years, mediation has been used at the state level around Australia in an attempt to solve some allegedly intractable environmental disputes. The most significant example is the mediation process which led to the Salamanca Agreement<sup>94</sup> relating to the management of Tasmania's forests. This agreement was premised on

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<sup>92</sup> In addition, the inquiry conducted under the *Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984* (Cth) found that the Minister for Aboriginal Affairs could be satisfied under the Act that the area was of particular significance to Aboriginal people in accordance with Aboriginal tradition, and that mining, or, on the other hand, incorporation into the park, could constitute a threat to the zone. This additional inquiry thus found that a declaration could be made under the Act by the Minister to protect the area. These findings made it doubly difficult for the federal government to allow mining to go ahead, at least without the consent of the traditional owners (see D.G. Stewart, *Report to the Minister for Aboriginal Affairs on the Kakadu Conservation Zone* (Canberra: Australian Government Publishing Service, 1991)).

<sup>93</sup> (1992), 107 A.L.R. 1 [hereinafter *Mabo*]. See below at 361.

<sup>94</sup> So called because the first meeting in the process took place in the Salamanca Inn, in central Hobart.

the Tasmanian Parliamentary Accord, also known as the Labor/Green Accord.<sup>95</sup> The Accord provided, *inter alia*, for the formation of a Forestry Task Force and the commencement of a review process in relation to forestry management options. The Salamanca Agreement was directed to setting out the principles on which further negotiations could take place. When it was signed in 1989, it was seen as a significant development by all parties and its subsequent history was closely watched around Australia. Negotiations were entered into by the Tasmanian Farmers and Graziers Association which was concerned about the deadlock between industry and conservationists. The Agreement was intended to bind the Tasmanian government and its Forestry Commission, forestry industry groups, the conservation groups, relevant unions, farmers and private forest owners to a commitment to develop a long-term forestry industry strategy for Tasmania. Part of the agreement was to produce a Forests and Forest Industry Strategy for Tasmania by September 1990 that would address both long-term resource security and the protection of conservation values. The parties to the agreement were meant to work on a collaborative basis, thus avoiding the continuation of public conflict.

It is significant to note that the mediation process was funded by a substantial federal grant. This enabled the Forests and Forest Industry Council to put together a total package, which was meant to incorporate,

1. a "level playing field" of information and resources agreed to by all the parties;
2. scientific rigour in research and analysis achieved by Technical Working Groups on which each party is represented;
3. legislative and policy prescriptions; and
4. public participation in strategy, development, and implementation at the regional and local, as well as at the state level through Regional Advisory Groups and the interest groups represented on the Forests and Forest Industry Council.<sup>96</sup>

The Agreement began to fall apart as the time neared for the completion of the Forests and Forest Industry Strategy in September 1990. The failure of the Agreement to achieve a long-term strategy, although regrettable, suggests that with the right processes it is possible to achieve a great deal of common ground, at least in principle, between parties who have been warring over resource matters for some years.

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<sup>95</sup> The Tasmanian Labor Government held power for several years to late 1991 by virtue of the accord between it and five "Green Independents."

<sup>96</sup> Boer *et al.*, *supra* note 82 at 35.

At a federal level, a report prepared for the Resource Assessment Commission during 1990 recommended the introduction and implementation of specific public participation strategies for Commission inquiries in order to ensure that broad sectors of the community are encouraged and assisted in the making of submissions to particular inquiries.<sup>97</sup> In that report, the process of mediation, apart from having the potential to resolve specific disputes, was seen as a strategy for the encouragement of public participation in environment protection and resource allocation. It is clear from its overall charter and from the politics surrounding its establishment, that the Commission can be seen as an institutional mediator in the federal-state politics surrounding environmental and resource allocation issues:

In its broadest sense, mediation need not be seen as separate from the everyday process of decision-making, nor is it limited to techniques involving the use of independent third party facilitators. It can have a central role to play in sophisticated planning, management and public participation processes. In using mediation, it must be recognized that social values, along with scientific and economic dimensions, inevitably impose parameters on environmental and resource policy. Understood in this way, mediation can have a direct and vital function in the RAC inquiry process. Through the RAC, it could also assist in the formulation of sustainable development strategies by the Federal Government in various resource areas. *In the light of the RAC's origins, the overall function of the RAC can be seen as that of a mediator assisting in the resolution of resource disputes involving government, industry, conservation interests and the general public [emphasis added].*<sup>98</sup>

It is certainly clear that mediation will become a more frequent feature of the decision making landscape in Australia in the next few years. In this it will be following trends in both the United States and Canada. For example, the *Canadian Environmental Assessment Act* includes a specific provision on the use of mediation as part of the environmental assessment process.<sup>99</sup>

## 6. Resource security or security of nature?

Partly as a result of the failure of the Salamanca process to develop a satisfactory long-term strategy for the management of Tasmania's forests, a clamour began in the last quarter of 1990 for the

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<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.* at x.

