ENVIRONMENTAL LAW — LICENSING POLLUTION

The decision of the High Court in *Phosphate Cooperative Co. (Aust.) Ltd.* v. *Environment Protection Authority*[1] directly involved only the interpretation of the Environment Protection Act, 1970 (Vic.). Nonetheless, it has more general importance for the increasing body of Australian environmental legislation. The appellant company applied to the Victorian Environment Protection Authority for a licence to discharge waste, in the form of sulphur trioxide acid gases, from one of its two plants at North-Shore on Corio Bay in Victoria. A licence was granted by the Authority, subject to a number of conditions, one of which prohibited the commencement or continuation of start-up operations at the plant if off-shore winds were blowing. Start-up operations apparently produce an especially high amount of waste discharge, in comparison with normal working operations.

The company objected to the condition as excessively onerous, and appealed in the manner provided by the Environment Protection Act, 1970 (Vic.) ("the Act"), to the Environment Protection Appeals Board in the first instance, and subsequently, on a number of points of law, to the Supreme Court of Victoria.[2] Having failed in both appeals, the company obtained special leave to appeal to the High Court on the question whether the Environment Protection Authority or the Appeal Board could or ought to take into account the economic consequences, to the community or to an applicant for a licence, of the imposition of a condition.

By a majority (Stephen and Mason JJ.), the High Court found that the Act did not entitle the Authority or, on appeal, the Board, to have regard to economic consequences in their deliberations upon licences or licence conditions. Aickin J., dissenting, indicated that he did not regard the Authority and the Board as exclusively concerned with the elimination of pollution, and held that they were "bound to consider at least some other matters of general public interest, including the economic interests of the community, which may outweigh the prevention or elimination of some particular example of pollution".[3]

The issue before the High Court raised the familiar problem of how to accommodate the traditional goals of development and economic well-being with the more recently recognised need to maintain acceptable standards of environmental quality.[4] The alternatives were neatly outlined by Stephen J.:

> "The problem for the Court is only to discern, from the terms of this Act, whether Victorian legislators have in fact to any extent assigned to the bodies constituted under the Act the task of balancing against possible environmental gain, possible consequential detriments of an economic nature; or whether, on the contrary, they have been content to have these bodies concentrate exclusively upon the former regardless of any economic consequences, whether

1. (1977) 18 A.L.R. 210.
2. Under s.36(3), an applicant for a licence may appeal from a determination of the Appeals Board on any question of law. The judgment of Crockett J. in the Supreme Court is unreported.
3. (1977) 18 A.L.R. 210, 222.
4. See, in particular, the comments of Stephen J. (*id.*, 212) concerning the problem of "reconciliation of aims" confronting those concerned with the formulation of environmental policies.

directly affecting the Company, or more remotely, the consumers of its product, the suppliers of its raw materials and the economy generally."[5]

The nature of this dispute reflects the extent to which the demand for protection of the environment has been acknowledged in Australia. The initial desire to introduce environmental factors into decision-making processes, previously dominated by the influence of technical and economic considerations, has been satisfied by an extensive range of new licensing measures,[6] and the adoption of environmental impact assessment procedures at both State and Commonwealth levels.[7] Government authorities may now take into consideration environmental factors in determining whether to proceed with proposed actions,[8] and private developers are obliged to satisfy decision-making bodies as to the environmentl aspects of their proposals.

This litigation raises the slightly disturbing spectre, however, that at least one piece of environmental legislation has apparently gone so far as to render environmental factors the only relevant consideration for certain decision-making bodies. In particular, conditions may be attached to licences without any regard to their technical plausibility or economic viability, where previously the proposal would have been designed with only technical and economic factors in mind. The situation may have been reached, therefore, where the determining body occupies exactly the reverse position to that of the proposer; the conflict between development and environment no longer requires to be resolved, since the objective of environmental quality has been elevated to a position where it overrides all others. It is proposed, therefore, to consider two matters: first, the correctness of the view, adopted by a majority of the High Court, of the licensing powers under the Environment Protection Act and secondly, the implications of the finding that a single-purpose licensing process regulates all forms of development.

