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## **REDCLIFF AND BEYOND: THE COMMONWEALTH GOVERNMENT AND ENVIRONMENTAL PLANNING**

On 17th December, 1974, the Commonwealth Environment Protection (Impact of Proposals) Bill received Royal Assent and came into force. For Dr. Cass, the closing days of the Spring session must have been gratifying. This legislation, promised for February 1974, was at last before Parliament, and received sympathetic treatment from all parties. Further, the tentative and premature flexing of Commonwealth muscle in the Redcliff Environmental Inquiry had apparently left the South Australian Government in disarray, and postponed the execution of an Indenture with the Redcliff Petrochemical Company and the passage of ratifying legislation in the South Australian Parliament.

This paper has two purposes. The first is to examine the new Commonwealth legislation and to indicate where it stands in the gradual evolution of multiple-purpose planning techniques. The second is to consider certain aspects of the recent Redcliff Environmental Inquiry, for although it was completed before the new legislation had passed, it will doubtless influence the way in which future inquiries are conducted under the Commonwealth Act.

### **Introduction**

#### *The Role of Environmental Factors in the Planning Process*

The practices and principles adopted in the new Commonwealth legislation, and already being independently applied in most States on either a formal or an informal basis, represent a reaction to experience under the United States National Environmental Policy Act 1969. This required the environmental consequences of proposed actions, which were funded by federal monies or executed by federal agencies, to be identified, evaluated and taken into account when deciding whether the proposed action should proceed.

Both here and in the United States, most attention has been given to the formal planning tool for documenting possible environmental consequences, which is often called an environmental impact statement (EIS). Such attention is understandable. The onus of preparing, publicising, revising and reviewing impact statements is considerable, and has called for the generation of important new administrative and planning techniques. The result, however, often has been to lose sight of the actual role of the EIS in the planning process and to accord it disproportionate weight.

Perhaps the clearest statement of the role of environmental factors in the planning process appears in the Principles and Standards for Multi-Objective Evaluation of Water Projects adopted by the United States Water Resources Council<sup>1</sup>. Their purpose is to ensure that, in choosing between alternative means of achieving a given end, sufficient information will be available to the decision-maker to allow the projected consequences of each alternative to be

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1. United States Water Resources Council, Principles and Standards for Planning Water and related Land Resources (1973), 38 *Federal Register* 24778. The notice of establishment of these principles and standards replace interim guidelines in (1971) 36 *Federal Register* 24144.

clearly seen. In making a decision, then, it would theoretically be possible to optimise the beneficial results and minimize the detrimental consequences; or, if the optimum choice is not made, the costs of choosing a less preferable alternative can be clearly identified.

Thus the United States Principles and Standards require parallel investigations to be made of the national economic benefits and costs associated with the proposal; the regional economic benefits and costs (which will usually be different); and the environmental consequences to each of the physical, human and social environment. Each possible alternative must be investigated in these ways (including the possibility of doing nothing at all) and three separate accounts drawn up for each alternative. The EIS is thus merely the formal documentation of the environmental consequences of each alternative. It, like a benefit-cost study or a mathematical model, merely documents the projected consequences of certain possible decisions. It does not, itself, make decisions, nor does it foreclose the possibility that the ultimate decision may be to pursue a course of action which is environmentally less sound than some other possible alternative.

It is clear that both the Commonwealth Government and the South Australian Government accept this general planning philosophy. In his second reading speech, Dr. Cass emphasized that the proposed "procedure will not give environmental considerations a veto-power in decision making. Environmental considerations will become an integral part of the information upon which a decision is taken"<sup>2</sup>. Similarly, the South Australian Environment Protection Council, in stating the objectives of EIS procedures, views them as ensuring that:

"[t]he environmental consequences of the proposal are considered along with economic, sociological and political factors in deciding upon the acceptability or otherwise of the proposed development"<sup>3</sup>.

In its view, any system of environmental planning should not be designed to inhibit industrial development, decentralization or economic growth, but should ensure that the adverse environmental effects associated with any proposal are recognized, considered and properly balanced against expected benefits<sup>4</sup>. Ultimately, then, the weight to be attached to environmental factors in comparison with other factors, and whether a project will proceed, are political decisions.

#### *The Role of the Decision-maker*

This point is worthy of emphasis, for the role of the political decision-maker in the planning process is not uncontested. It has been the failure, historically, of political decision-makers to give consideration (if not primacy) to environmental factors which has sparked the organization of the conservation movement as a political force. It is a tenet of at least some conservationists that the prediction of adverse environmental consequences should be, *ipso facto*, a bar to development, whatever the possible economic, technological or political benefits may be. The search among such interests has been for political or institutional means to limit the discretion of the political decision-maker. In the United States, this has taken the form of an

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2. Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 26th November, 1974, p.4083.
  3. South Australia Environment Protection Council, Policy Statement on Environmental Impact Statements, para. 3.1.
  4. *Ibid.*

aggressive use of the courts to ensure that institutional procedures for planning are meticulously observed<sup>5</sup>. In Australia, where the courts, for a number of reasons, are not in a position to play a similar role<sup>6</sup> we have seen the emergence of the extra-legal tactic of the green ban. The confrontation over the proposed Newport power station in Victoria clearly demonstrates the way in which governmental decisions, duly arrived at after exhaustive institutional procedures have been satisfied, may still be negated<sup>7</sup>. Even the Redcliff Environmental Inquiry Report shows an uncertainty in the mind of the Commissioners as to the proper weight to be accorded to environmental factors and, in fact, represents an attempt to limit the discretion of the political decision-maker<sup>8</sup>. Yet it is clearly the policy of the Commonwealth Government that the ultimate role of the political decision-maker should not be fettered, and in responding to United States experience, the room for political decision has been increased, rather than reduced.

### *The United States Experience*

The United States National Environmental Policy Act 1969 has spawned much litigation in its brief life. Couched in broad terms, it requires an EIS to be prepared for all proposals which may "significantly affect the quality of the human environment". The Act makes such studies mandatory, but leaves many questions of fundamental policy and procedure unanswered. Consequently, the gaps have been filled by the courts, which have not always been attuned to the administrative and economic consequences of their decisions. The classic issues which have required resolution through litigation, rather than by clear administrative or legislative direction, are as follows:

(i) Which projects require an EIS?

Given that all proposals which "significantly affect" the environment must be accompanied by an EIS, the measure of significance is an open-ended invitation to litigation<sup>9</sup>.

(ii) Who is to undertake the study?

There is, in many circles, distrust of the notion that the proposer of the action should have the task of objectively assessing its possible environmental consequences<sup>10</sup>.

5. *Calvert Cliffs' Co-ordinating Committee v. United States Atomic Energy Commission* (1971) 449 F.2d 1109.

6. See Clark, "Conservation and Government: Towards an Understanding of Roles" (1974) 5 *Search* 241.

7. Phenomena of this sort have an interesting impact on traditional concepts of the government as the ultimate decision-maker. Even when acting under ample statutory authority, it is apparent that government decisions may not be the final step in either the planning or the political process. Similar phenomena also create doubts whether the courts could be effective tools for determining planning disputes. In other areas, trade union philosophy has been reluctant to accept that courts, acting under statutory authority, have jurisdiction over their policies. It is interesting that trade unions in the United States have not been active in developing the tactic of the green ban, presumably because union leadership is largely conservative.

8. See p. *infra*.

9. Early authority permitted judicial review of a decision not to prepare an impact statement only if the agency had been arbitrary or capricious. Later authority points more towards a *de novo* review of the merits of the decision, e.g. *Save Our Ten Acres v. Kreger* (1973) 2 ELR 20305; *Scherr v. Volpe* (1972) 336 F. Supp. 882; 466 F. 2d 1027.

