ENVIRONMENTAL LAW AND POLITICS

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This article examines the current state of environmental law in New South Wales. The author discusses some of the definitions that may be applied to environmental law and attempts to provide a functional definition. The primary focus of the article is upon the complications caused by social, political and economic conflicts, and upon how these conflicts are reflected in the environmental decisions actually made. Mr. Cole points out that the responsibility for environmental protection has remained largely within the realm of executive government.

This paper seeks to facilitate the understanding of "Environmental Law". It explores a functional definition of the term in relation to its historical development, its present scope and its role for the future. When questioned, most people do not exhibit any overview of the area, though usually they can name at least one specific concern of the law in the environmental field, for example pollution control or land use development. In seeking to expand such narrow perspectives the inter-relationship of law and politics is clearly evident. These were related in the world wide explosion of legislative activity covering the environment, during the 1960's and 1970's. Further, as environmental consciousness spread through the populous, environmental politics – in the sense of "what are your environmental politics?", that is what is your opinion on a particular environmental issue – became a distinct force in the resource allocation decision-making processes of most modern western societies. Such decisions are the major concern of environmental law.

As with many disciplines law and politics can be usefully qualified by "environmental" for delineation and analysis. Their close inter-relationship here is required in the role of the law in providing a frame-work for the resolution of political issues in the broad sense. The traditional avoidance by the judiciary of such issues ensured that the responsibility for this task was to rest with the executive government and its administrative agencies. This itself is a trend reaffirming the fusion of law and politics in the area.[1] Though definitional problems arise from this fusion these appear dwarfed by the problems stemming from the breadth of the field circumscribed by "the environment". The task at hand then is to develop an analytical framework with the breadth and flexibility necessary to provide a readily understandable overview of the area while being capable of facilitating detailed analysis by interested parties.

I THE ENVIRONMENT

Environment is a term which has come into vogue in the last two decades. However, despite its wide usage at all levels it is a term which avoids precise definition. In general

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1 It should be noted, however, that in the United States the courts, especially the Supreme Court, have taken an active role in the development of environmental law in that country.

usage "environment" is defined – "surrounding objects or circumstances; conditions under which any person or thing lives or is developed . . ."[2] *Prima facie* such a definition could include almost anything and everything. Legislative attempts at both Commonwealth and State levels have resulted in similarly broad definitions.[3] The Commonwealth Environment Protection (Impact of Proposals) Act 1974[4] and the N.S.W. Environmental Planning and Assessment Act 1979[5] both define "the environment" to include "all aspects of the surroundings of man, whether affecting him as an individual or in his social groupings". Such definitions though flexible and all-encompassing, throw little light onto the inquiry of the educated observed as to the realms of either environmental law or environmental politics.

An alternative approach seeks to circumscribe the above by reference to the physical components of the environment. The Tasmanian Environment Protection Act 1973, for example, limits the meaning of environment to land, water and atmosphere of the earth.[6] The New South Wales Government document *Proposals for a New Environmental Planning System for N.S.W.* is more expansive and lists land, water, noise, wind, energy and air as the internationally recognised components of the environment.[7] It clearly envisages, however, a wider spectrum in the synopsis where it refers to the "widely expressed need to broaden the scope of planning to encompass environmental factors, including social and economic considerations."[8] This points to the inadequacies of a purely physical approach to the environment.

A useful approach to facilitate detailed analysis of law and politics in the area views the environment as simply the sum total of all resources within it. Where necessary this facilitates the breaking up of the broad undefinable area into a number of smaller ones more readily delineated and analysed. At the theoretical level, at least, such an approach still has inherent problems. The term "resource" is commonly used when referring to a natural resource such as coal, oil, water or the atmosphere: that is the physical components of the environment. Its dictionary meaning, however, is far more general: "expedient device, means of supplying a need, stock that can be drawn on."[9] Roget clarifies this broad definition by reference to the economic perspective of resources. He mentions such terms as means, revenue, income, capital, property, possessions, estate, title, assets, wealth, riches, money and affluence.[10] At the theoretical level it would appear that "resources" presents similar difficulties in definition as does "environment". Once a particular resource, or section of the environment, has been isolated practical legal analysis, social or economic, can ensue.

The most common classification of resources splits them into renewable and non-renewable. Of the renewable resources some require action by man, for example human capital and technology, while others need his inaction. Trees for example are a renewable resource only if man does not substantially alter the physical parameters necessary for re-growth. The current "die-back" problem in New South Wales and Western Australia is frightening evidence of the failure of man to recognise these environmental limitations

2 G. Johnson, *The Australian Pocket Oxford Dictionary*, (1st Aust. ed. 1976) 2276.
3 *E.g.* State Regional Planning and Development, Public Works Organization and Environmental Control Act 1971 (Qld.) and Environmental Protection Council Act 1972 (S.A.).
4 See Section 3.
5 See Section 4.
6 See Section 2(1).
7 Minister for Planning and Environment, *Proposals for a New Environmental Planning System for N.S.W.* (June, 1975).
8 *Id.*, 4.
9 Note 2 *supra.*
10 P. M. Roget, *Thesaurus* (1953) paras. 632, 780, 803.

on a renewable resource. The atmosphere and water courses, on this basis, provide further examples of naturally renewable resources. Non-renewable resources, on the other hand, are those which are finite in supply and not capable of reproduction either by man or nature. The obvious examples here are oil and minerals. A further distinction which should be noted lies between those non-renewable resources capable of recycling and those destroyed in the production process; for example, both oil and coal are used up in producing energy whereas copper and iron are capable of recycling.

A distinguishing characteristic of those resources which are capable and desirable of alienation to private ownership is their relative scarcity. Though the law controls the alienation process, economics is the intellectual discipline which has been developed to precipitate the making of efficient decisions concerning private and many public resource allocations. It is politics however which appears to bear the ultimate responsibility for the problem of allocating the scarce resources of society to alternative uses. This responsibility is generally exercised through the use of the law.