The determination of which factors are relevant or extraneous to the exercise of a discretionary statutory power by a court involves a considerable degree of subjective judgment.[9] Cases concerning the relevance of considera-

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5. *Ibid.*
6. There have been no other enactments in Australia relating to pollution control which match the Environment Protection Act, 1970 (Vic.), in comprehensiveness; however, extensive new regulatory measures and administrative reorganisation have been introduced in several States by similar measures. See, e.g., the State Pollution Control Commission Act, 1970 (N.S.W.), the Environmental Protection Act, 1971 (W.A.), and the Environment Protection Act, 1973 (Tas.).
7. At Commonwealth level, see the Environment Protection (Impact of Proposals) Act, 1974, and the Order Approving Administrative Procedures (June, 1975). At State level, there are no legislative provisions for environmental impact assessment, but administrative procedures applicable both to private and public development have been published in New South Wales, Victoria, Queensland and Tasmania. In addition, provisional procedures have been adopted in Western Australia, and legislative measures are proposed to be introduced in South Australia.
8. But see comments (*infra,* n.24) concerning the possible limitation on statutory corporations, in particular, with respect to assessment of environmental factors.
9. Benjafield and Whitmore, *Principles of Australian Administrative Law* (4th ed., 1971), 175, in discussing the cases on *ultra vires,* suggest that "it is quite clear that the courts have created a situation in which it is possible to extend the scope of judicial review indefinitely and in a manner which, of its nature, defies definition". The determination of relevant factors is one such instance where review may depend heavily upon an individual judicial assessment.

tions are legion,[10] and in the absence of specific statutory provision as to the matters required to be taken into consideration, are determined from case to case by reference to the subject-matter and scope and purposes of the legislation in question. In consequence, the court has to exercise its discretion in determining whether to review a decision. The High Court, in the *Phosphate Cooperative* case, adopted the usual course of undertaking a thorough investigation of the provisions and purposes of the Act.

This task had been undertaken before by Gillard J. in the Supreme Court of Victoria in *Protean (Holdings) Ltd.* v. *The Environment Protection Authority*,[11] where he expressed a rather critical view of the Act:

> "Broadly, this Act has two objectives. It provides, first, for a licensing system whereby the discharge, emission or deposit of "waste" may be permitted and, secondly for the imposition of certain prohibitions and limitations in the enjoyment of rights of a personal and proprietary character where it might be thought the exercise of such rights might be hurtful to the physical well-being of the community in general . . . Although it may be readily conceded that the purposes and objects of the Act are praiseworthy, the means adopted to achieve them seem to be quite authoritarian, if not draconian in nature. The penalties are harsh (*cf.* ss.39, 43, 48, 48A). Because of these features, I am of opinion that the legislature must be taken to have intended that although the statutory provisions of this Act might appear to confer powers upon the subordinate bodies, which would enable them to invade or erode the existing rights and privileges of the individual, either of a personal or proprietary character, such provisions if at all ambiguous should be strictly construed in favour of the subject."[12]

There is, in fact, considerable ambiguity in the provisions relating to the control of wastes, which establish a licensing system as the basic control device. S.20(1) provides that after the commencement of the section no person shall "begin discharging, emitting or depositing wastes into the environment without being licensed under this Act"; the definition of "waste" in s.4 is extremely wide.[13] Aickin J., in his dissenting judgment, suggested that ordinary domestic activities such as watering one's garden or driving a car would result in the discharge of "waste" as defined and therefore require a licence from the Authority.[14] He concluded that the total elimination of all waste discharges could not have been intended by the Act, this being "so unlikely an intention that clear words would be