10. The problem of delegation of responsibility by an agency to, say, a private party to prepare the statement was considered in *Greene County Planning Board v. Federal Power Commission* (1972) 455 F. 2d 412. See also Note, "Environmental Impact Statements—A Duty of Independent Investigation by Federal Agencies" (1972) 44 *Colorado Law Review* 161; Anderson, F. R., *NEPA in the Courts* (Baltimore, 1974), pp.186-200.

## (iii) What constitutes an adequate EIS?

In the absence of a clear statutory direction as to who shall specify the terms of reference of a study or determine whether a report submitted is adequate, substantial compliance with the legislation becomes a question for litigation<sup>11</sup>.

## (iv) What input should the public have in evaluating an EIS or in expressing its preferences?

The United States legislative and administrative system has well established hearing and committee procedures. It is not surprising that the application of these procedures to environmental planning should have been a matter for debate, particularly as an integral part of the planning philosophy is to identify social and human consequences of particular proposals<sup>12</sup>.

## (v) What bodies should be responsible for reviewing an EIS?

Again, there is sometimes distrust of the objectivity of reviewing agencies and of the possibility that information or data solely within the knowledge of the proponent may not be capable of independent verification<sup>13</sup>.

## (vi) How are the results of environmental investigations to be integrated into the decision-making process?

The contest here has been to persuade courts to ensure that decision-makers do, in fact, give adequate consideration to environmental factors when reaching their decisions<sup>14</sup>.

The same issues are, of course, equally critical in Australia but there seems widespread agreement at both the Commonwealth and State level that litigation is a wasteful means of resolving such matters. It is clearly Commonwealth policy to discourage use of the courts as fora for establishing planning procedures and it is interesting to observe how the new legislation attempts to remove such matters from the courts.

### **The Environment Protection (Impact of Proposals) Act 1974**

The two most significant provisions of the Act are as follows:

5. (1) The object of this Act is to ensure, to the greatest extent that it is practicable, that matters affecting the environment to a significant extent are fully examined and taken into account in and in relation to—
- (a) the formulation of proposals;
  - (b) the carrying out of works and other projects;
  - (c) the negotiation, operation and enforcement of agreements and arrangements (including agreements with, and with authorities of, the States);
  - (d) the making of, or the participation in the making of, decisions and recommendations; and
  - (e) the incurring of expenditure,
- by, or on behalf of, the Australian Government and authorities of

11. E.g. *Environmental Defence Fund v. Corps of Engineers* (1971) 331 F. Supp. 925; (1972) 348 F. Supp. 916; *Natural Resources Defense Council v. Morton* (1971) 337 F. Supp. 165; 458 F. 2d 827.

12. See Anderson, *NEPA in the Courts*, pp.234-239.

13. *Natural Resources Defense Council v. Morton* (1971) 337 F. Supp. 165; 458 F. 2d 827; *Calvert Cliffs' Co-ordinating Committee v. United States Atomic Energy Commission* (1971) 449 F. 2d 1109.

14. See Anderson, *NEPA in the Courts*, pp.246-274.

Australia, either alone or in association with any other government, authority, body or person.

- (2) The matters referred to in sub-section (1) extend to matters of those kinds arising in relation to financial assistance granted, or proposed to be granted, to the States.
6. (1) The Governor-General may, from time to time, by order, approve, and approve variations of, administrative procedures for the purpose of achieving the object of this Act, being procedures that are consistent with relevant laws, as affected by regulations under this Act.
- (2) Without limiting the generality of sub-section (1), the approved procedures may provide for—
- (a) the supplying to the Minister of information for the purpose of consideration, by him or on his behalf, of the necessity for environmental impact statements;
  - (b) authorizing the Minister to direct the preparation or obtaining, and the submission to the Minister, of statements to be known as environmental impact statements;
  - (c) defining, or authorizing the Minister to determine, the matters to be dealt with by, and the form of, those statements;
  - (d) the making of those statements available, in cases or circumstances specified by or in accordance with the procedures, for public comment;
  - (e) inquiries in accordance with this Act, and action to be taken in respect of reports resulting from such inquiries;
  - (f) the revision of those statements;
  - (g) the examination of those statements by or on behalf of the Minister and the making by or on behalf of the Minister of comments, suggestions or recommendations concerning the matters to which those statements relate, including suggestions or recommendations concerning conditions to which approvals, agreements and other matters should be subject; and
  - (h) exemptions from all or any of the requirements of the procedures.

Several aspects of these provisions are noteworthy.

### *Statement of Objects*

The American provision that impact studies were mandatory for any proposal which might “significantly affect the quality of the human environment” led to protracted litigation and phrases in s.5, such as “to the greatest extent that is practicable”, “a significant extent”, “fully examined” and “taken into account” would also seem insufficiently precise.

Yet s.5, unlike the American provision, creates neither rights nor duties. It is rather, a broad statement of the object of the Act; something which, until the Victorian Liquor Control Act 1968 was an untried device in Australian legislation. Such a statement of objects, though foreign to our legislative system, is widely employed elsewhere and has been particularly advocated in the context of resources legislation, where it is seen as having an educative effect on both the administration and the community at large<sup>15</sup>. Its secondary effect, of course, is to provide a clear, if not absolutely precise, statement of legislative intent within the body of the Act, thereby hopefully reducing the

15. United Nations “Guidelines for the Drafting of Water Codes” *Water Resources Series No. 43* (New York, 1974) pp.9, 17, 66.

need for courts to cast around in search of a speculative parliamentary intention. Section 5 is thus not an open invitation to litigation. It is, rather, a statement of the purposes for which the powers contained in s.6 are to be exercised.

### *Administrative Procedures*

The Act is also remarkable in the sense that, despite its passage, one is no better informed as to the circumstances in which environmental investigations are to be required, what form they are to take, when public enquiries are to be conducted or how such investigations are to be integrated into the making of decisions. Such matters are, of course, the essence of the legislative scheme, but the Act leaves their establishment, not to regulations, but to administrative procedures which will be promulgated as orders made by the Governor-General.

Again, this may seem to be a departure in our legislative tradition, for the Act confers power in the broadest terms, giving little attention to the limitation of those powers, and leaving the implementation of the legislation to orders of the Governor-General, which have not yet been determined.

Among more active conservation groups, there is still lingering distrust of the actual commitment of government to sound environmental planning. In another context, the Redcliff Commission of Inquiry has expressed disquiet as to whether the interests of the environment can be protected adequately by analogous legislative procedures. Some concern is justified, for orders of the Governor-General are not subject to the same detailed scrutiny as are regulations. Thus regulations would normally be scrutinized by the Senate Regulations and Ordinances Committee which specifically examines whether regulations "are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment"<sup>16</sup>. Such scrutiny will not be applied to the proposed orders<sup>17</sup> and, as substantive rights and duties are not defined by either s.5 or s.6, it would seem necessary to ensure that all techniques of legislative review apply. Admittedly, the Act spells out in some detail the duty to lay orders on the table of both Houses and provides for disallowance. If orders of the Governor-General are to be used in the manner proposed, there nevertheless is a good case for widening the terms of reference of the Regulations and Ordinances Committee.

Sub-section (2) of s.6 purports to resolve most of the issues hotly contested under American legislation, by leaving it up to the administrative procedures and the Minister to decide when EIS will be required, who will prepare the statement, and what will be dealt with in such statements. The procedures will also govern the publication of statements, the holding of public enquiries and the evaluation and reporting on statements. More importantly, the procedures may provide for the granting of exemptions from any of the requirements of the procedures. Because the statutory power to promulgate such procedures is conferred in general terms — i.e. to make procedures for the purpose of achieving the object set out in s.5 — it is unlikely that any attack on the procedures as being *ultra vires* would ever be successful.