<sup>99</sup> *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, ss. 25-28. For recent comments on mediation in environmental decision making in Canada, see D.P. Emond, "The Greening of Environmental Law" (1991) 36 McGill L.J. 743 at 759-769.

introduction of "resource security" legislation at the federal and the Tasmanian state levels. This legislation was intended to be enacted by the federal government in the initial instance, with mirror legislation to be brought in at state level. It has been the subject of bitter debate in the past several years and played a significant role in bringing down the minority Tasmanian Labor government in 1991. The federal *Forest Conservation and Development Bill* (Cth) was defeated in the Senate in May 1992.<sup>100</sup> Despite the defeat of the federal legislation, it is dealt with here as an example of the way in which the environmental debate has the ability to change markedly the resolve of government from one issue to the next. The objects of the legislation were to:

- (a) identify, and facilitate the protection and conservation of, forest areas of significant environmental, cultural and heritage value; and
- (b) facilitate investment by enterprises in major wood processing projects for the production of value-added products for export, import, replacement, or both.<sup>101</sup>

These objects were intended to be achieved by establishing procedures and conditions for granting security to a wood processing project by the Commonwealth and the relevant state through a comprehensive integrated assessment process. This process involved a consideration of the environmental, cultural, heritage, social, and economic impacts of the project, and was intended to preclude the exercise of Commonwealth legislative powers subsequent to the approval of the project except in exceptional circumstances. These circumstances included "major and unforeseen environmental or cultural impact" which were not taken into account in the initial assessment process.<sup>102</sup>

The resource security legislation was intended to apply only to major new industrial wood processing projects, where the project involved a capital-intensive, value-adding investment of \$100 million or more, and was directed to import replacement and/or export. In effect, this would limit its application to the introduction of high capacity wood pulp mills. The proponent company would be required to make a commitment to accept and act in accordance with a Forest Conservation and Development Process and to proceed with the project subject to

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<sup>100</sup> See L. Taylor, "Resource security deal killed by Kelly" *Sydney Morning Herald* (30 April 1992) 13. For detailed background to the resource security scheme, see D.E. Fisher "The Proposed Forest Resource Security Scheme: Sovereign Risk or Resource Security" (1991) 65 A.L.J. 453.

<sup>101</sup> Clause 3, *Forest Conservation and Development Bill* (Cth) 1992.

<sup>102</sup> *Ibid.* at Clause 17; see further, D.E. Fisher, "Resource Security" (1992) 2 Australian Env'tl. L. News 48 at 51.



receiving the necessary government approvals. The federal government did not propose to go ahead with the legislation unless the relevant state government also agreed to accept the Forest Conservation and Development Process and to enact parallel resource security legislation to apply to the project. The Forest Conservation and Development Process was intended to comprise a number of stages. These included in summary:

1. formulation of a development project strategy;
2. integrated Commonwealth-State assessment of environmental, heritage, cultural, social, and economic issues, designed to identify and resolve as many policy impediments as possible prior to the project's commencement. This may have involved the possible application of the *Environment Protection (Impact of Proposals) Act 1974*, the *Australian Heritage Commission Act 1975*, the *World Heritage Properties Conservation Act 1983*, and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.
3. A Commonwealth-State agreement to define the project as finally agreed and to incorporate the outcome of the integrated process.
4. The enactment of resource security legislation by the Commonwealth and the State to implement the terms of the agreement.

The agreement's provisions were intended to include the identified wood supply area; the best estimate of the volume that would be supplied from the area; forestry management prescriptions to be encompassed in Codes of Forest Practice; periodic review of management and environment protection practices; safeguards to accommodate such matters as rare and endangered species, and provision for compensation in kind where any previously agreed upon area was excised from the agreement.

The legislative scheme contemplated by the Commonwealth thus involved the passing of a specific statute, which would be suspended from operation until such time as it was activated by the Minister through a regulation. The regulation itself would have been subject to parliamentary disallowance in the normal way.

The most remarkable aspect of this proposed process was that the Commonwealth and state governments would conclude agreements, which would limit the extent of the future application of the relevant environmental assessment legislation and heritage protection legislation. In addition, the Commonwealth would agree not to prevent the project pursuant to any other power available to it. That is, it would agree not

to take action on the basis of the various constitutional powers mentioned above: the trade and commerce power, the corporations power, the "people of any race power," and the external affairs power.<sup>103</sup> The agreement would also cover the Commonwealth's powers to acquire land, and the section 96 "tied grants" power. This legislation would have been a significant weakening of the federal government's position compared with the 1980s when it relied on precisely these powers to secure the conservation of significant elements of Australia's natural environment for conservation purposes.