10. For an extensive discussion of the leading authorities, see *id.*, 166-172. One of the most important recent decisions on the relevance of environmental factors (in the context of the export powers of the Commonwealth under the Customs (Prohibited Exports) Regulations) is *Murphyores Inc.* v. *The Commonwealth* (1976) 9 A.L.R. 199, in which the High Court held that environmental factors were not extraneous to a decision of the Minister for Minerals and Energy concerning export licenses for mineral concentrates.
11. [1977] V.R. 51.
12. *Id.*, 54-56. Gillard J. proceeded to strike down conditions imposed by the Authority on a licence as to the general user of the premises, on the ground that they were extraneous to the purpose of the grant of the licence. The conditions must fairly and reasonably relate to the permitted user (*id.*, 60).
13. "Waste" is defined by s.4 to include "any matter, whether liquid, solid, gaseous, or radio-active, which is discharged, emitted or deposited in the environment in such volume, constituency or manner as to cause any alteration of the environment".
14. (1977) 18 A.L.R. 210, 220.

required to convey it".[15] In consequence, he regarded the Authority and the Appeal Board as bound to consider matters of public interest:

> "As it seems to me they would be bound to consider at least some other matters of general public interest, including the economic interests of the community, which may outweigh the prevention or elimination of some particular example of pollution. At the very least, the capacity of the environment to absorb waste without detriment to its quality would require consideration."[16]

The contrast between this line of reasoning and the approach adopted by Stephen J. to the problem of uncertainty of language in the Act (with which Mason J. agreed) demonstrates in an unusually clear manner the extent to which judicial attitudes may vary in ascertaining the ambit of a discretionary statutory power. Stephen J., although aware that to attribute a single-purpose mandate to the Authority and the Board could lead to "curious and perhaps unforseen consequences of considerable detriment to the community as a whole",[17] was unwilling to remould the functions involved simply on the basis of the broad and uncertain language employed in the Act:

> "That the Act's provisions are often inept in drafting and contain many ambiguities and a considerable degree of incoherence of language, a matter remarked upon by Gillard J. in the recent case of *Protean (Holdings) Ltd.* v. *Environment Protection Authority*, does not detract from the firm impression which its terms convey as to the functions of the Authority and the Board. The Courts have certainly no mandate to remould those functions so as to afford to the Act an operation different from that intended by the legislature."[18]

The divergence in the conclusions reached by Stephen and Aickin JJ. may be traced to this particular issue, since both agreed that there was no positive direction in the Act that economic consequences were to be taken into account, and that there were a number of contrary indications.[19] Unlike Stephen J., Aickin J. was willing to engage in a form of "judicial activism"[20] in order to reach what he obviously considered a desirable result.

However, Aickin J.'s arguments for a wider reading of the Authority's powers were not wholly convincing. It may be conceded, as Aickin J. suggested, that the Act could not reasonably commit the Authority to the task of ensuring the elimination of *all* waste discharges. It may be impossible, both administratively and according to ordinary notions of

15. *Id.*, 221. This seems to be an adoption by Aickin J. of Gillard J's sugestion (*supra*, n.12) that the Act be construed strictly in favour of the subject.
16. *Id.*, 222.
17. *Id.*, 217 *per* Stephen J.
18. *Id.*, 216.
19. *E.g.*, s.20(8) requires the Authority in considering an application for the issue of a licence to have regard to the effect of the discharge of waste in relation to State environment protection policy. In fact, no general and very few specific policies have been declared under the Act *id.*, 219 *per* Aickin J.), thus removing the intended basis for licensing decisions. Stephen J. conceded that such policies, if they did exist, could conceivably cater for the interests of industry (*id.*, 213) and that this might in turn affect the considerations relevant to the granting of licences.
20. The term used by de Smith, *Judicial Review of Administrative Action* (3rd ed., 1973), 572 to describe a recent trend (particularly in the English courts) of judicial checks on the exercise of discretionary powers conferred by statute.

commonsense for the Authority to enforce the penal or licensing provisions of the Act in relation to certain day-to-day activities which technically fall within the provisions of the Act. However, the existence of these practical limitations on the supervisory role of the Authority does not mean that licences should be issued in particular instances on the ground of general public interest, or that the economic interests of the community must be considered in relation to every application to the Authority. It is difficult to ascertain how the matters of public interest referred to by Aickin J. emerge as relevant considerations from the terminological confusion of the Act. In the absence of any other possible indication in the Act, the conclusion reached by Stephen and Mason JJ. that economic considerations are not relevant to the decvision seems from the terms of the Act to be the more acceptable one.