Although opposition may be expected to the philosophy of leaving such important matters to the Minister or his Departmental officers, there are good

16. (1929-31) *Journals of the Senate* 544-5; Parliamentary Paper No. S.1 of 1929-31.

17. Senate Standing Order 36A(4) applies only to regulations and ordinances and not to orders of the Governor-General.

practical reasons for adopting this solution. Environmental planning is very much an emerging science and there is an obvious need for considerable flexibility and experiment in devising the most suitable administrative pattern. The administrative procedures will probably be drafted in the spirit of guidelines rather than as rigid regulations, and the form of orders of the Governor-General is probably more appropriate to the purpose. Further, the need for frequent and progressive amendment can be better accommodated through orders than through regulations or amendment of principal Act. Finally to leave many questions to the administrative discretion of the Minister does overcome the debilitating delays and litigation which have characterized recent United States experience. It has been suggested elsewhere<sup>18</sup> that in cold, economic terms, Australia would be unable to afford a system of environmental planning based on American lines. At the same time, however, a system of Ministerial discretion will only be successful if administered in a way which commands the respect and confidence of widely differing sections of the community.

### *The Scope of Ministerial Discretion*

It may well be upon this practical, political problem of being seen to exercise Ministerial discretion dispassionately that the whole scheme founders. Recent experience of relationships between the Victorian Environment Protection Authority and the Ministry of Conservation indicates that, even among public servants and environmental planners, a view sometimes exists that an environmental watch-dog, to be effective, must have complete autonomy and be seen to be removed from all possibility of political direction. This view certainly finds favour with many conservationists. Yet, as has been explained above, both the States and the Commonwealth have clearly taken the view that, ultimately, decisions whether or not projects may proceed in view of projected environmental consequences are properly political.

It is possible that it will be the manner in which the exempting power in s.6(2)(h) is exercised which will create most dissension. Although it did not appear in the Bill, the Minister, in his second reading speech, gave some hints as to the manner of its exercise. Thus, public enquiries would only be held "where the environmental consequences of a proposal are considered to be particularly significant, or where there is considerable public controversy over these consequences"<sup>19</sup>. Similarly, public comment would not be sought prior to a decision being taken "where publication of the impact statement could lead to land speculation or endanger national security"<sup>20</sup>. In the part of the Act dealing with the competence and compellability of witnesses before a public enquiry, there is an express saving of Crown privilege. In view of the recent litigation over Black Mountain Tower in Canberra and the readiness with which the Crown sought to invoke privilege to prevent the production of documents<sup>21</sup>, such provisions must be regarded with caution.

18. Clark, "Conservation and Government: Towards an Understanding of Roles" (1974) 5 *Search* 241.

19. Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 26th November, 1974, p.4083.

20. *Ibid.*

21. The episode concerned two memoranda from the National Capital Development Commission to the Minister for Urban and Regional Development, written in May 1973, in which the Commission stated its opposition to the proposed tower. The plaintiffs sought to submit the memoranda in evidence, but were met by an objection on the ground of public interest. Counsel sought to support his objection by relying on a draft affidavit prepared by the Attorney-General's Department for signature by the Minister (but not then executed) claiming that, as the documents related to "the framing of policy" they belonged "to a class document [sic]

### *The Potential Scope of the Act*

There is, however, enough in the Act to indicate that it will go far beyond a mere requirement that impact statements be prepared. Section 5 certainly embraces the formulation of proposals and the carrying out of works, for which impact statements might normally be required. But the section further requires environmental factors to be examined and taken into account in relation to negotiating agreements, making decisions and incurring expenditure, and administrative procedures under s.6 may be prescribed for each of these matters.

If these provisions are given their full weight, the Act will go far beyond the mechanistic problem of requiring impact studies. It represents, potentially, a legislative requirement that environmental consequences be "taken into account" in making many important planning decisions. It may well represent a move towards overt, known criteria and procedures for multiple-objective planning and decision-making. The Commonwealth Department of Environment and Conservation has already indicated its enthusiasm for multiple-objective planning procedures for water management projects<sup>22</sup> and the Act contains provisions which could effectively require the use of similar procedures over a wide range of Ministerial and Departmental decisions.

Section 6(2)(g) contemplates that the Minister, or his Department, will have the task of reviewing the adequacy of any impact statement. It also envisages that he will be in a position to make suggestions or recommendations concerning conditions to which approvals, agreements and other matters should be subject. Against this background, s.8 is an unusually explicit attempt to enforce inter-Ministerial and inter-Departmental co-operation and co-ordination. All Ministers are specifically obliged to ensure that the administrative procedures established under the Act are observed and given effect to within their Departments. They are further obliged to ensure that any impact statement, together with any recommendations or suggestions made under s.6(2)(g), are taken into account within their Departments. Section 9, indeed, goes even further by allowing regulations to require any authority prescribed therein to take into account "matters affecting the environment in the taking of any action or the making of any decision or recommendation". Such regulations are to have effect, notwithstanding any other law. Potentially the Act could thus have far-reaching effect in introducing uniform planning procedures at the federal level and, perhaps indirectly, at the State level as well. Whether the promise is fulfilled is, of course, a matter of hard politics and inter-Ministerial jockeying. One must be sceptical of the likelihood of wide Ministerial support for regulations which may reduce the area in which Ministerial discretion can presently operate.

### *Effect on the States*

Some comment is required as to the scope of the Act and its likely impact on the States. Section 5 explicitly refers to the Australian Government and

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which it is necessary to withhold from production for the proper functioning of the public service". An affidavit was eventually sworn, but Smithers J. overruled the objection. This and other vagaries of that litigation are retold by Sir Keith Hancock, with an appropriate sense of wonderment, in *The Battle of Black Mountain* (Canberra, 1974).

22. The United States Water Resources Council Principles and Standards (note 2, *supra*) were considered in detail at a series of Water Management Workshops arranged by the Australian Water Resources Council in 1974, and a pilot project to evaluate these techniques is being funded in Victoria. The Commonwealth Department provides the secretariat for the A.W.R.C.



authorities of Australia<sup>23</sup> acting alone or in association with any other government, and to any proposed financial assistance to the States. While it appears that Loan Council monies will not be caught by the Act<sup>24</sup>, it is certainly intended that many State activities requiring Commonwealth finance or approval will be affected. In most States, of course, environmental impact procedures already exist, at least on an informal basis, and assurances have been given that the Commonwealth legislation will not be administered in a way which will require two separate impact statements to be prepared<sup>25</sup>. Yet the way in which terms of reference for studies will be established at both the State and Commonwealth levels is not yet clear and, in the context of the often critical time-frame for carrying out such investigations, unnecessary duplication or delay may be most important. It is obvious that the exact position of the States will remain unclear, at least until the proposed administrative procedures are promulgated, and possibly for a good time thereafter. The dangers of legislating for duplicate or conflicting structures are thus considerable and it is perhaps surprising that there has not been much closer consultation between the Commonwealth and the States to generate complementary legislation. In view of the Commonwealth's intention to prepare legislation early in 1974, and of the delays which attended the new Act and possible future delays before finalizing administrative procedures, it is not surprising that a number of States have refrained from introducing their own legislation. It would seem much more sensible to wait until the Commonwealth's requirements are known.

#### *Role of Public Hearings*

The second major part of the Act relates to Commissions of Inquiry, which the Minister may convene to investigate all or any of the environmental aspects of the matters referred to in any of the paragraphs of s.5. A Commission must report its findings and recommendations first to the Minister, before making them public, and it is doubtless envisaged that the Minister will consider such a report before making the suggestions and recommendations contemplated under s.6(2)(g) of the Act. Adequate public knowledge of the intention to hold an enquiry is required, although what will amount to reasonable notice is not specified.