II DEFINITION OF "ENVIRONMENTAL LAW"

The broad definition of "environment" as set out above highlights the enormity of potential areas of law which could be gathered together under this umbrella. The exploration of these potentialities by the legislature and courts during the 1960's and 1970's has brought about its emergence as a distinct branch of the law. With this came the attempted delineation, conceptualisation and projection of the "self identity" of environmental law by various observers. Thus one definitional approach to the area could be in terms of these recent developments.

Some commentators have in fact attempted to define environmental law by reference to those factors which precipitated its "birth and growth"; that is the public concern and awareness for conservation of the environment. Sir Garfield Barwick, for example,

> saw environmental law as embracing the concept of the maintenance whether by positive or negative action, of a *proper* framework both natural and contrived, in which humans can have and enjoy a life which engages and satisfies their capabilities both as of nature and as cultivated by education and social contact.[11]

Though environmental protection may have provided the impetus for the emergence of environmental law any attempt at this later stage in its development to circumscribe the term by reference to what is "proper" in the emerging spirit of conservation seems to the author, unreasonably altruistic and confining. Environmental law is equally concerned with development of resources as with conservation of them.

Though environmental law may only be beginning to emerge as a distinct branch of the legal system, the law has probably been concerned with issues affecting the environment for some considerable time. A major conceptual issue which arises is whether such early laws should be categorised under environmental law. In the Australian experience these laws were designed merely to facilitate the development of individual resources. Consequently they are in sharp contrast to the more recent legislation in associated cases which reflect a conservation orientation. The recent legislation in areas such as pollution control, heritage, national parks and wildlife, and environmental planning and assessment cause no definitional problems. It must be an open question, however, as to whether earlier laws fall under the auspices of environmental law, for example, legislation in the mining, forestry and energy areas. In the author's opinion any conceptualisation of the area must recognise the play off or conflict between the "conservation spirit" and the

11 G. Barwick, "Problems of Conservation" (1975) 1 *U.N.S.W. L.J.* 1, 4.

traditional economic profit based development orientation of the law which it sought to change. Both are equally at the root of the various laws concerned with the administration and development of the environment. Development and conservation are really two sides of the same coin. Take the example of legislation controlling pollution. Most would classify it as conservation legislation. In the alternative it could be viewed as development orientated legislation governing to what extent the environment may be developed for polluting purposes, *i.e.* the disposal of waste from the production process. On this basis the author would stress the importance of including *all* resource development law, whether development or conservation orientated, under environmental law.

One possible limitation which could be placed on the subject matter of environmental law would be to exclude laws already classified under existing legal categories. A glance through university law school subject lists or at the names of various legal associations produces many recognised areas of law which are forseeably encompassed by the broad statutory definition of environment: for example, Local Government Law, Town Planning Law, Mining and Petroleum Law, International Law, Industrial Law and various aspects of the Common Law. To exclude such areas would, however, be intolerable. It would fail to recognise the opportunity for environmental law to conceptually bring together various fragmented sections of the legal system long ignored in their specific isolation. Environmental law does not and cannot have the mutual exclusiveness which facilitates the ordered "pigeon holing" of many areas of law. It is a functional classification rather than a legalistic one.

A distinguishing characteristic suggested for environmental law was noted by Fisher:

> The law is accustomed to regulating relationships, but normally those between individual persons or persons having recognised legal status, such as companies, corporations, statutory institutions or the Crown. The distinctive feature of environmental law is that it deals with the relationship between man and his surroundings. It is this relationship that creates the challenge of environmental law.[12]

This is at best a half-truth. A realistic approach to the environment in fact sees that "physical phenomena are intrinsically without meaning; we have to give meaning to them according to our intentions towards them".[13] If this is accepted the law is in fact regulating the relationships between those legal personalities having divergent intentions towards the environment, rather than the relationship between these legal identities and the environment itself.

The author believes that the regulation of these inter-relationships between legal entities with diverse environmental intentions and resource allocation priorities, presents the challenge for environmental law in the future. It was only when sections of the public took up the cause that "environmental law" emerged as a distinct area of legal pursuit. Traditionally the legal system only regulated human relationships and was blind in its recognition of the inherent values of the environment *per se*. Whether this situation has changed is opened to debate. From one perspective the law was supposed to be a "mirror of society" reflecting its morals, norms and standards, and to develop in response to changes in these. The problem then for "environmental law" is that there are no generally accepted norms or standards, only an incredible diversity of individual opinion on the environment.[14] This diversity besides adding to definitional problems, points to the

12 D.E. Fisher, *Environmental Law in Australia* (1980) 5.

13 J. Bailey, *Social Theory for Planning* (1975) 6.

14 With the development of environmental law this situation may be gradually changing, *e.g.* most people would now agree that environmental pollution is undesirable. Government campaigns such as "Do the Right Thing" (N.S.W.) litter campaign may also have some effect in this regard.

difficulties inherent in any attempt to develop general principles for environmental law.[15]

Despite the problems outlined above one point is clear. The broad inter-disciplinary nature of the activities to which environmental laws are directed and the developing identity of environmental law, necessiate a broad flexible definition that can cope with and assist the development of environmental law.

III EARLY "ENVIRONMENTAL LAWS"

When the British Empire acquired Australia the existing Aboriginal tribal laws were closely connected to the environment. With the white settlers however, came the English legal and social system superimposed onto the Australian environment and 'culture'. As a penal settlement the early contempt of convicts and government officials alike must have left its mark on the Australian environment. Later came the pioneering spirit, almost totally directed at taming the wild bushland and creating a safe, civilised, ordered environment similar to that of the English shores left far behind. The early timber-getters and squatters are strong evidence of the development mentality of early Australians. After federalism the states held most of the powers relating to resources and the environment. Early environmental laws were passed at state level to facilitate the ordered development and exploitation of the country. Resources such as forests, minerals, water courses, soil and crown lands were controlled by state legislation.[16]

Health issues were the other major interest of early governmental action relating to the environment. Public health issues had become apparent with industrialisation and urbanisation. Early legislative responses in England reflected concern by those in power with the quality of the resource-labour. It was apparently recognised that England had a commercial advantage in its work force potentiality which was being eroded by poor health and housing conditions. A classic example is seen in the passing of the first Alkalai Act in 1863. This sought to prevent 0.75 of a ton of acid hydrogen being discharged into the atmosphere with the manufacture of every ton of soda. Early concern in New South Wales in this area is seen in the Local Government Act 1919 (N.S.W.) Part X Division 5 – "Interferences with health, safety or convenience" and in the N.S.W. Public Health Act 1902 Part 7 on Nuisances and Part 8 covering Polluted Water Supply.