One point of difficulty in relation to the introduction of this type of legislation would possibly be its constitutional effect at both the state and federal levels. The question is whether agreeing not to use certain constitutional powers or not to apply certain laws as between the Commonwealth and a state amounts to a *restrictive procedure* in terms of an attempt to bind future governments not to exercise their constitutional power.<sup>104</sup> Would either government be able to walk away from a particular agreement at any time, or could either side enforce the terms of the agreement? If it could be pursued on the basis of contract, the only remedy would seem to be damages. However, the Bill specified that, although the agreement would be legally binding, neither the Commonwealth or the states would be liable to pay damages for any breach.<sup>105</sup> In any case, the legislation providing for secure access to resources could be repealed at any time by the Commonwealth. The state legislation could also be repealed by the relevant state, although such repeal would be unlikely if the agreement continued to be in the interests of the state. Thus, it appears that any security of access to forest resources would not be any stronger than the political will of the Commonwealth to continue with such arrangements.

Therefore, as with the World Heritage disputes of the 1980s, which saw the federal government tussling with the states of Tasmania, Victoria, Queensland, and the Northern Territory, the early 1990s has seen a continuation of the same music, but with different lyrics. The battleground could be said, at least for the moment, to have shifted from a concentration on what might be called *conservation security* to *resource*

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<sup>103</sup> *Supra* note 18 and accompanying text.

<sup>104</sup> See further P. Hanks, *Constitutional Law in Australia* (Sydney: Butterworths, 1991) at 85-102, and *Ansett Transport Industries v. The Commonwealth of Australia* (1977), 139 C.L.R. 54, especially Mason J. at 73-74. See more particularly in this context, *Westlakes Ltd. v. State of South Australia* (1980), 25 S.A.S.R. 389 at 397-398; and *Commonwealth Aluminium Corp. v. Attorney General (Qld.)* (1974), [1976] Qd.R. 231 at 237-239. See also Fisher, *supra* note 102.

<sup>105</sup> *Forest Conservation and Development Bill 1992*, (Cth.), clause 9(1).

*security*. In terms of the federal government's efforts to win approval for its environmental policies, particularly in relation to sustainable development, the resource security legislation, or its equivalent, would in any case have been a short-term expedient.<sup>106</sup>

## 7. Aboriginal land

In Australia in the past few years, there has been a growing realization that environmental and resource allocation issues must much more explicitly take into account the needs and aspirations of the Aboriginal people who relate to land that is subject to a resource decision. This is regardless of whether or not the traditional owners of that land have legal title to it. Particularly since the passing of the first land rights legislation by the federal government in 1976,<sup>107</sup> the question of Aboriginal involvement in resource allocation and use has figured in many environmental decisions. This is likely to continue and become even more contentious in the next decade, particularly in Queensland,<sup>108</sup> the Northern Territory, and in Western Australia.<sup>109</sup> Aboriginal heritage questions, apart from those raised directly by land rights issues, have been the subject of legislative activity at both state and territory level in the past decade. The most significant legislation relates to the

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<sup>106</sup> See further R.J. Fowler, "Resource Security Legislation: The Commonwealth Proposals" (1991) 16 *Legal Service Bulletin* 116; and R.J. Fowler, "Implications of Resource Security for Environmental Law" in *The Challenge of Resource Security: Law and Policy* (Centre for Commercial and Resources Law, University of Western Australia and Murdoch University, 1992).

<sup>107</sup> *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). This legislation has been subject to a wide variety of amendments in terms of processes, what can be claimed, and whether the traditional owners should have a right of veto over exploration and mining in two stages rather than one. See G. Neate, *Aboriginal Land Rights in the Northern Territory*, vol. 1 (Sydney: Alternative Publishing, 1988).

<sup>108</sup> Until recently, Queensland had very limited land rights, under a system known as Deeds of Grant in Trust. These grants do not directly vest the land in the communities or the traditional owners; see B. Morse & B. Keon-Cohen, "Indigenous Land Rights in Australia and Canada" in P.J. Hanks & B. Keon-Cohen, eds., *Aborigines and the Law* (Sydney: Allen & Unwin, 1984) 88.