Although Commissions are not bound by the formal rules of evidence, they may summon and swear witnesses and require the production of documents. Failure to appear when summoned, to be sworn, to produce documents or to answer questions is punishable by a fine of \$1,000 or imprisonment for six months. Similar penalties attend any act which would amount to contempt if a Commission were a court of law.

The public inquiry process provided for in the Act is claimed by the Minister as "a very real reflection of our commitment to open government"<sup>26</sup>.

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23. This expression "does not include a court but includes an authority of a Territory and all authorities and bodies (not being companies or societies) established by or appointed under the laws of Australia and of the Territories and also includes a company in which the whole of the shares or stock, or shares or stock carrying more than one-half of the voting power, is or are owned by or on behalf of Australia": s.3.
  24. That the Act will not have application to Loan Council money was stated in a letter from Dr. Cass to Mr. Hunt tabled in the Senate by Senator Carrick: Commonwealth of Australia, *Parliamentary Debates*, Senate, 27 November 1974, p.3408.
  25. Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 26th November 1974, p.4082 *per* Dr. Cass.
  26. Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 26th November, 1974, p.4082 *per* Dr. Cass.

It is, however, a standard, tried technique for endeavouring to obtain public reaction to alternative development possibilities, although it is fraught with dangers and possible imperfections. As used in the United States, a public hearing generally takes place when the proposed EIS is in draft form and it is about to be reviewed by the responsible administrative agency. Such public comment as is elicited may cast new light on the adequacy of the statement and require its revision.

The process is, it must be noted, expensive both of time and financial resources. Particularly in the case of commercial proposals which require impact studies, the almost universal deficiency of existing environmental data means that the planning phase of any development must be substantially extended to enable data to be collected before predictions can be made<sup>27</sup>. Such an extension of planning time in an inflationary situation can have serious consequences on the projected profitability of many proposals and, in economic terms, the delays necessarily inherent in a public inquiry may be costly. Further, the cost of preparing documentation for an inquiry, of staffing it, of keeping a transcript, of paying allowances to witnesses and advisers to the Commission, will be most significant even for a relatively small-scale investigation<sup>28</sup>. Yet there are some who would advocate that all proposals with any possible environmental impact should attract a public inquiry and, furthermore, that there should be two such inquiries for each proposal; one when the study is in draft form, the other when it is finalized<sup>29</sup>.

There is no doubt that there are some circumstances when a public inquiry is essential and will have a most salutary effect on the quality of planning. The Commonwealth proposal to convene an inquiry only in situations where the environmental consequences are particularly significant, or where there is considerable public controversy may be correct. Yet opposition may be anticipated from a wide section of the conservation movement to this apparent limitation on the public's role in decision-making.

It is relevant, however, to reflect on the actual planning objectives which lie behind a public inquiry and to consider whether they might not be more effectively met by other means. The expression of public opinion is primarily important for the insights which it may give the planner as to the technical, economic, environmental, social or political acceptability of the alternative proposals he is evaluating. As a matter of practical planning, it is preferable if the planner can be possessed of these insights as early as possible in the planning process, before, say, he has invested too much time and effort in developing an unacceptable technology. As planning is an integrated process and investigations must proceed in parallel if the critical time-frames of both developers and politicians are to be met, external inputs must be obtained as early as possible if they are to have any real influence on the business of planning.

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27. It has been suggested that, if really comprehensive data is required, the planning phase of a typical water management project might be extended up to five times: D. N. Fisher and G. R. Francis, "Environmental Aspects of Water Management Decisions" O.E.C.D. Water Management Sector Group, Paris, January 1972.

It is, of course, quite impossible to consider postponing a decision until absolutely all relevant data is collected: *Environmental Defense Fund v. Corps of Engineers* (1972) 348 F. Supp. 916, 927.

28. See note 38 *infra*.

29. G. Mosley "The EIS as a valuable aid to achieving environmental quality" p.3. Paper presented to Australian Conservation Foundation EIS Techniques Symposium 30th November, 1974.

It is also important to isolate the particular type of public input to be elicited. Dr. W. G. Inglis, in evidence before the Redcliff Inquiry, referred to the difficulty of evoking any response from many sections of the public<sup>30</sup>. In many instances, it is necessary to inform people as to the choices available to them before they are able to express a preference; and the very process of informing them involves the psychological danger of pre-determining their responses through the way information and questionnaires are structured. From the point of view of the planner, the most startling, cogent challenges or insights are not likely to emerge from such people, but from some of the organized groups or individuals in the community who represent specific interests and have access to particular skills. It is the input of such people, often readily identifiable in advance, which is likely to have a constructive impact on the quality of planning.

Given the type of input which is likely to be most effective and the need for that input to be scheduled early in the planning process, public hearings at the stage of a draft EIS may not be the optimum technique. Perhaps resources available for public hearings could be better spent in generating a data-bank of individuals, community groups or organizations who might be expected to have an informed and energetic input into particular sorts of environmental problems. That information-base could then be used by the appropriate government agency in specifying the terms of reference for particular impact studies and the body executing the study could be required to consult with specified groups or individuals at particular planning stages. This would not entirely eliminate the need for public hearings, for there are occasions when political reasons alone will be compelling enough to justify them. But it should prove a more effective method of eliciting inputs likely to change the direction of planning at a stage when such change is still possible.

It should be observed that the Commonwealth Act does not confine the possibility of public comment only to those instances where a public inquiry is held. Section 6(2)(d) envisages that the administrative procedures will provide for other impact statements to be submitted to the public for comment, and the Minister has hinted that this will be done by advertising the availability of a statement and by seeking written comments upon it<sup>31</sup>.

Perhaps the most accurate indicator of the type of problem likely to arise in implementing the hearing provisions of the Act is found in the recent Redcliff Environmental Inquiry. It is to that proposed project which we now turn.

### **The Redcliff Environmental Inquiry**

#### *Background*

The South Australian Government has been considering the possibility of a petro-chemical complex at Redcliff on Spencer Gulf for several years. In March 1973, the South Australian Department of Environment and Conservation began to prepare a Plan for Environmental Study for the project, which was published in May 1974. In the meantime, the Petro-chemical Consortium of South Australia, of which the Redcliff Petro-chemical Company (RPC) is the operating company, was chosen to undertake detailed investiga-

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30. Redcliff Environmental Inquiry, *Minutes of Evidence* p.43.

31. Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 26 November 1974, p.4083 *per* Dr. Cass.

tions, with a view ultimately to constructing and operating the plant, if the project were approved. Under the Plan for Environmental Study, a draft EIS would be prepared and submitted to public comment and evaluation by the South Australian Department.

Because of the magnitude of the project, however, responsibility for preparing the draft EIS was divided between RPC and the Government. The company was to undertake studies relating to major process plants and sites and the gulf waters and to examine certain aspects of the impact on urban areas. Other major studies, concerning such matters as the marine loading facility, raw materials and pipe lines were primarily the responsibility of nominated agencies of the South Australian Government. The draft EIS was scheduled for completion by February 1975 and under the Plan for Environmental Study, it was at this stage that public comment on the draft would be solicited. Thus far, then, the proposed procedures would seem to accord closely with those emerging from the Commonwealth Act and the Minister's second reading speech. Logically, the appropriate time to conduct a public inquiry would seem to have been after February 1975.