The third legal area concerned with the environment at an early time was the common law. Australia had inherited this from England. It primarily developed to protect private property. Accordingly it had to deal with the conflicting rights of adjoining land owners. Though doctrines such as *Rylands* v *Fletcher*, private nuisance and public nuisance slowly evolved, these provided only limited potential for environmental "protection". Standing in the courts rigidly required a legal estate in the land in question and this is still a major obstacle to the effective involvement of the common law in the environmental area.[17] Thus early "environmental laws" were preoccupied with either resource development, public health or property rights.

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15 *E.g.* See S.16 Clean Waters Act 1961-1981 (N.S.W.) which attempts to set up a general standard prohibiting the pollution of water. The remainder of the Act proceeds to qualify this principle by allowing pollution under various circumstances.

16 For a detailed analysis of the relative scope of Federal power with regard to pollution see H. Opie, "Commonwealth Power to Regulate Industrial Pollution" (1976) 10 *M.U.L.R.* 577.

17 *E.g. Malone* v *Laskey* [1907] 2 K.B. 141.

IV STIMULUS FOR "NEW WAVE" ENVIRONMENTAL LAW

An explosion of activity in relation to the environment has been witnessed at a national level in the last two decades. "Since the late 1960's virtually every government in virtually every country in the world has taken some action to deal with its own national environmental problems and to establish policies and machinery for that purpose."[18] Factors stimulating this activity can be grouped under two inter-related headings.

(a) Increased Impact of Man on the Environment

Industrialisation and its associated development of natural resources lie historically at the heart of man's capacity to affect his environment. Mass production and economies of scale have ensured the continuing escalation of the industrialisation process. The result has been an unprecedented extension of the ability and capacity of man to affect the environment. This phenomena has two major influences.

First, industrialisation has fostered the accumulation of large amounts of capital which has facilitated the modification of the environment on a very large scale. In the development of company law legal personality was given to an organisational fiction and it was allowed to raise the required capital from a number of individuals. With the increasing sophistication of industrial society came the rise of financial institutions and varied money markets to assist in industrial funding. In Australia with its small population this need was met by multi-national corporate conglomerates. The second and more obvious factor has been the rise of technology. From the early days of the industrial revolution when man began to use large and sophisticated machines to aid him in his conversion of resources into marketable goods there has been a rapid extension in the capacity to develop the environment. Technology, itself a man-made resource, has further enhanced man's capabilities in this regard. Examples are innumerable. Nuclear power is perhaps the most frightening as man now possesses the capacity to make the whole environment of the planet uninhabitable. The ramifications of technology's rise to power have been well documented and are beyond the scope of this paper.

(b) Increased Public Concern for the Environment

The growth of technology and knowledge has allowed man to better understand and monitor his impact on the environment. Machines and computers have given him a capacity to collect and analyse data, previously beyond his reach, and at an increasing rate. The impact of a particulat activity can now be more readily qualified and quantified. Associated with this has been a reallocation of man-power and technology to such tasks. As man's understanding in this regard expanded so did his fears concerning the ramifications of his activities on the environment. Growing education standards of the general public have further permitted this understanding to permeate all levels of society. This ground swell of educational awareness of the environment has been further fueled in the last two decades by ever increasing media interest in the area. World communication systems now inform the public of such happenings as international nuclear reactor disasters the day they happen. "Live eye" news, current affairs programmes, television documentaries, as well as the newspapers all given environmental issues extensive coverage. Information factors must have played an important role in the awakening of public awareness and concern in the environmental field.[19]

18 M. Strong, "Only One Earth" (1975) *A.B.C. Insight (No. 320) Broadcast.*

19 *E.g.* The Terania Creek forestry dispute (N.S.W.) and the pollution readings on evening television news.

Associated with this has been a change in the expectations of ordinary people with regard to their environment. In the development of society ordinary people have now come to expect standards of cleanliness, safety and wholesomeness in their surroundings that previously had been the exclusive birthright of the well-born or rich.[20] As economic growth distributed the benefits of industrialisation a high "quantity of life" (consumer durables, money and assets for example) was obtainable by a greater percentage of the population in modern western economies. As the middle classes achieved this, their interests may be seen to have shifted towards "quality of life" issues.[21] This shift in public awareness and concern has, through the democratic process, stimulated a shift in the concerns of governmental policy. The unchecked pursuit of traditional goals of government economic policy were to some extent brought into question, that is " . . . full employment, price stability, balance of payments equilibrium, a satisfactory rate of economic growth, efficient use of resources, and equitable distribution of income."[22]

In seeking to cope with this shift, pollution emerged as the major centre of concern for law, politics and economics. Economists coined the term "common property resources" for "those stable natural assets which cannot, or can only imperfectly, be reduced to private ownership".[23] Common examples are the air and water courses. These resources were unpriced and access open and unlimited. It was apparent that this led to overuse, misuse and quality degradation. As Kneese noted:

> market forces while marvellously efficient in allocating owned resources, worked to damage or destroy common property resources. Though the market system worked efficiently in stimulating the exploitation of basis resource, and the processing and distributing of them, it failed almost completely in the efficient disposal of the residue.[24]

Here environmental economics pointed to the already felt need for government involvement to give effect to the relatively recent concern of the public for an awareness of the environment.