Nonetheless, Aickin J's conclusion involved a more balanced decision-making role for the Authority, and a more satisfactory framework for the exercise of its licensing function. Of course, this raises the familiar arguments concerning the proper extent of judicial review. The adoption of a "liberal" approach to judicial review may reduce the standard of legal reasoning through the overriding desire to reach the preferred result, and the independence and integrity of the judiciary may be threatened by such a "descent into the arena". On the other hand, such an approach may be viewed as the laying aside of legalism in favour of a more socially-conscious approach to the regulation of administrative action.

Two further points may be made about the significance of the *Phosphate Cooperative* case to the general questions of protection of the environment. In the first place, although the decision may appear a victory for the proponents of the view that environmental factors comprise an essential element of decision-making in relation to future development, the approach adopted by the majority could lead to quite the opposite result in a slightly different context. Where major public development is to be undertaken by a statutory corporation vested with specific functions and duties, it may be equally inappropriate to regard that authority as bound by its statutory charter to have regard to environmental factors. There are many examples of such corporations at both Commonwealth[21] and State[22] level, and with some exceptions[23] there are no specific directions to consider environmental factors in their authorising statutes.[24] Of course, where, as

21. See, *e.g.*, Snowy-Mountains Hydro-Electric Power Act, 1949; Atomic Energy Act, 1953; National Capital Development Commission Act, 1957; Pipeline Authority Act, 1973; Snowy Mountains Engineering Corporation Act, 1970, and Albury-Wodonga Development Act, 1973.
22. See, *e.g.*, in South Australia, Electricity Trust of South Australia Act, 1946; South Australian Housing Trust Act, 1936; Highways Act, 1924 (establishing Commissioner of Highways); National Gas Pipelines Authority Act, 1967; Land Commission Act, 1973; Monarto Development Commission Act, 1973, and State Transport Authority Act, 1974.
23. The Pipeline Authority Act, 1973 (Cth.), s.14(1)(c), provides that it is the duty of the Authority "to consider in connexion with the construction of a pipeline, factors concerned with the ecology and the environment and, as far as practicable, to lay its pipes below the surface of the ground". See similarly, the Petroleum and Minerals Authority Act, 1973 (since held invalid on other grounds), s.10(7), and the Canberra Water Supply (Googong Dam) Act, 1974, s.6(1).
24. In *Paddle* v. *State Electricity Commission of Victoria* [1968] V.R. 425, Menhennitt J. held that the duty imposed on the Commission under s.106(2) of the State Electricity Commission Act, 1958 (Vic.), to "do as little damage as may be" could not be invoked to challenge the decision by the Commission to erect a power

in Victoria, the responsibility for environmental assessment has been imposed on a licensing authority, some consideration of environmental factors will be forced upon the corporation, but it must be remembered that the licensing system relates only to pollution effects. Many forms of public development have serious environmental effects not connected with pollution, and in relation to these activities the only consideration to be given will be that by the corporation itself. It should also be noted that the environmental impact assessment schemes at State level are purely administrative arrangements, which cannot alter the substantive functions of public corporations as determined by statute.

The problem can be simply illustrated by the Lake Pedder issue. The Hydro-Electric Commission in Tasmania proposed large-scale hydro-electric works on the Gordon River in the south-western region of Tasmania, involving *inter alia* the flooding of Lake Pedder. The Commission was constituted by the Hydro-Electric Commission Act, 1944 (Tas.), s.16(2)(a) of which required it to submit a report on any new development to the Minister, setting out as far as practicable "the opinion of the Commission as to the necessity or desirability of the new power development".[25] The Final Report of the Lake Pedder Committee of Enquiry[26] discussed the legal framework within which the Commission operated, and in particular the question whether the legislation contemplated the consideration of environmental factors by the Commission. The Final Report concluded that a broad assessment ought to have been made by the Commission of the environmental consequences of the project, under the Act:

> "It is difficult to accept that, even in 1944, Parliament should have intended that no weight whatever should be given to social or environmental factors. In the Committee's view, the general words 'necessity or desirability' should be broadly interpreted, and cannot be confined to purely economic considerations."[27]