Two factors intervened at this point. If the project proceeds, considerable public investment will be required in the infra-structure for the development. Monies for this will have to be made available by the Commonwealth. The necessary nexus for Commonwealth intervention in planning for the proposal was thus established. Secondly, RPC and the South Australian Government were in the process of negotiating a formal Indenture. This agreement would govern relations between them in the investigatory phase (which was already far advanced and had involved both parties in substantial expenditure without any formal understandings); would establish the relative rights and duties of the parties in the event that the project proved not to be feasible; or would provide for an orderly transition to the construction and operation phase, should the project go ahead. The South Australian Government had indicated its intention to introduce ratifying legislation once the Indenture was signed, and hopefully before the end of 1974.

In the prevailing atmosphere of suspicion and controversy which had raged over the choice of site, the possibility of damage to gulf waters, the desirability of producing the proposed products of the complex and of using natural gas to generate them, it is not surprising that the intention to pass legislation ratifying an Indenture should be construed by some as a wilful decision on the part of the South Australian Government to make an irrevocable commitment to the project without awaiting the results of the environmental investigations. The firmness with which the Government had previously rejected suggestions that the environmental advantages and disadvantages of different sites should be investigated, probably added weight to this concern.

In retrospect, however, it must be conceded that the proposed Indenture may not have been intended to foreclose the possibility of an ultimate decision not to proceed, and that there were good practical reasons for both RPC and the South Australian Government wishing to have their existing and possible future relationships clearly stated. But, understandably enough, neither party would be anxious to have terms of the proposed Indenture released for public comment while it was still under negotiation.

It was at this delicate stage that the Commonwealth chose to act, and the suggestion of an Inquiry may well have been precipitated by the fact that the parties had agreed to file progress reports on the state of their environmental

studies in mid-October. Although the inquiry was nominally commissioned by both the State and Commonwealth Ministers, there is little doubt that it was primarily instigated by the Commonwealth<sup>32</sup>. The most charitable view of the decision to intervene is that the Commonwealth could not proceed further to consider funding the intra-structure without a public inquiry, and that there were important reasons which required that inquiry to take place in October rather than waiting until after February, when there would both have been a legislative basis for the inquiry and a completed draft EIS. Any other interpretation of the Commonwealth's action would seem to carry unfortunate implications as to the propriety of the State's environmental planning procedures, which may not be entirely conducive to amicable Federal-State relations, nor augur well for the future administration of the Commonwealth Act.

### *Timetable for the Inquiry*

The timetable for the Inquiry was inconveniently tight. The Commissioners, both employees of the Commonwealth Department of Environment and Conservation, were appointed on 2nd October and directed to report by 4th November. Public advertisements appeared between 5-12th October announcing that the inquiry would begin on 15th October. On that day, the progress report prepared by RPC became available to the public, which had only until 23rd October to evaluate the report and prepare written submissions. Predictably, there was outspoken opposition and quite trenchant criticism of the desperate shortage of time available to the public to formulate their proposals, and the unseemly haste associated with the inquiry must also have inconvenienced the Commissioners, RPC and the various South Australian Government Departments. It can only be hoped that, under the new Act, such notice of an inquiry will not be deemed "reasonable" under s.13.

Nevertheless, despite the shortage of time, the Commission received some 140 documentary and verbal submissions by way of evidence and reported on 6th November.

Several aspects of the report raise interesting problems which may influence the future pattern of environmental inquiries.

### *Purpose of the Inquiry*

The terms of reference for the inquiry were to:

"inquire into and report to the Australian Government and South Australian Government on the environmental implications of the proposed Redcliff Petrochemical complex using as a basis the Environmental Status Report prepared by the Redcliff Petrochemical Consortium of South Australia."

Both RPC<sup>33</sup> and the South Australian Government<sup>34</sup> emphasized that the Status Report in no way purported to be a draft EIS, and the Commission consequently faced a threshold dilemma as to the usefulness of its exercise. If decisions as to the future of the project did not have to be taken immediately, it would obviously be better to postpone making decisions until the draft EIS was completed and had been subjected to public scrutiny. On this view, the

32. Dr. Cass has acknowledged that the inquiry was undertaken at his request: Cass, "The Federal Government's EIS Proposals", p.9. Paper presented to Australian Conservation Foundation EIS Techniques Symposium, 29th November, 1974.

33. Redcliff Petrochemical Company Ltd., *Progress Report—Environmental Studies* p.1.

34. Dr. W. G. Inglis, Redcliff Environmental Inquiry, *Minutes of Evidence* p.26-27.

only legitimate function of the inquiry would be to comment on the adequacy of the conception of studies already in progress<sup>35</sup>. This task would, of course, normally be undertaken by the South Australian or Commonwealth Departments responsible for specifying the terms of reference for environmental studies. It certainly would not have merited a full-blown public inquiry.

If, however, immediate decisions as to the future of the project were necessary, the Commission had insufficient information upon which to act and expressed the view that, to ensure the maintenance of environmental quality, "it would be better if no *irrevocable* decisions involving commitment to, or authorization of, the further planning and development of the Redcliff project were made at this stage"<sup>36</sup>. In other words, if the Commonwealth had intervened without awaiting the draft EIS so that immediate decisions as to its future support of the project could be made, the Commission saw itself as unable to provide the necessary recommendations.

What, then, could the inquiry possibly hope to achieve that could not have been achieved by other means, or by waiting for a full inquiry to be held after the draft EIS was completed? Insofar as the Commission managed to resolve this basic dilemma they seem to conclude that, as the *investigation phase* of the project required costly economic, technological and environmental studies to proceed in parallel, the "parties need to ascertain whether any major obstacles seem likely to arise in any one of these areas to justify *the investment in the planning process alone*"<sup>37</sup>. As they defined their task, then, it was to examine any major obstacles, not just to environmental, but also to economic or technological investigations, which might prevent them proceeding further to a stage where a decision might be taken.

Even this is unsatisfactory. Both the RPC and the South Australian Government had already committed themselves to completing the investigation phase, at least to a stage where economic, technological and environmental factors could be weighed and a decision reached. That stage was, in fact, only three months off and, in the time-span allotted for the work, any insuperable obstacles discovered by the inquiry which might call a halt to further investigations could not have effected major savings, particularly in view of the substantial costs to both parties of having to prepare for, and participate in, a public inquiry in October<sup>38</sup>.

Furthermore, the actual report of the Commissioners, and the evidence and submissions received by them, do not really bear out their interpretation of their role. Little attention was paid to the detailed economic planning of the project or to the technological investigations. It may be, of course, that such matters do not properly fall within the scope of a public hearing anyway, but the Commissioners did certainly not live up to their avowed intent of identify-

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35. Redcliff Environmental Inquiry, *Report* p.3.

36. *Ibid.*

37. *Ibid.* Emphasis added.

38. It is difficult to cost such an exercise exactly. An unofficial and rough estimate of the costs of its involvement in the Inquiry by officers of R.P.C. is \$45,000. This figure includes the printing of its report to the Inquiry. A similar unofficial, rough estimate by officers of the Commonwealth Department of Environment and Conservation of the cost to the Commonwealth Government is \$15,000. No similar estimate of the cost to the South Australian Government is available, but the preparation and publication of the *Redcliff Petrochemical Development Project Report—Sadec II* and the attendance of witnesses would indicate a cost closer to that of R.P.C. It may be observed that the cost to the Commonwealth is substantially less than the cost to those under investigation.

ing any major obstacles in these areas which might have affected the desirability of further investment in the planning process. In fact, they saw their report ultimately as "mainly confined to the effect of emissions and effluent from the plant, its significance in respect of land use and land planning, its impact on the social environment and the implications of some of the proposed legal controls over it"<sup>39</sup>.