<sup>109</sup> Western Australia has no land rights legislation, although it was proposed in 1984 by the Seaman Inquiry; see P. Seaman, *Aboriginal Land Inquiry* (Perth: Ministry of Aboriginal Affairs, 1984); and East Kimberley Impact Assessment Project, *The Legal Framework Affecting Aboriginal People in the East Kimberley* (Working Paper No. 30) by B.W. Boer (Canberra: Centre for Resource and Environmental Studies, Australian National University, 1989). Aboriginal people in the East Kimberley area are particularly affected in terms of diamond mining (the Argyle diamond mine is the largest in the world), pastoralism (much of their traditional land has in the past century been taken over by non-Aboriginal pastoralists), and tourism. See the final report of the project: H.C. Coombs et al., eds., *Land of Promises* (Canberra: Aboriginal Studies Press, 1989).

protection of Aboriginal sites and objects, and the safekeeping of Aboriginal remains.<sup>110</sup> From an Aboriginal political viewpoint, the most significant recent federal initiative in this area has probably been the establishment of the Aboriginal and Torres Strait Islander Commission (ATSIC).<sup>111</sup> In introducing the legislation, the then Minister stated:

In proposing the establishment of ATSIC, the Government recognized and accepted the persistent demands of the Aboriginal and Torres Strait Islander people of this nation to become involved in the decision-making processes of government. ATSIC is an acknowledgement by all of us that it is no longer acceptable for governments to dictate what is best for the Aboriginal and Torres Strait Islander people; they should decide for themselves what needs to be done ... In this regard, ATSIC represents a significant and major step towards the achievement of self-determination for the indigenous peoples of Australia.<sup>112</sup>

The legislation took several years to make its way through the federal parliament, being the subject of a great deal of controversy. In Aboriginal Australia, the reception of the Commission has been a mixed one. It is certainly clear, however, that the matter of self-determination and land rights is back on the agenda both at the state and Commonwealth levels, with environmental and resource allocation issues being at the forefront of consideration in Aboriginal communities.<sup>113</sup>

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<sup>110</sup> For example, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) allows the federal minister for Aboriginal affairs to make declarations to protect Aboriginal areas, objects, and remains, particularly in those cases where inadequate protection exists at the state level. See B.W. Boer, "The *Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984*" (1984) 1 E.P.L.J. 285; B.W. Boer, "*Aboriginal and Torres Strait Islander Heritage (Interim Protection) Amendment Act 1986*" (1986) 4 E.P.L.J. 66. See also G. Neate, "Power, Policy, Politics and Persuasion—Protecting Aboriginal Heritage Under Federal Laws" (1989) 6 E.P.L.J. 214.

<sup>111</sup> See *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth).

<sup>112</sup> G. Hand, Minister of Aboriginal Affairs, House of Representatives, *Parliamentary Debates*, Weekly Hansard No. 10, 1988, Second Reading Speech, (24 August 1988) at 251.

<sup>113</sup> A major aspect of the debate over land rights in Australia is the question of Aboriginal title at common law. The position for the past twenty years was seen to be governed by a decision of a single judge of the Supreme Court of the Northern Territory, in *Milirrpum v. Nabalco Pty. Ltd.* (1971), 17 F.L.R. 141. That case found that communal native title, argued for by the plaintiffs, did not form and had never formed part of the law of any part of Australia. This decision has been trenchantly criticised; see, for example, K. McNeil, *Common Law Aboriginal Title* (London: Oxford University Press, 1989) at 290-297. That case has now effectively been overturned by *Mabo*, supra note 93.

It is not unlikely that a much discussed Instrument of Reconciliation,<sup>114</sup> which the federal government has been promoting for some time, will need to address the environmental issues as well. It may well be that the Australian government will derive some from inspiration the agreements over resources and social issues negotiated with Canadian Aboriginal communities in recent years.

However, the recent High Court decision, *Mabo*,<sup>115</sup> has been the fundamental turning point in the Aboriginal land rights debate. The case concerned title to the Murray Islands in the Torres Strait, situated between Australia and Papua New Guinea and governed by Queensland law. The Full Court in that case recognized the limited existence of Aboriginal native title. The majority decision<sup>116</sup> rejected the doctrine of *terra nullius* which asserted that Australia was legally uninhabited upon settlement. It was determined that indefeasible title to the land in question vested in the Meriam people, inhabitants of the island and descendants of the original inhabitants in occupation for generations before European contact. The decision was limited by the proviso that native title only vests if, *inter alia*, title has not been extinguished by Crown grant creating freehold title. The *Mabo* decision was based in part on a number of Canadian precedents.<sup>117</sup>

As a result of the uncertainty about the effects of the case on existing titles, the federal government initiated a Prime Minister's Consultative Committee to confer with Aboriginal, mining and farming groups, and the states about land rights with the view to finding a legislative solution.<sup>118</sup> This committee announced its intention to produce a final report by September 1993.<sup>119</sup> The terms of a Native Title Bill were still being debated at the time of writing (October 1993).