V THE RESPONSE OF THE COMMON LAW

The role of the common law in the environmental area was limited by the existence of rigid requirements for enforcing traditional rights attached to land. Its slow evolution, with strict adherence to precedent ensured no radical reaction to the pressures of the 1960's and 1970's for environmental reform. Attempts by environmentalists to move from the traditional framework into the wider dimensions of environmental issues were thwarted. The courts failed to recognise the interests of various individuals and groups in the environment and its component resources. Standing and class action rules clearly favoured the development lobby. Even where such obstacles were overcome the legalism and the adversary system, clinging tenaciously to precedent and antiquated legal concepts, usually ensured that environmental issues were turned into technical legal battles. This criticism is well outlined by Mr. Justice Jacobs in *Johnson* v *Kent* (the Black Mountain Tower case).[25] The dispute concerned the P.M.G.'s decision to build a large communications tower and restaurant in a public park on the mountain rim surrounding Canberra.

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20 A. V. Keese, *Economics and The Environment* (1977) 8.
21 The examination of the environmental movement from a class perspective is an interesting project on which the author has found little written.
22 J. W. Nevile, *Fiscal Policy in Australia, Theory and Practice* (1970) 7.
23 Note 20 *supra,* 10.
24 *Id.,* 11.
25 (1975) 132 C.L.R. 164; (1975) 49 A.L.J.R. 27.

Jacobs J. stated:

> But the substance of the battle is not one which easily lends itself to determination by the courts along established avenues of legal decision. So what was at base a dispute involving community attitudes and purposes, *a political dispute in the broad sense,* had perforce when it was brought before the Court to turn itself largely into a technical legal dispute on the question whether there was legal authority to erect the structure.[26]

The recent Australian High Court decision in the Australian Conservation Foundation case[27] reaffirmed the tight controls the courts exercise over access to them in relation to environmental issues. This situation is often compared to that of the United States which has far more lenient requirements for standing. There the growing body of concerned lawyers with the financial backing of large foundations and societies, ensured the United States Courts (especially the Supreme Court) a far more effective role in environmental law. Broad powers to go to court, for example, to seek to enforce certain standards or to force an administrative agency to act, were established. Environmental organisations soon found themselves in court fighting for specific issues and general principles regarding the environment. Examples can be seen in the Sierra Club, the Wilderness Society and the Environmental Defence Fund.[28] Unfortunately, however, this was a uniquely American experience.

VI THE "NEW WAVE" OF ENVIRONMENTAL LAW

Various powers to control pollution had been scattered through a number of unrelated Acts implemented by equally unrelated government bureaucracies. These were relatively unknown and practically ineffective. The passing of the Victorian Clean Air Act in 1956 heralded the political recognition in Australia of the need for specific legislative programmes to prevent environmental pollution. Other states followed. The Clean Air Act 1961 (N.S.W.) was passed by the Askin Government to take advantage of the extent and popularity of the pollution issue at the time. The sources of waste emission attacked by the legislation were the large scale commercial and industrial plants. The various state schemes almost universally adopted programmes based on the licensing of discharges from such plants. It is not the intention of this paper to examine these schemes in detail nor to review the alternative approaches available in controlling pollution at either the state or Commonwealth levels.[29]

Due to the confusing multiplicity of new environmental laws at the state level the position in New South Wales will be examined by way of example As with most states a government agency was necessary to implement pollution legislation and monitor environmental quality. The State Pollution Control Commission Act 1970 (N.S.W.) set up such an authority for New South Wales. Once the politicians had made the commitment to the policy of pollution control the details were left to the agency. Broad delegations of power were necessary with discretions lying in enforcement bodies. The Clean Waters Act 1970 (N.S.W.) and the Waste Disposal Act 1970 (N.S.W.) (setting up its own metropolitan waste disposal authority) were also passed in 1970. The regulatory scheme in the air and water areas was imposed with minimum conflict as standards reflected a compromise between

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26 *Id.*, 173.

27 (1980) 28 A.L.R. 257.

28 *E.g. Sierra Club* v *Morton* 405 U.S. 727 (1972); 31 L.Ed. 2d 636 and *U.S.* v *Students Challenging Regulatory Agency Procedures* 412 U.S. 669 (1973); 37 L.Ed. 2d 254.

29 See generally M. Tedeschi, "Environmental Law in New South Wales" (1973) 47 *A.L.J.* 711. F. Johnson, "Reforming Environmental Laws – A choice of Analogies" National Conservation Study Conference, Canberra, November 1973, Unpublished. Note 16 *supra.*

industry and public interests (defined here by the S.P.C.C.). The community pressure for reform was appeased and the electorate could "sleep soundly" knowing that their bureaucratic watchdog, the S.P.C.C., was at work securing environmental quality. Many have criticised the semi-appeasement role of the S.P.C.C. in this regard, preferring a hard-line approach. The author however feels, that this body is a dedicated and effective organisation working within serious confines of budgetry restraint relative to the size of their task.

The problem of noise pollution was attacked in 1975 by the Noise Control Act 1975 (N.S.W.). The area presented greater difficulties for the legislature as the problem was far more intangible and arose not only in the industry-public context but increasingly in the public – public context. The common law was relatively ineffective being only concerned with protecting proprietary rights. Under the provisions of the Noise Control Act similar emission and development controls as those in the air and water areas were mainly applied to industry. The conflicting interest of individuals on the other hand, were resolved by the adoption, in the regulations, of some generally accepted social standards, for example no lawn mowers before 8.00 a.m. on Sundays or Public Holidays. Avenues for complaint were opened to the police, the S.P.C.C., the Courts of Petty Sessions and the Supreme Court (now the jurisdiction of the Land and Environment Court) and various enforcement powers were given to them. One final pollution statute which should be noted here is the Prevention of Oil Pollution of Navigable Waters Act 1960 (N.S.W.). This applies to the control of oil pollution from vessels and from land installations into navigable waters lying within the territorial limits, the ports, and tidal rivers and the inland navigable waters of New South Wales. It is complimentary to Commonwealth legislation, and administered by the Maritime Services Board.[30]

Another early response to the electoral pressure regarding environmental issues was the National Parks and Wildlife Act 1967 (N.S.W.). The second national park in the world was in fact created in New South Wales on 31 March, 1879 – the Royal National Park. The new act allowed for the setting up of a specialist agency which could analyse and present proposals to Cabinet concerning the setting aside of areas in New South Wales which were environmentally significant. The Act was completely overhauled in 1974.[31] Two other resources received legislative attention – Heritage was dealt with under the Heritage Act 1977 (N.S.W.) and coasts under the Coastal Protection Act 1979 (N.S.W.). In the same year the resource land received treatment under the Environmental Planning and Assessment Act 1979 (N.S.W.).