It could equally be argued that it is difficult to accept, even in 1970, when the concern for environmental quality was running high, that the Victorian Parliament intended that under the Environmental Protection Act, 1970, weight should be given only to environmental factors, as suggested by the majority of the High Court in the *Phosphate Cooperative* case. Nevertheless, such assertions rely essentially on the type of external assumption which the majority would not allow to influence an appraisal of the functions established under the Act. It is therefore possible that, given the same approach to the broad range of legislation authorising public corporations to undertake development, environmental factors

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24. (Continued).
line upon a particular route (*id.*, 438). Requirements of this nature are very common in development legislation (*e.g.*, to perform functions "in a proper and workmanlike manner", or so as to cause "as little damage and detriment as possible"), but they would not appear to be capable of imposing a responsibility to consider environmental factors; for the large part, they are closely linked with the measures usually found in such legislation concerning compensation payments for damage inevitably occasioned by the actions of the corporation.
25. The Act also required the Commission to deem its activities to be "desirable in the interests of the State" before proceeding with them (s.15(2)(a)), and to secure Parliamentary approval for its proposals (s.16(1)).
26. Lake Pedder Committee of Enquiry, Final Report, *The Flooding of Lake Pedder* (1974). The Report constitutes an analysis of the Lake Pedder controversy and, more significantly, its implications for the planning of major development projects and the management of natural resources in Australia.
27. *Id.*, 153.

might be regarded as irrelevant to the decision-making functions established in such legislation. Hence the decision may have an adverse effect on the general trend in favour of including environmental factors in government decision-making.

In the second place, the decision may obscure the important point that while the execution of development, whether by government or private developers, has been traditionally motivated by the technical and economic factors involved, the adoption of environmental controls through legislation is not necessarily aimed at establishing a veto over development. Rather, the object is generally to achieve "balanced" decision-making procedures, where all relevant considerations, including environmental factors, are taken into account. This was the stated purpose of the Commonwealth legislation relating to environmental impact assessment,[28] and has been judicially acknowledged as the substantive effect of the procedures established by similar legislation in the United States.[29] Where development is to be controlled by a licensing process, it would seem no less appropriate for the same "balancing process" to be employed, since the developer has no choice but to accept the conditions imposed on him by an environmental authority, provided they reasonably relate to the projected use.[30] It is undesirable that authorities, in determining whether to grant licences, and particularly in relation to the types of conditions which they impose, should be entitled to ignore the technical plausibility or the economic implications of those conditions, both for the applicant and the community. In the interests of a more practical and balanced approach to decision-making concerning both public and private development in Victoria, consideration should be given to amending the Act to extend the functions of the Authority and the Board beyond their existing narrow, single-purpose mandate.

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28. Dr. Cass, the then Minister for Environment, made this point forcefully at a symposium on the EIS technique: see Australian Conservation Foundation, *The EIS Technique* (1975) (collection of papers presented to the symposium, conducted 30th November, 1974), 13: ". . . let me immediately point out what our legislation will not achieve. It 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 force developers to include environmental impact in their planning. It will present the Government with comprehensive information about environmental impact as an aid to decision-making".
29. The National Environmental Policy Act, 1969 (U.S.A.), established in s.102(2)(c), the first procedural EIS requirement in the United States, at either Federal or State level. In *Calvert Cliffs Co-ordinating Committee* v. *Atomic Energy Commission* 449 F.2d. 1109 (1971), Judge Wright concluded that s.102 "mandates a particular sort of careful and informed decision-making process" requiring the "individualised consideration and balancing of environmental factors" with all other relevant considerations (*id.*, 1115). Considerable debate still continues over the existence and extent of the so-called "balancing process": see further, Anderson, *NEPA in the Courts* (1973), for a review of judicial reaction to NEPA.
30. This qualification was emphatically applied by Gillard J. in *Protean (Holdings) Ltd.* v. *Environment Protection Authority* [1977] V.R. 51 (see discussion, *supra*, n.12).

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