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<sup>114</sup> This instrument has in earlier incarnations been known as a treaty, agreement, or *makarrata*. No federal or state government in Australia has ever concluded such an agreement or treaty with Aboriginal or Torres Strait Islander people. The word *treaty* is now not used by the main political parties in order to avoid any connotation of sovereignty or separate nationhood.

<sup>115</sup> *Supra* note 93.

<sup>116</sup> Mason C.J., Brennan J., Deane J., Toohey J., Gaudron J., and McHugh J.; Dawson J. dissenting.

<sup>117</sup> *Calder v. British Columbia (A.G.)* [1973], S.C.R. 313; *R. v. Sparrow* [1990] 1 S.C.R. 1075.

<sup>118</sup> J. Slee, "After Mabo, who owns what land?" *Sydney Morning Herald* (30 October 1992) 10.

<sup>119</sup> K. Cole-Adams, "War of words in the North" *Sydney Morning Herald* (9 November 1992) 17.

## 8. Environmental assessment

Australia has had a legislatively enacted, environmental assessment process at the federal level since 1974,<sup>120</sup> and the states have introduced various schemes, both legislatively and otherwise since that time.<sup>121</sup> The federal and state schemes are based to some extent on the United States model, as developed under the *National Environmental Policy Act*.<sup>122</sup> The Australian experience contrasts considerably with that of Canada in respect of legislative backing. Although there has been an Environmental Assessment and Review Process (EARP) in Canada since 1974, that process operated only under a Cabinet directive for some years. A Guidelines Order for the Canadian process was issued under the *Government Organisation Act 1979*. The Federal Environmental Assessment Review Office (FEARO) was responsible for the administration of EARP in Canada. Until recently, it had been assumed that the Guidelines Order was unenforceable; however, a recent case, *Friends of the Oldman River Society v. Canada (Minister for Transport)*<sup>123</sup> established that the Minister is bound by the Guidelines Order.

The new Canadian legislation<sup>124</sup> introduced a Canadian Environmental Assessment Agency that abolished FEARO, but retains many of the positive characteristics of that office, including panel reviews and the encouragement of public participation.<sup>125</sup> The package of reforms has the potential to affect a broad range of projects under the Canadian federal government's jurisdiction by purportedly ensuring that environmental considerations are integrated into all government decision-making processes. One of the stated objectives of the new

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<sup>120</sup> *Environment Protection (Impact of Proposals) Act 1974* (Cth).

<sup>121</sup> See R. Fowler, "Environmental Law and Administration" (1984) 1 E.P.L.J. 10; A. Martyn, M.-L. Morris & F. Downing, *Environmental Impact Assessment Processes in Australia* (Sydney: Environment Institute of Australia, 1991).

<sup>122</sup> 42 U.S.C.S. §§ 4321-4370a (Law. Co-op. 1989).

<sup>123</sup> (1990), 68 D.L.R.(4th) 375, [1990] 2 F.C. 18, aff'd. [1992] 1 S.C.R. 3. See further M.I. Jeffery, "The New Canadian Environment Assessment Act, Bill C-78: A Disappointing Response to Promised Reform" (1991) 36 McGill L.J. 1070; and J. Hanebury, "Environmental Impact Assessment in the Canadian Federal System" (1991) 36 McGill L.J. 962.

<sup>124</sup> *Canadian Environmental Assessment Act*, *supra* note 99.

<sup>125</sup> This is not to say that all is well with processes of public participation in Canada; see for example a critique of public participation in environmental assessment, particularly in Ontario: C. Prophet, "Public Participation, Executive Discretion and Environmental Assessment: Confused Norms, Uncertain Limits" (1990) 48 U.T. Fac. L. Rev. 279. For further critique of the Act, *ibid.*, when it was still in the form of a Bill, see Jeffery, *supra* note 123; and Hanebury, *supra* note 123.

process is to seek to achieve an "appropriate balance between economic development and the preservation and enhancement of environmental quality."<sup>126</sup> The documentation available with the new legislation makes it clear that the new enactment was influenced by the many developments at the international level, especially the Brundtland Report of 1987.<sup>127</sup> In addition, the legislation also states that the Canadian government wishes to exercise leadership within Canada and internationally in ensuring compatibility between economic development and environmental quality.<sup>128</sup>

Now that this new legislation has become law, Canada has temporarily leap-frogged over Australia in this area. This is because the Australian federal environmental assessment legislation seems to be unenforceable against the government for all intents and purposes.<sup>129</sup> Without a clear possibility for judicial review of an environmental agency's discretion, the question of the right to public participation in the environmental assessment process takes a back seat.