In England administrative controls over such matters as sub-divisions, residential districts, flat buildings and other buildings came with industrialisation and urbanisation.[32] There was an early form of town and country planning, arguably the most important resource development control capable of falling under the auspices of environmental law. In fact town planning legislation had existed in the United Kingdom since 1909 and in New Zealand since 1926.[33] In New South Wales action was taken by the government in 1945 with the introduction of Part XIIA – Town and Country Planning Schemes, into the Local Government Act. This legislation, which was in force until 1979, was modelled on the equivalent United Kingdom legislation. Amendments had been made on purely

30 State Pollution Control Commission, *The State Pollution Control Commission and The Environmental Control Legislation of N.S.W.* EL -1 October, 1974.
31 National Parks and Wildlife Act 1974 (N.S.W.).
32 H. Whitmore, "Town and Country Planning" Chapter VII of *U.N.S.W. Law School Notes on Local Government Law.*
33 *Ibid.*

an ad hoc basis either in response to changing political policies on a particular issue or as a stop-gap measure to counter a problem raised by litigation.[34] Rather than examine this legislation it is sufficient to note that due to its practical problems and lack of environmental standards most involved parties and observers considered it long overdue for review and overhaul when this was done in 1979. The legislative processes leading up to the statutory package of 1979 were lengthy. The transition from Local Government Law to Environmental Law had clearly been established by 1963 when the N.S.W. State Planning Authority Act charged the Authority with the responsibility of securing orderly and economic development of the State's land. The previous Liberal/Country Party State Government officially commenced the review process in 1974 with the publication of its report, generally referred to as the Green Book.[35] This was followed by two further reports the Blue Book[36] and the White Book,[37] before the final presentation of a draft Bill. The Bill lapsed after being introduced into Parliament shortly before the 1976 State elections. Of the 1979 Environmental Reform which finally evenutuated, Murray Wilcox states:

> . . .the process of review has been one which had been undertaken over a number of years on both sides of politics and undoubtedly represents a consensus amongst politicians that the present legislation is obsolete and needs to be replaced.[38]

The Environmental Planning and Assessment Act 1979 (N.S.W.) and the Land and Environment Court Act 1979 (N.S.W.) have ensured the importance of environmental law in the legal system of New South Wales. The E.P.A. Act has however received some criticism, especially concerning the scope of ministerial powers. Despite this the new system must be seen as providing a far more effective framework to facilitate total or overall environmental planning and produce a system more readily understood by the general public.[39] It also reflects a development from the early movements towards environmental reform as reflected in the objects of the State Planning Authority Act 1963 (N.S.W.) concerning the orderly and economic development of land. The stated objects of the E.P.A. Act as set out in Section 5 clearly point to the political recognition of the rising environmental consciousness of the general public.

VII CLASSIFICATION OF ENVIRONMENTAL LAWS

This paper to date suggests a break up of environmental law into the old legislation preoccupied with development and "the new wave" where the conservation spirit would seem to predominate. This would be incorrect and add only confusion to any attempted analysis of the area. The E.P.A. Act for example is concerned with facilitating development just as was the Forestry Act 1916 (N.S.W.) or the Mining Act 1906 (N.S.W.).

Another possibility could be to distinguish resource laws, such as mining or forestry

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34 Australian Seminar Services (Seminar Transcript) *Environmental Planning and Assessment Bill, 1979. A New Era for Planning and Development in N.S.W.* Wentworth Hotel, Sydney, 11 June, 1979. M. Wilcox, "The Environmental Planning and Assessment Bill 1979: A Conceptual and Legal Framework" 1.1.

35 Minister for Planning and Environment, *Towards a New Planning System for New South Wales* (1st Report, 1974).

36 Minister for Planning and Environment, *Proposals for a New Environment Planning System for New South Wales* (2nd Report, 1975).

37 N.S.W. Planning and Environment Commission, *Report to the Minister for Planning and Environment required under Section 20(1) of the N.S.W. Planning and Environment Commission Act, 1974* (November, 1975).

38 Note 34 *supra.*

39 Australian Seminar Services, note 34 *supra.* H. Whitmore, "Appeal Mechanisms and Administration of the New Planning Legislation" 6.1.

legislation, from environmental laws, that is, those laws seeking in the spirit of conservation, to introduce the environmental dimension into the overall decision-making process. As with the distinction between development and conservation laws this approach is unsatisfactory. Both run the risk of alienating resource allocation decisions from the growing community awareness and expectations regarding the environment, and relegating environmental law, as so classified, to a relatively ineffective public relations exercise. A useful approach derives from a loose analogy with the related discipline of economics. There micro-economics is the analysis of individual markets. Macro-economics, on the other hand, is concerned with total flows of income, expenditure and employment within the economic system. Here it is concerned with the intrusion of government into the economy through its use of fiscal policies. A similar conceptual break-down may be useful for statutory environmental law. At the micro level are a number of specific statutes setting up the regulatory frameworks under which a particular section of the environment, usually one natural resource, is developed or conserved. At the macro level, on the other hand, are the more generalised statutory inroads seeking to introduce into government and private decision making, an awareness and consideration of the total environmental spectrum. Some examples follow.

