

The environment: How the common law can help

By Anthony Kerin



Protecting the environment has become a prominent issue for all Australians. But, sadly, it has also become a political football in recent years, and as a consequence has suffered the same fate as many other important areas of policymaking at the pointy end of politics – insufficient informed and dispassionate debate, and inadequate consultation.

Indeed, in recent years, proper consultation by the government before introducing large-scale reforms has been sadly lacking in many important areas of social and economic policy. For example, the controversial Stronger Futures legislation, extending the NT Intervention for a further 10 years, was passed in the face of much opposition and UN questioning. Slashes to workers' compensation in NSW were rushed through without adequate discussion; only 10 days were given for public comment before the right to silence was removed in NSW; and 90-second time limits were imposed on witnesses in the Queensland inquiry into workers' compensation. Similarly, consultation processes on the development of the National Disability Insurance Scheme have been conducted outside the transparent processes of parliamentary committees. So, when it comes to protecting the environment, can we rely upon government to do it justice? Can Australia's long-term environmental interests be best served by the short-term political strategies and objectives typical of our parliamentary system?

In this context, the vigilance, knowledge and expertise of organisations in the non-government sector have become vital. Recent threats to the funding of the Environmental Defender's Offices are very worrying, given the importance of this collective voice in protecting the public interest.

The ALA has itself been active in advocating for environmental protection. Our members are representing the interests of Aboriginal elders in the shadow of the proposed Muckaty nuclear waste dump, and in helping farmers to exercise their rights to 'lock the gate' in the face of proposed mining explorations.

This year, the ALA also expressed concern regarding the ongoing impact of the 2009 Montara oil spill, which is continuing to cause a reported \$1.5 billion in damage to Indonesian communities every year, on our doorstep.

And yet, surely it should be the role of government to safeguard the public interest, by enshrining the necessary

protections as enforceable under law?

Ecuador was the first country in the world to grant constitutional rights to nature. In Australia, we are a lot further behind. Moving into the next century, protecting the environment effectively – and balancing this against the economic interests of big business – will be one of the biggest challenges facing our political leaders. Issues such as climate change, carbon trading, access to and preservation of water, large-scale pollution and deforestation, clean energy and sustainability of energy production will all pose questions about the role of law and government. One of the major issues for Australia is the current tension between the role and responsibilities of state and federal governments in environmental protection – a common theme in several of the articles in this edition of *Precedent*.

For ALA members, the role of common law is paramount. If you had said to me 25 years ago that I would be writing about plaintiffs' rights in the context of environmental law, I would have looked glassy-eyed. And yet this is now an area of law that is firmly entrenched, complex and of great value to the community. The common law has been an appropriate regulator of human behaviour in this area on an increasing scale for some time. The law of negligence and the significance of breaches of statutory duty have underpinned common law actions on behalf of asbestos victims, and the Ok Tedi litigation also illustrated the point and importance of the common law. Governments, policies and social attitudes change constantly, and while amending statute can be a daunting prospect, the common law is a more flexible and adaptable instrument.

While it may not be the complete answer in terms of regulating behaviour, the common law certainly has a vital role to play in ensuring access to justice for all Australians. As is often the case, practitioners must have heart and determination to take on much larger and better resourced adversaries. But even in the context of environmental law, the effective deployment of the common law demonstrates, once again, the importance of the concepts of negligence and accountability to the current and future wellbeing of our broader community. ■

Anthony Kerin is the managing director of Johnston Withers in Adelaide, where he has worked for over 25 years. **PHONE** (08) 8231 1110 **EMAIL** Anthony.Kerin@johnstonwithers.com.au.