In Australia, a feature of the environmental assessment process under federal legislation is that the relevant Minister is able to order a public inquiry into any activity caught by the *Environment Protection (Impact of Proposals) Act 1974*. However, in contrast to the system in Canada under FEARO, the inquiry process in the Australian legislation has only been used three times since 1974 to order such an inquiry.

In relation to the application of federal and state environmental assessment legislation, the IGAE<sup>130</sup> indicates that there is a ground swell to ensure that the assessment system becomes more consistent at the federal and state levels.<sup>131</sup>

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<sup>126</sup> See Preamble, *Canadian Environmental Assessment Act*, *supra* note 99.

<sup>127</sup> *Our Common Future*, *supra* note 52.

<sup>128</sup> *Supra* note 126.

<sup>129</sup> See *Australian Conservation Foundation v. The Commonwealth* (1980), 146 C.L.R. 493, which merely decided that the *Environment Protection (Impact of Proposals) Act 1974* (Cth) and the administrative procedures under it were justiciable without deciding that they were specifically enforceable.

<sup>130</sup> See text accompanying *supra* notes 44-56.

<sup>131</sup> See also Australian and New Zealand Environment and Conservation Council, *A National Approach to Environmental Impact Assessment in Australia* (Canberra: Australian and New Zealand Environment and Conservation Council, October 1991).

a) *Environmental impact of foreign aid*

An aspect of environmental assessment, which has clear significance in international terms, and one with which both Australia and Canada have had to grapple, is the question of the environmental impact of official development assistance in countries where aid programmes are administered. A 1989 report of a Senate Standing Committee examined this closely and found that the record of the Australian International Development Assistance Bureau (AIDAB) in this area was "regrettable." The Committee recommended that AIDAB should establish an environment section within its Appraisals, Evaluation and Sectoral Studies Branch, and that the programme of the Bureau should include a comprehensive commitment to the Brundtland Report.<sup>132</sup>

An element in the impact of foreign aid is that of ensuring that Australian policies on ecologically sustainable development are applied in recipient countries. To this end, AIDAB produced a strategy intended to place Australia's commitment to the concept of ecologically sustainable development at the forefront of its considerations when setting up its delivery mechanisms for assistance. This strategy would apply in the areas of food aid, training, its *Differential Import Finance Facility*, its support for non-government organizations, commodity and staffing assistance, and contributions to the work of multilateral organizations.<sup>133</sup> AIDAB stated that there would be particular activities which it would not support. These included activities which:

1. affect soil structure and long-term soil fertility,
2. alter levels or flows of groundwater,
3. cause irreversible damage to estuarine, coastal, or oceanic seas,
4. impact on sites of special scientific or conservation significance,
5. do not provide for adequate waste management,
6. add to the depletion of the ozone layer, and

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<sup>132</sup> Senate Standing Committee on the Environment, Recreation and the Arts, *Environmental Impact of Development Assistance* (Canberra: Australian Government Publishing Service, 1989) at xiii-xiv. It should be said that AIDAB had already begun to move in this direction with the publication of its booklet Australian International Development Assistance Bureau, *Aid and the Environment* (Canberra: Australian Government Publishing Service, 1989). See also the Brundtland Report, *supra* note 52.

<sup>133</sup> Australian International Development Assistance Bureau, *Ecologically Sustainable Development in International Development Cooperation* (Interim Policy Statement) (Canberra: Australian Government Publishing Service, 1990) at 48.



7. are likely to cause the extinction or endangering of any species, flora/fauna association, or ecosystem.<sup>134</sup>

Subsequently, AIDAB has commissioned annual audits of the environmental impact of the Australian International Development Cooperation programme. The 1992 audit stated that AIDAB had made good progress in implementing an effective environmental programme, with the use of environmental impact assessment of projects increasing and with projects being specifically targeted at environmental restoration or conservation. It was also found that there is a broad acceptance of the principle of ecologically sustainable development in the agency.<sup>135</sup>

b) *A federal environment protection agency*

In recent years, another aspect of the environmental debate at the federal level in Australia has been whether the federal government should introduce an environment protection agency (EPA) to coordinate environmental management among all levels of government around Australia. Various models for the introduction of an EPA were suggested, ranging from a full-blown agency, which would be established under separate environment protection agency legislation, down to a cooperative arrangement set up within the federal department of the environment and not as a separate entity. The agency would set standards for pollution control and would engage in environmental impact assessments at both the federal and state levels. It also would coordinate the activities of the states and be oriented towards a standardization of assessment practices, and so on.<sup>136</sup> The chosen model is one which for the moment is located within the Federal Department of the Environment with no specific statutory backing.<sup>137</sup>

The establishment of the Commonwealth Environmental Protection Agency (CEPA) as a section within the federal department of

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<sup>134</sup> "Commitment Pledged to Sustainable Development" 5(1) *Focus* (April 1991) at 9 (AIDAB Newsletter).