(a) Micro Environmental Law

Early New South Wales legislation covering particular resources was directed towards facilitating their exploitation and development. Examples are seen in the Mining Act 1906, the State Coal Mines Act 1912, the Water Act 1912, the River Murray Waters Act 1915, the Crown Lands Consolidation Act 1913, the Pastures Protection Act 1934, the Fisheries and Oyster Farms Act 1935, the Soil Conservation Act 1938, and the Forestry Act 1916. It is interesting to note that although the Pastures Protection Act 1934 and the Soil Conservation Act 1938 are apparently directed towards conservation they really reflect simply the statutory recognition that unchecked exploitation of particular resources could lead to the economic degradation of the resource. They still had therefore, development as their fundamental concern and it is only in the 1960's and 1970's that the orientation of some micro legislation regarding resources control has shifted towards conservation. Clear examples of this shift are seen in the Clean Air Act 1961, the National Parks and Wildlife Acts 1967 and 1974 and the Clean Waters Act 1970. Micro environmental laws, then, are those which set up the administrative framework under which private and government resource allocation and development decisions are made concerning a particular resource. A few final examples are the Dangerous Goods Act 1975 (N.S.W.), the Radioactive Substances Act 1967 (N.S.W.), the Poisons Act 1966 (N.S.W. and the Atomic Energy Act 1953-1973 (Cth).

(b) Macro Environmental Law

These laws can be viewed as a political reaction to the previously outlined rising expectations within the general public concerning their environment. Through them government has sought to infuse an awareness of the environmental dimension into the development activities of private individuals and into its own instrumentalities. They further can be seen as setting up the general administrative framework under which the environmental impact of resource allocation decisions can be assessed.

The most notable example of a macro environmental law in Australia is the Environment Protection (Impact of Proposals) Act passed by the Federal Labor Government in 1974. This is probably the most extensive attempt anywhere to achieve the integration

of the environmental dimension into government decision making across the board. Section 5 of the Act took the then unusual step of setting out its object:

> to ensure to the greatest extent that is practicable that matters affecting the environment to a significant extent are fully examined and taken into account in and in relation to . . .

Following this was an extensive list which attempted to extend the coverage of the Act to all decisions made by or on behalf of the Commonwealth government and Commonwealth authorities.[40] This extensive scope was indirectly validated by the High Court in *Murphyores Inc. Pty. Ltd.* v. *The Commonwealth.*[41] The main tools used by the Act in achieving its stated purpose were the environmental impact statement and the public inquiry. Between July 1975, when the administrative procedures under the Act came into force, and March 1978, 48 environmental impact statements were directed.[42] Two important environmental inquiries were also conducted, the Ranger Inquiry on uranium development in the Northern Territory and the Fraser Island Inquiry. The importance of the Act has, however, seriously diminished with the Fraser Government.

The New South Wales counterpart to this legislation was originally contained in a document "Principles and Procedures for Environmental Impact Assessment in N.S.W. – S.P.C.C. Environmental Standard EI-4" published in October 1974. It was a vague document of uncertain application and was never enacted. Though its fundamental concern was environmental considerations it stressed that these were only one factor to be taken into account along with social and economic factors. The State Pollution Control Commission, the Planning and Environment Commission, Local Government and other public authorities who were "determining authorities" were charged with the implementation of the document. Again, use was made of inquiries and environmental impact statements. One principle of particular interest to the later analysis of "environmental politics" required development authorities to demand an environmental impact statement where the proposal " . . . may generate significant public controversy".[43] These principles were later replaced by Part 5 of the Environmental Planning and Assessment Act 1979 (N.S.W.). This Act shows that the macro and micro delineations are not necessarily mutually exclusive within individual Acts. Under the suggested classification the E.P.A. Act in its control of development in relation to the particular resource land would be a micro environmental law. Within it however, the provisions of Part 5 are clearly macro in orientation.

In summary, "environmental law" ranges over a broad field of related and unrelated legislation. The macro-micro break-up of it should assist in analysis by allowing a broad classification suggesting the scope and orientation of the law in question. When detailed analysis ensues and the practical operation of the law is examined the close inter-relationship of law and politics is often seen. Environmental law must regularly produce a decision on a political issue of resource allocation having environmental significance. The various parties acting under and operating the law in these circumstances greatly influence the ultimate decision which the law has governed. Both the scope of environmental law and its recent history point to its political nature in the broad sense. The only

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40 Even the United States National Environmental Policy Act was limited in scope to "major federal actions". For general discussion of this qualification see F. Anderson, "N.E.P.A. in the Courts" as cited in G. Kelly, "Commonwealth Legislation Relating to Environmental Impact Statements" (1976) 50 *A.L.J.* 498, 499 in note 4.

41 (1976) 136 C.L.R.1; (1976) 9 A.L.R. 199.

42 For the full list of projects subjected to F.13 see (1978) 10 *Australia and New Zealand Environmental Report* 276.

43 Issued under authority of the Hon. Sir John Fuller, M.L.C., Minister for Planning and Environment, 1 October, 1974.

useful comparison is industrial law. It is in the operation of the environmental law then, that environmental politics are of fundamental importance.

VIII ENVIRONMENTAL POLITICS

The distinction between environmental politics and environmental law is not easy to discern. It appears environmental law provides the framework in which environmental politics can take place. The close inter-relationship between the two is noted at all levels of analysis. Politicians pass environmental laws in response to political pressure from the electorate. Most of the powers pursuant to these laws are in turn placed in the hands of executive government or its delegates in the form of Government Agencies, Commissions, Statutory Authorities or other governmental bodies. Thus, outside of the role of the judiciary, most of the responsibility for decisions relating to the environment under existing environmental laws is, in this sense, political. The importance of environmental politics is seen in the policies exhibited by, and implemented in government involvement in the environmental area. Two levels can be outlined. First, the general policy behind macro-environmental laws which usually reflects the attitude of the democratically elected political party. Secondly, at the more specific level, are the policies of the various government agencies involved in the implementation of macro and micro environmental laws. As with government agencies, individuals and groups within a community have formed various attitudes with respect to individual environmental issues. Usually these reflect their conflicting interests in the outcome of the issue, for example, employment, profit or recreation. It must be stressed that:

> practical disagreements about environmental policy are rarely simple conflicts between growth and conservation. They are conflicts about what to use, what to produce and how to pay for it – conflicts between people competing in familiar ways for rival values or shares of scarce resources.[44]

This political nature of environmental law was pointed out by Mr. Justice Jacobs in the previously noted Black Mountain Tower Case.[45] There a legal dispute arose from conflicting community attitudes and purposes and was classified as "a political dispute in the broad sense".