The real object of the inquiry would thus either not seem to have been clearly expressed by the Commissioners in their report, or, if it was so expressed, the information before them or the time available to them was insufficient to allow them to achieve it.

The perplexing question still remains. Why was the inquiry held when it was?

#### *The Need for Further Public Inquiries*

Neither the Commonwealth Government nor the South Australian Government has clearly stated whether the proposal in the Plan for Environmental Study that public reaction should be solicited *after* the draft EIS has been made redundant as a result of the October Inquiry. It is still possible that both Governments and RPC will be put to the expense of mounting further public inquiries.

Clearly the Commissioners feel that opportunity for public comment should be afforded on additional issues before final decisions are possible. Little information was presented to the inquiry on the physical impact of pipe-lines, salt fields and quarries<sup>40</sup>. The Commission rightly identifies the need to solicit informed public response on these questions, once preliminary studies are complete<sup>41</sup>.

On another issue, the propriety of public comment recommended by the Commission is more questionable. As already indicated, the Commission faced considerable problems in deciding how broadly it should draw its terms of reference. The most restrictive view was that the inquiry should be confined to the effect of possible emissions and construction and operation activities on the immediate physical environment of Redcliff. On the other hand, evidence was offered on a much wider range of possible consequences of the project. The Commission was urged to consider the possible health hazards of vinyl chloride monomer which would be generated by any company using ethylene dichloride produced by the plant to make PVC. Other witnesses drew attention to the capital structure of the Company, its likely rates of return, and the benefits that might be expected to remain in Australia. The general use of plastics was attacked as environmentally undesirable and the wisdom of using natural gas as energy for the plant was also questioned.

The issues which could have been considered were almost boundless and one must sympathise with the agonized question of the Chairman:

"This interests me, because do you believe that every environmental inquiry, for example, should examine the desirability of zero population growth because if it did every environmental inquiry would ultimately

39. Redcliff Environmental Inquiry, *Report* p.5.

40. Under the *Plan for Environmental Study*, the preparation of impact studies on these matters rested, not with R.P.C., but with the S.A. Natural Gas Pipelines Authority, the Company selected to provide salt to the complex and the S.A. Department of Mines, respectively.

41. Redcliff Environmental Inquiry, *Report* p.19.

come back to an investigation of that problem, I suggest. You have to put some sort of bounds around the problem that a given inquiry investigates"<sup>42</sup>.

Yet, in its report, the Commission concluded:

"that further public inquiries should be conducted on a number of these fundamental points, in particular, the environmental effects of the use of plastics, and competing claims for the use of natural gas"<sup>43</sup>.

Leaving aside, for the moment, whether such matters should properly be dealt with in a public hearing, it is important to observe that the Commissioners would obviously prefer to see supplemental public inquiries held after the draft EIS is complete and before final decisions are made.

On the whole, it would have been better to have postponed the October inquiry until the draft EIS had been completed. It has already been suggested that a carefully maintained information system of individuals and organizations with particular expertise could have been utilized to ensure that early consideration was given to a range of possible public reactions. Such sources of expertise could be readily tapped, merely by an administrative direction by the authority responsible for specifying the limits of the impact study, that early and continuing consultations should be held with nominated groups or individuals. The complexity and cost of an ultimate public inquiry, which should not be held before the draft EIS is complete, would doubtless be reduced as many important public inputs would already have been received and taken account of in preparing the draft.

#### *Proper Scope of an Environmental Public Inquiry*

It is difficult to essay a direct answer to the question whether public inquiries should canvass such fundamental questions as the proper use of plastics and natural gas. Some limits to the scope of an inquiry may be perceived in the light of expressed Government policy. Thus, the guidelines of the South Australian Environment Protection Council have already been mentioned<sup>44</sup>. They accept the political commitment of the South Australian Government to industrial development, decentralization and economic growth, and endeavour to work out adequate environmental safeguards within that context. Similarly, the Australian Government has emphasized that the ultimate task of weighing environmental factors against economic and technical factors is one for the politician.

The conclusion might thus be drawn that it is not the role of a public inquiry to question fundamental values expressed in existing government policies, for to do so is to trespass on the role of the political decision-maker. Equally, of course, it can be argued that an environmental inquiry is specifically designed to inform the decision-maker as to the public evaluation of a particular proposal and is a far more accurate gauge of public feeling on environmental issues than an opinion expressed through a ballot-box could ever be. From this view, the public inquiry has a legitimate political role and could well examine whether existing government policy is in accordance with the balance of the evidence presented to the inquiry.

Should a government wish to limit the scope of a public inquiry, the

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42. Redcliff Environmental Inquiry, *Minutes of Evidence* p.165.

43. Redcliff Environmental Inquiry, *Report* p.5.

44. *Supra* p.

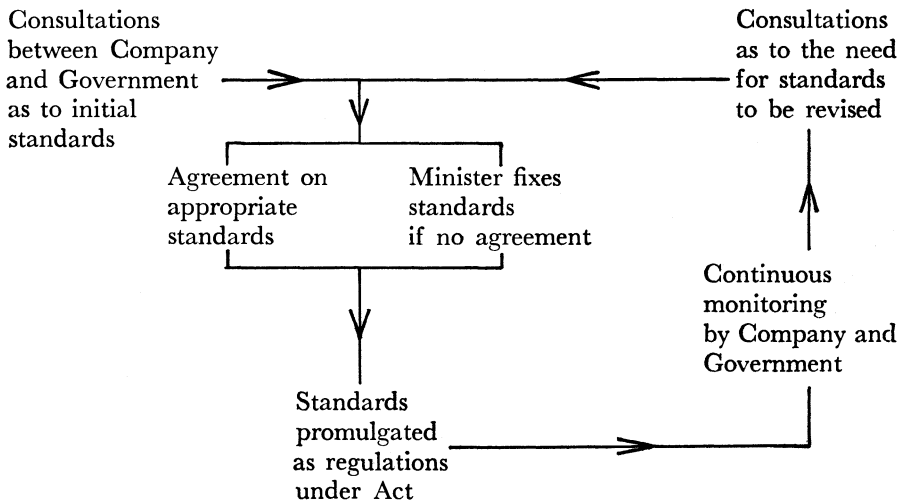


appropriate means of so doing would be to limit its terms of reference. Under the new Commonwealth legislation the Minister has power to “direct that an inquiry be conducted in respect of all or any of the environmental aspects of a matter referred to in any of the paragraphs of section 5”<sup>45</sup>. His ability to specify the precise limits of an inquiry thus depends on whether the matter can be adequately characterized under one of the heads of s.5. Beyond that, Commissioners are not subject to the direction of the Minister or of the Government in conducting an inquiry<sup>46</sup>. There is thus some doubt whether the Minister can effectively restrain a Commission from examining fundamental questions of government policy, other than by setting restrictive time-limits within which it must report. Whether the consequent possible autonomy on the part of Commissioners was either intended or desirable is uncertain.

*Legal Arrangements for Environment Protection*

Almost one-third of the Commission’s report is devoted to a section entitled The Redcliff Legal Environment. This examines the proposed provision in the Indenture concerning emission standards and the way in which such standards are to be promulgated and enforced. The conclusions raise some fundamental questions concerning the law-making process and the proper breadth of Ministerial discretion.

Clause 15 of the proposed Indenture posited a system for establishing and revising standards which may be explained diagrammatically as follows:



The two most important sub-clauses of the proposed Indenture were as follows:

15. *Environment Protection . . .*

- (4) As soon as practicable, the Company and the State will agree upon a programme for the establishment of—
  - (i) discharge standards and procedures for the disposal of waste effluents and other emissions into the environment, and
  - (ii) such further studies as may be required.