<sup>135</sup> 1992 *Audit of the Environment in the Australian International Development Cooperation Programme* (Canberra: Australian Government Publishing Service, 1992) xi-xii.

<sup>136</sup> See Fowler, *supra* note 41; Solomon, *supra* note 13; and Department of Arts, Sport, the Environment, Tourism and Territories, *Proposed Commonwealth Environment Protection Agency* (Position Paper) (Canberra: Australian Government Publishing Service, 1991).

<sup>137</sup> Note also the development of the National Environment Protection Authority (NEPA) guaranteed by Schedule 4 of the *IGAE*, *supra* note 1.

environment was announced on 20 August 1991 and became fully operational within one year. CEPA was heralded as part of a "nationally coordinated approach to environment protection,"<sup>138</sup> to work in close collaboration with the states, the territories, and the private sector. The objectives of CEPA include to "advise on and implement policies and programmes for the protection and conservation of the environment, while ensuring its use is ecologically sustainable."<sup>139</sup>

CEPA represents one part of the new national approach to environmental policy in Australia. The other is the Intergovernmental Agreement, which was discussed earlier. Together, they clearly indicate that the time has come for the federal government in Australia to take more definite responsibility for national environmental management and for the introduction of sustainable development strategies. Further evidence is afforded by publication of the National Strategy on Ecologically Sustainable Development, based on the analysis and recommendation of the nine Ecologically Sustainable Development Working Groups set up to investigate ecologically sustainable development in various industry sectors.<sup>140</sup> However, much of that work may go to waste without a strong central body to ensure that the strategies suggested by these groups are eventually implemented at both federal and state level.

#### IV. CANADIAN AND AUSTRALIAN INITIATIVES COMPARED

Measured by the policy statements and studies emanating from the Canadian and Australian federal governments, Australia was for some years behind Canada in matters of environmental policy, but seems now to be more or less on a par. Canada set up its *Task Force on Environment and the Economy* in 1986, partially in response to the Brundtland Commission, while Australia only began responding seriously to the Commission's work in 1989. The *Green Plan*, published by the Canadian government in 1990, is supposed to be the basis for

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<sup>138</sup>CEPA, "The Commonwealth Environment Protection Agency" (Fact Sheet) (Canberra: CEPA, 1992).

<sup>139</sup>N. Pain, "An Overview of the Commonwealth Environment Protection Agency, The Intergovernmental Agreement on the Environment and the National Environment Protection Authority" (Paper presented at the Seminar—*Environmental Law and its Impact on You*, 4 November 1992); on file, Australian Centre for Environmental Law, University of Sydney.

<sup>140</sup>*National Strategy on Ecologically Sustainable Development*, *supra* note 71, and *Final Reports of the Ecologically Sustainable Development Working Groups*, *supra* note 70.

national environmental action on a range of fronts.<sup>141</sup> Australia, on the other hand, published its *National Strategy on Ecologically Sustainable Development* in late 1992.<sup>142</sup> The Canadian federal agency, Environment Canada, set up a sustainable development section in the late 1980s and publishes a regular newsletter entitled *Sustainable Development*. The Canadian federal and provincial round-tables on the environment, comprising industry, government and community representatives, have been operating for several years.<sup>143</sup> In Australia, round-tables are still a relatively new idea. However, the Ecologically Sustainable Development Working Groups had some things in common with the Canadian round-tables, indicating that Australia is now dealing with environmental issues in a comparable way to that in Canada.

In terms of formal structures and legislation on environmental matters, each country has, at a federal and state/provincial level, examples of where one can learn a good deal from the other. The reasons for the different rates of *greening* in the development of legislation and policy in each country no doubt relate to different pressures from environmental and industry groups and for Canada, the influence of legislative and policy initiatives in the United States.<sup>144</sup> It might also be said that the depth of *greenness* which these indicators point to in both countries should be regarded as fairly superficial, and do not evidence any *fundamental* shifts in orientation, particularly in terms of economic direction. Certainly in Australia, a good number of decisions are still being made to appease electoral pressures as opposed to decisions made on ecological principles and coherent economic reasoning, despite the high-sounding rhetoric pumped out in ministerial press releases and the advice given by commissions of inquiry on natural resources issues. In Canada, a more activist role for the Canadian government seems to have been accepted at a relatively early stage.<sup>145</sup>

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<sup>141</sup> See M.I. Jeffery, "Environmental Management (Canada)" (1991) 8 E.P.L.J. 83 at 83.