The broader perspective on evironmental politics is seen when the above issues are viewed at the societal level. Society is organised to ensure segmental group participation of individuals. A peripheral effect of this is the standardisation of individual opinions and priorities to reduce conflict which would otherwise be unmanageable. In practice this trend predominates in the environmental field as many groups do not have any power or desire to stop the terminological translation of their sectional interest, by those with power into the elusive and everchanging "public interest". In this way "consensus" is achieved through a political decision imposed on the groups involved. Democracy asserts that in so doing the government has acted in the public interest. Though the interests of individuals conflict, people are assumed to agree with each other about the most important things in social life and basic values are seen to be shared.[46] Respect for a government decision in this regard is one such value. The institutionalisation of governmental power in imposing a solution to resolve conflicting interests brings into play the notion of political authority.

In the environmental arena in Australia, and most of the industrialised western world, an undermining of authority can be detected in the growing dissatisfaction with

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44 H. Stretton, *Capitalism, Socialism and the Environment* (1976) 2.
45 Note 25 *supra.*
46 Note 13 *supra,* 24-33.

the traditional justifications for development; petitions, demonstrations, objections under relevant laws and even court actions provide evidence of this. One factor limiting the scope of this trend in Australia is the apathy so often prevalent in the general public. Many conflicting opinions regarding the environment can be found, ranging from those believers in renewable resources (the attitude that the future will cure the present problems) to the "dire doomsdayers" who stress exhaustible resources and wait patiently for the oncoming day of reckoning. Few individuals however have the time or the motivation to convert opinion into participation. Conflict thus to a large extent remains dormant from a societal point of view. Increasingly, however, this is not the case with regard to individual issues as the following example reflects.

Washpool is a current example of environmental conflict surrounding forestry resources in New South Wales. It reflects the political nature of the issues with which environmental law must deal. The Washpool forest is about 80 kilometres west of Grafton, covering an area of about 46,000 hectares. It is considered by environmental observers to be the most important area of rainforest in the State. At the centre of the conflict is Grafton City. The importance of the timber issue locally can be seen in the last Grafton City Council elections. Mike Emerson was elected as an alderman on his campaign "Mike Emerson stands for the Timber Industry". It was a timber vote with the conservationist candidate coming last in the polls.[47] This, on the one hand, is an area of unique environmental value for present and future generations, and on the other, a local community predominantly supporting its logging on the basis of their own legitimate vested interests. Both the pro-logging group and the conservationists have organised themselves into lobby groups which have engendered much heated debate over the future of the forest.

The social conflict generated over this environmental issue is obvious and far reaching. People seeing their vested interests threatened, and having no for system for seeking to channel their interests and energies into the search for a consensus solution, must resort to overt conflict. Any decision will have to be imposed by governmental authority, but the acceptability of it may well be governed by the effectiveness of the decision-making processes in providing a receptive forum for the presentation of the various interests involved. Early recognition of such potential conflicts, planning to avoid them, and seeking consensus regarding them is necessary from the outset of the dispute. If this is done the development of the dispute may be directed towards achieving some real consensus, if possible, rather than supporting the alienation of people to opposing factions where a government is forced to impose a political solution at the latest stage possible after the conflict has had time to spread and intensify. In dealing with environmental politics the environmental law must be developed to meet future conflicts.

IX PUBLIC INQUIRIES

From a conflict point of view the public inquiry offers the greatest opportunities for resolution of the interests of various parties. It has now generally been accepted by governments that public participation in environmental decision making processes is desirable in the public interest. As noted, this usually involves participation of groups with conflicting interests. There are a number of ways in which public participation may be achieved. Some examples include seeking comment in response to a public advertisement, written submissions, discussion in the office of the relevant body, public meetings, dis-

47 J. Hoffman, "Saturday Morning in Grafton; trees, river, money" *Sydney Morning Herald* (2 May, 1981) 45.

cussions with a group of persons invited, open discussions and public inquiries.[48] In seek- to resolve conflicting interests the most significant of these techniques would appear to be the use of public inquiries.

In the United Kingdom public inquiries have been a feature of government for many years especially in relation to land use planning and compulsory acquisition. Inquiries related specifically to environmental planning are, however, unknown in the United Kingdom, although statutory planning inquiries may well include the environmental aspects of a proposal.[49] In New South Wales the use of public inquiries in environmental-resource matters, has been increasingly prominant as an administrative tool. Inquiries have been used for a number of years in New South Wales with regard to mining. Under the Mining Act 1973 (N.S.W.) section 112 "any person" may object to the granting of a lease for mining or mining purposes. There is no limitation requiring any estate or interest in land, as is necessary at common law, for locus standi.