Both parties will use their best endeavours to meet the requirements of the programme. If the parties fail to agree on the estab-

45. Environment Protection (Impact of Proposals) Act 1974 (Cth), s.11(6).

46. *Ibid.*, s.11(1).

lishment of any standard or procedure the Minister may determine such standard or procedure.

- (7) Where an addition to or variation to discharge standards or procedures is considered to be necessary by the Company or the State or any proposed law is to be made by the State which is likely to have application to the controls, methods or procedures for the disposal of waste effluents and other emissions into the environment by the Petrochemical Complex or the Power Plant, a reasonable period of written notice will be given to the other party to enable a study to be made to assess the effect of any proposed addition, variation or law on the environment and on the efficient operation of the Petrochemical Complex and the Power Plant taking into account the relevant technical, economic and other factors. The State and the Company will use the findings of any such study to reach agreement on the need for any addition to or variation in discharge standards or procedures established pursuant to this clause and where a need is established the parties will agree upon the discharge standards or procedures to be adopted. If the State and the Company are unable to agree the Minister having regard to the relevant technical, economic, or other factors (including the proposed new law where applicable) may determine any addition to or variation of the said discharge standards or procedures. The Company will be given reasonable time to comply with additions to or variations of discharge standards or procedures pursuant to this sub-clause.

The Commission acknowledged that the proposed clause was a marked departure from the wholesale indemnities and exemptions historically offered by governments to attract major investment<sup>47</sup>, "in that a formula is provided for the development, application and revision of discharge standards and procedures for the plant, as well as for the assessment and study of its environmental impact"<sup>48</sup>.

Nevertheless, there was disquiet as to the adequacy of both clauses. The heads of objection to clause 4 were:

- (i) That the portfolio of the Minister with discretion to fix standards was unspecified;
- (ii) that he was not specifically directed to consider environmental factors in fixing standards;
- (iii) that no time-table was set for fixing initial standards and if this were left until later in the construction phase, the Government might be constrained to adopt unacceptable standards;
- (iv) that if the Company had the right not to proceed with the project, should they be dissatisfied with the standards proposed, this might also lead to unacceptable standards being adopted<sup>49</sup>.

Clause 15 was, in fact, headed "Environment Protection" and the general programme envisaged would, on one view, make it inconceivable that environmental factors would be disregarded, whatever the portfolio of the responsible

47. E.g. Broken Hill Proprietary Company's Steel Works Indenture Act, 1958 (S.A.), s.7; North Haven Development Act, 1972 (S.A.), s.25. Pulp and Paper Mill (Hundred of Gambier) Indenture Act, 1969 (S.A.), s.7; West Lakes Development Act 1969, (S.A.), s.13; Monarto Development Commission Act, 1973 (S.A.). s.38.

48. Redcliff Environmental Inquiry, *Report* p.30.

49. *Ibid.*, pp.32, 33.

Minister<sup>50</sup>. The mechanistic insertion of criteria, including environmental criteria, might have met the objection of the Commission. To state that the Minister should consider, say, economic, technological, environmental and other criteria when fixing standards would not have been objectionable to principles of multiple-objective planning, nor would it contravene the basic position of both State and Commonwealth Governments that the ultimate balancing of these factors must be political. Yet there are indications that the Commission would still not have been satisfied. Its final two objections demonstrate a fear that, in the normal interaction between government and business, a political situation might arise where the requirements of the environment could be discounted in order to achieve other objectives. Could their premiss have been that environmental factors must remain the paramount consideration in planning decisions?

The discussion of sub-clause (7) tends to confirm this view<sup>51</sup>. They express doubts whether the stringent upgrading of standards would ever be possible, once the plant became operational and people were dependent on it for their continued livelihood. They look to the fact that the Minister is directed to consider "relevant technical, economic and other factors" when revising standards and by a dubious application of the *ejusdem generis* rule, conclude that environmental factors might be neglected<sup>52</sup>. Furthermore, they question a system which would allow for the revision of standards in a downwards direction, should the initial standards be shown to be unnecessarily stringent in the light of future knowledge. They are concerned that standards which may be promulgated under general laws applicable to industrial activities in urban areas may be superceded by special laws specifically aimed at the relatively remote location of Redcliff. And they are concerned that the clause fails to provide heavy penalties for failure to conform with standards.

Yet the fundamental objection of the Commission to both sub-clauses is apparently that there was room for consultation between the Company and the State in establishing and revising standards, and that "consequently there is no safeguard that the needs of the environment will prevail"<sup>53</sup>. They are concerned that a "potential polluter is therefore to be given a substantial say in establishing the legal standards to be applied to its effluents and emissions; society does not insist on establishing and imposing objective standards of general application over the Company"<sup>54</sup>.

Their final conclusion is that:

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50. It has never been the custom to specify the particular portfolio of a responsible Minister in legislation. The decision as to how many portfolios there will be and what they will be called is one for the government of the day. As the Indenture would have to be ratified by Act of Parliament, and thus become part of the Act, the reason for not specifying the portfolio of the Minister is apparent.
  51. Redcliff Environmental Inquiry, *Report* pp. 35-38.
  52. An ineluctable requirement for the operation of the rule is that there is a specific, identifiable *genus* (*Tillmanns & Co. v. S. S. Knutsford Ltd.* [1908] 2 K.B. 385) and it is not enough to show that there are two or more possible *genera* which may limit the word in question (*R. v. Regos and Morgan* (1947) 74 C.L.R. 613, 623). The Commission did not describe the particular *genus* which they apprehend would limit the words "other factors" to exclude environmental factors. It has been said that the doctrine may "easily be pressed too far" (*A.G. v. Brown* [1920] 1 K.B. 773, 797 *per* Sankey J.) and its applicability to deeds and other private documents has been questioned (*Chandris v. Isbrandtsen-Moller and Co.* [1951] 1 K.B. 240, 246). See also Lord Devlin, *Samples of Lawmaking* (London, 1962) p.58.
  53. Redcliff Environmental Inquiry, *Report* p.35.
  54. *Ibid.*, p.31.

“Legal controls establishing specific standards for emissions and effluent discharges must be imposed by society on the Redcliff Petrochemical Company and not left to negotiation. They must attain the goal of maintaining environmental quality, if the risk of environmental damage is to be minimised”<sup>55</sup>.

The puritan rectitude of this view is compelling but, as it embraces a philosophy which apparently does not exist elsewhere in the world and, it is submitted, overlooks fundamental psychological problems in achieving adherence to norms of behaviour, it may have far-reaching effects on relationships between government and industry.

*Propriety of Consultation Between Government and Potential Polluters*

The traditional legislative proscription of a particular act, accompanied by a penalty, has been recognised as an inadequate means of controlling pollution. First, without an apprehension of responsibility on the part of the potential polluter, such legislation depends on a policeman hiding in the bushes in order to detect infractions. Second, penalties may act as prospective deterrents, but cannot prevent the original pollutive act. In situations such as Redcliff, there may not be many second chances. Third, modern theories of pollution control acknowledge that pollution is not an absolute, but a relative concept, and that, in many circumstances, standards may be varied depending on the situation of the discharge and its cumulative effect on the receiving medium. There has thus been a move away from the absolutist “don’t-throw-dead-dogs-in-the-dam” school of thought to a system of licensing permissible discharges, established by reference to the particular situation. Furthermore, with greater public awareness of the problems of pollution, the need gradually to revise standards as technology develops is widely recognised. Finally, the most important task in a pollution-control programme is instilling a sense of responsibility in the minds of potential polluters.