<sup>142</sup> *Supra* note 71.

<sup>143</sup> See P.S. Elder, "Sustainability" (1991) 36 McGill L.J. 831.

<sup>144</sup> For a comparative overview of federal environmental law in Australia and Canada, see B.W. Boer & D.G. Craig, "Federalism and Environmental Law in Australia and Canada" in B.W. Hodgins *et al.*, eds., *Federalism in Canada and Australia: Historical Perspectives, 1920-1988* (Peterborough: Frost Centre for Canadian Heritage and Development Studies, 1989) 301.

<sup>145</sup> For an analysis of Canadian progress in environmental law matters, see Emond, *supra* note 99 and A. Roman, "Sustainability and the New Environmental Law of the 1990s" in *Private Investments Abroad* (Oakland: Matthew Bender, 1993).

## V. ENVIRONMENTAL LAW AS IF ECOLOGY MATTERED

Australia and Canada both see themselves in various ways at the forefront of the world debate on the environment. It is certainly true that both countries have taken important initiatives on particular matters, such as the initiatives for the introduction of sustainable development strategies. In examining the imperatives laid down by the successor to the World Conservation Strategy, *Caring for the Earth*,<sup>146</sup> for the minimum content of environmental law, both Australia and Canada fare very well. There is, however, no room for complacency. The experience of both countries clearly indicates that, although there is a very important role for environmental law to play in the conservation of ecosystems and the allocation of resources, the implementation of sustainable strategies through legal and policy mechanisms cannot be addressed without at the same time seeking fundamental changes to economic structures and mass consumerist tendencies. If we are genuinely serious about changing personal and corporate behaviour, we need to take a broader approach to the use of environmental law, in order to come to new understandings of the human relation to the natural environment.<sup>147</sup> This would seem to be impossible if we do not thoroughly examine human-to-human relations at the same time. To reorient Schumacher's phrase, we need to use environmental law as if ecology mattered.<sup>148</sup>

In any case, a concentration purely on municipal law will not be enough by any means. Full compliance by the international community with the various environmental conventions by the implementation of national laws and administrative policy, as well as broad cooperation between countries, particularly on a regional basis, may make the real difference in saving the planet from ourselves.<sup>149</sup> In this sense, individual countries can no longer maintain a separation between international law and municipal law. A "more complete integration of

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<sup>146</sup> World Conservation Union, World Wide Fund for Nature & United Nations Environment Programme, *Caring for the Earth: A Strategy for Sustainable Living* (Gland, Switzerland: IUCN/UNEP/WWF, 1991) at 68.

<sup>147</sup> See further P. Emond, "Cooperation in Nature: New Directions for Environmental Law" (1984) 22 Osgoode Hall L.J. 323; B.W. Boer, "Social Ecology and Environmental Law" (1984) 1 E.P.L.J. 233; and C.D. Stone, *Earth and Other Ethics* (New York: Harper & Row, 1987).

<sup>148</sup> E.F. Schumacher, *Small is Beautiful: A Study of Economics as if People Mattered* (London: Abacus, 1974).

<sup>149</sup> See L.A. Kimball, *Forging International Agreement: Strengthening Intergovernmental Institutions for Environment and Development* (Washington, D.C.: World Resources Institute, 1992).

the international and national framework of environmental law” is called for.<sup>150</sup> In achieving such integration, the question of national sovereignty will no doubt be on the agenda.<sup>151</sup> A new world order, established on ecological sustainability principles, might yet replace the New International Economic Order of the 1970s.<sup>152</sup> The United Nations Conference on Environment and Development in June 1992 provided a great deal of impetus for the achievement of these objectives. Although it is certain that legal and administrative structures can have a vital role to play in changing existing paradigms, these structures can only begin to be part of the answer if they stop being part of the problem.

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<sup>150</sup> Robinson, *supra* note 3 at 26.

<sup>151</sup> K.W. Piddington, “Sovereignty and the Environment: Part of the Solution or Part of the Problem?” (1989) 31:7 *Env't*. 18.

<sup>152</sup> See J. Pronk, “A New International Ecological Order” (1991) 14 *Internationale Spectator* 728, and P. Sand, “UNCED and the Development of International Environmental Law” (1992) 3 *Y.B. Int'l Env. L.* 1 at 16.