It was further established in *Sinclair* v *Maryborough Mining Warden*[50] that the making of an objection was also sufficient to establish locus standi for an appeal against the mining warden's decision. The Act gives no indication however as to what is considered to be a sound basis for an objection, merely stating that the warden will inquire into the issues and deliver a report: section 112 (3). It seems that the scope of a warden inquiry will be limited: *Stow* v *Mineral Holdings Ltd.*[51] There the High Court decided that the warden was only empowered to hear the objection and to decide whether the application was one capable of being granted. It was the Minister's decision as to whether or not it should be granted "as a matter of policy and public interest."[52] It was also for the Minister to place any conditions upon the lease. Under section 178 of the Mining Act 1973 (N.S.W.) the Minister may direct the warden to hold an inquiry "with reference to any matter arising under or connected with, this Act . . .". The warden then, pursuant to section 178 (2), has the power to hold such an inquiry as he deems necessary. Here lies the scope for environmental inquiries under the Act. It is to be noted however that the warden, who has a vested interest in mining, is the sole residuary of such powers under the Act. It is further important, in light of this example, to note that the Forestry Act 1916 (N.S.W.) has no parallel sections providing for inquiry powers.

The extensive development of the inquiry system in New South Wales regarding environmental issues was facilitated by the powers granted to the S.P.C.C. and the P.E.C. (now the Department of Environment and Planning) under their respective source statutes.[53] Various powers regarding calling of witnesses, evidence, etc., were granted under the Acts to the Commission as statutory bodies. The S.P.C.C. was given the role of implementing the government's Environmental Impact Policy as outlined in EI-4 in its 1975 Annual Report. An interesting insight into the area can be seen in its statement:

> It is vital that these inquiries be objective and practical, so that they do not degenerate into costly legalistic battles, or into exercises in mud-raking and point-taking arguments irrelevant to their environmental purposes.

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48 O'Brien, "Environmental Impact Statements and 'Push-me-pull-me' approach" (1973) 7 *Search* 264, 265.

49 Wraith and Lamb, "Public Inquiries as an Instrument of Government" (1971) 157-163 as cited in D.E. Fisher, "Legal Aspects of the Use in Australia of the Public Inquiry as a Technique of Environmental Planning of the Government Level", Unpublished.

50 (1975) 49 A.L.J.R. 166.

51 (1977) 51 A.L.J.R. 672.

52 *Id.*, 673.

53 State Pollution Control Commission Act 1970 (N.S.W.). Planning and Environment Commission Act 1974 (N.S.W.).

> The judgment of non-environmental issues should be left to properly constituted tribunals, and decision making on points of law to the courts. The purpose of environmental inquiries should be to adduce and analyse facts and opinions on the environmental impact of proposals, so that governments and their agencies have proper advice on, and regard for, environmental factors in decision making.[54]

With the replacement of EI-4 by Part 5 of the Environmental Planning and Assessment Act 1979 (N.S.W.) the S.P.C.C. was replaced as the inquiring body by a ministerially appointed commission of inquiry to analyse a particular issue. The inquiry has very broad powers under the Act, though procedures actually followed do not appear to have changed substantially. The Commission is to produce a copy of "Findings and Recommendations" which shall be considered by the Minister in forwarding his advice to the particular authority concerned. This procedure would appear to involve somewhat more than the traditional fact-finding role of inquiries. It is interesting to compare these comments with the Commonwealth position under the Environmental Assessment (Impact of Proposals) Act 1974 (Cth) as explained by the Ranger Commissioners of Inquiry. Though the Commissioners stressed the importance of their findings of fact this was because:

> the intended operation of the Act . . . is that members of the public . . . be provided with findings of fact as determined by an independent tribunal, so that they can form their own opinions and if necessary, influence parliamentary and government action.[55]

This clearly stresses what can be seen as an important role of inquiries in conflict resolutions. To be effective in this regard the inquiry must be seen by its participants as more than simply a fact finding tribunal.

Public inquiries provide the perfect example of the close inter-relationships between environmental law and environmental politics. They deal with political issues in the broad sense. The activation process however and the conduct of the inquiries clearly has a legal base. In New South Wales the Environmental Planning and Assessment Act 1979 gives the Minister power to direct an inquiry regarding a designated development: sections 88 and 89. Part 6 – Implementation and Enforcement Division – "Public Inquiries and Settlement of Disputes" provides the other legislative base for the ministerial power to direct that an inquiry be held regarding an environmental issue. Section 119 allows the Minister a very broad power to direct a public inquiry and section 120 covers the proceedings at inquiries. Though section 119 (5) specifically excludes the Commission of Inquiry from being subject to the direction of the Minister, his power to appoint commissioners under sub-section 2 reflects a further political influence on the final outcome of the Commission's findings. Political power is also exercised in setting the terms of reference for an inquiry. Two distinct kinds are noted. First, those intended to ascertain the facts to which a stated political policy is to be applied and secondly, those whose purpose is to indicate what policy is desirable in the individual case or what policy should be appropriate in general (Parliamentary Committees of Inquiry are especially important for this latter classification).[56] In its examination of policy issues the second type of inquiry must be considered as having far greater potential for the resolution of conflict. Their increasing use highlights the government's recognition, in the environmental field, of the importance of environmental conflict. Alternatively, they may be viewed as a tool used

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54 Parliament of New South Wales *Report of the State Pollution Control Commission for year ended 30th June, 1975* (1975) 25-26.

55 Ranger Uranium Environmental Inquiry (2nd Report, Parl. Paper No. 117, 1977) cited in D.E. Fisher, note 12 *supra.*

56 Note 49 *supra.*

by government to reassert its authority with regard to difficult environmental decisions. In either sense they are undoubtedly political in nature. Consequently their decisions and reports often reflect short-term political priorities rather than longer term objective planning considerations of environmental, social or economic significance. One possible solution to this problem would involve the further fusion of law and politics in the conduct of inquiries on a judicial basis. The Federal Ranger Inquiry conducted by Mr. Justice Fox provides an example of a "semi-judicial appraoch". Many advantages and disadvantages of such a step can be discerned, the details of which are beyond the scope of this paper.

X CONCLUSION

Environmental law covers a broad spectrum and eludes precise definition. In its practical operation many related disciplines are of significance. Its preoccupation with the allocation of society's scarce resources produces its close inter-relationship with politics. Here it governs the activities of various parties having diverse intentions towards the environment. Conflict is inherent and environmental law must provide the framework within which such conflicts are to be resolved.