Against this background, the insistence by the Redcliff Commissioners that “objective” standards be set; that they be standards which are applied under the general law rather than laws specifically adapted to the circumstances of Redcliff; that they be accompanied by stringent penalties irrespective of fault; and that there should be no consultation between the Company and the Government in fixing and revising standards, is puzzling to say the least.

It is not clear whether the Commissioners felt that to consult with the Company in setting initial standards, to co-operate in continuous monitoring, and to consult in affixing appropriate revisions would actually lead to the South Australian Government being suborned or misled, or whether they merely felt that there was something vaguely improper about the arrangement. Consultation is not deemed improper in other fields where government controls industry and there are two very good reasons for encouraging consultation in situations like Redcliff.

The first relates to technology. In the highly specialized business of technological development, government can never, if it relies on its own resources, be fully up to date with the latest technological solutions to manufacturing and management problems. Whether the “best available technology” test or the “best practicable technology” test is adopted for pollution control, amicable access to latest industrial processes is imperative. It is worth observing that, in the context of discussing this very aspect of the Redcliff Report, William

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55. Recommendation 7, *ibid.*, p.42.

D. Ruckleshaus, the former Administrator of the United States Environmental Protection Agency, emphasized that even the United States Government, with its wealth of resources and research programmes, found consultation with industry indispensable in the task of setting appropriate standards<sup>56</sup>.

The second reason for encouraging consultation is a simple, psychological one. If there is any real doubt as to the desire of the company to meet its environmental obligations, the most effective way of ensuring that it is assiduous in its monitoring and control procedures is to make it jointly responsible for developing the programmes, standards and procedures to govern its operations and for their continual testing, evaluation and revision. Even if it were possible for initial procedures and standards to be fixed without consultation, it must seriously be doubted whether the company would be as concerned and co-operative in future adjustments as it would be if it were jointly responsible for devising them.

It is understood that consultation is widely practiced overseas. The possible consequences to commercial confidence of not allowing such a system to prevail in Australia ought not to be entirely disregarded. For the sake of future environmental management in Australia, it is to be hoped that the South Australian Government will stand firm on its original intention to permit consultation.

#### *Propriety of Imposing Standards by Regulations*

There is a further difficulty in the conclusion that specific standards "must be imposed by society" and "not left to negotiation". Both sub-clauses (4) and (7) envisage that, if procedures or standards cannot be agreed upon, they will be fixed by the Minister. Sub-clause (8) provides that they "shall upon agreement or determination be prescribed by regulation". However, standards are initially proposed, they will ultimately be fixed by regulations made under the Indenture Act. Even if no consultations were permitted between the Company and the Government, it would be appropriate to fix standards by regulation rather than to include them in the body of the Act. Standards are commonly established in this way, and it is difficult to see how this is any the less an imposition by society of standards than any other technique of making law.

In fact, the provisions for detailed Parliamentary scrutiny of such regulations in South Australia are far more stringent than will be applied to the proposed administrative procedures envisaged under the Commonwealth Environment Protection (Impact of Proposals) Act 1974. Joint Standing Orders of the South Australian Parliament establish the Joint Committee on Subordinate Legislation, which is a Committee composed of representatives of both Houses with power to examine any regulation, rule, by-law, order or proclamation<sup>57</sup>. The comparable Committee at the Commonwealth level, it will be recalled, is a Committee of one House only and only has power to examine regulations and ordinances<sup>58</sup>. The primary purpose of such Committees is to ensure that the executive arm of government does not seek to abuse the flexibility afforded by allowing delegated legislation to exist, by arrogating to itself law-making functions which society and the relevant constitutional rules have allotted to

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56. In speaking to the seminar on "Environmental Law: The Australian Government's Role", Canberra, 13 December 1974.

57. South Australia Parliament, *Joint Standing Orders* (1952), Nos. 19-31.

58. *Supra*, p.

the legislature. Those who are concerned to prevent questionable administrative decisions being made into law without proper Parliamentary scrutiny have much less to fear from the South Australian system than they have of the system applying to the new Commonwealth Act. In view of the Commission's objection, there is a certain irony in the fact that the procedures governing future Commissions of Inquiry will be subjected to less scrutiny by the legislature than the standards for Redcliff will be. Nor will they be subjected to any form of public hearing or scrutiny before they are promulgated<sup>59</sup>.

### *The Politician as Decision-maker*

It has already been stressed that it is the policy of both the South Australian and Commonwealth Governments that the task of determining what weight shall be attached to environmental, economic, technical or other factors in making decisions is one for the politician<sup>60</sup>. This is not the task of Governmental Departments nor of Commissions of Inquiry. Furthermore, the purpose of the new Commonwealth legislation is not to give "environmental considerations a veto-power in decision making" but to ensure that they "become an integral part of the information upon which a decision is taken"<sup>61</sup>. The actual words of the Act state that environmental factors "are fully examined and taken into account"<sup>62</sup>. In considering the American Act, the Courts have held that "a rather finely tuned and 'systematic' balancing analysis is required"<sup>63</sup>, but, in making decisions, sometimes the anticipated benefits under other heads "will be great enough to justify a certain quantum of environmental cost"<sup>64</sup>. The Commonwealth Government sees the new Act in much the same light. Dr. Cass has forcibly stated that the Act:

"will not grant me the exclusive power of veto over proposals or policies. It will not force developers to abandon environmentally unsound objectives. It will not ensure that the Government makes environmentally sensible decisions. It will not give individual citizens the power to stop bad projects or to set conditions for moderate ones. . . . Since it is impossible to legislate for wise decisions we have preferred to make decision makers—and decision takers—as well informed as possible"<sup>65</sup>.

The ultimate rationale of the recommendations of the Redcliff Commission was that "there is no safeguard that the needs of the environment will prevail"<sup>66</sup>. Throughout the report, the unexpressed concern is that the inevitable trade-offs in the political process may lead to environmental factors being downgraded. It is difficult to avoid the conclusion that the Commission

59. In answer to the question whether the administrative procedures under the Act would be subjected to a public hearing, Mr. H. J. Higgs, Deputy Secretary of the Commonwealth Department of the Environment and Conservation has stated that they would not: Seminar on "Environmental Law: The Australian Government's Role", 13th December 1974.

60. *Supra*, p.

61. Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 26th November, 1974, p.4083 *per* Dr. Cass.

62. Environment Protection (Impact of Proposals) Act 1974 (Cth) s.5.

63. *Calvert Cliffs' Co-ordinating Committee v. United States Atomic Energy Commission* (1971) 449 F. 2d 1109, 1113.

64. *Ibid.*, p.1123.

65. Dr. Cass, "The Federal Government's EIS Proposals", p.3. Paper presented to Australian Conservation Foundation EIS Techniques Symposium, 29th November, 1974.

66. Redcliff Environmental Inquiry, *Report* p.35.

felt that any arrangement which did not give environmental factors an overriding role in making decisions would be unacceptable. This was certainly the ground on which they found Clause 15 inadequate.

This is, of course, a defensible political position and the balancing analysis proposed by American courts has been trenchantly criticized as unhelpful.<sup>67</sup> But, for the sake of evaluating the Commission's report and the weight that should be attached to it by either Government or RPC in their negotiations to reach an acceptable Indenture, it must be clearly understood that the premiss upon which their criticisms of Clause 15 is based is in fundamental conflict with the declared policies of both Governments.

It is submitted that both Governments would do well to consider the possible implications of this conflict before they decide to adopt the recommendations of the Commission or make fundamental changes to the proposed Clause 15. There are obvious dangers in being seen to reject the balancing process widely accepted as necessary to multiple-objective planning, quite apart from the charge of inconsistency. It may well be the charge of inconsistency, of course, that is most worrying to potential investors.

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67. Anderson, *NEPA in the Courts*, pp.256-258.