ENVIRONMENTAL POLICY IN AUSTRALIA:

A THEMATIC REVIEW

by

IAN H. EBERHARD Ph.D.

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DECLARATION

This dissertation contains no material which has been submitted for the award of any degree of diploma in any university or college and to the best of my knowledge and belief, contains no copy or paraphrase of material previously written or published by another person except where due acknowledgement is made in the text.

IAN EBERHARD

CONTENTS

APPENDIXES

PREFACE

The importance of 'environmental policy' and its claim to a special portfolio in government at the national level was first recognized in 1971. Policy since then has grown rapidly. It is now diverse, complex and influential in public affairs. A great deal has happened in little more than fifteen years and it has been difficult for practitioners, partisans and commentators to keep in touch with events in particular areas of interest, let alone with events covering the field as a whole. Environmental policy has a strong claim to critical attention.

In view of the pace of events, it is not surprising that the literature of serious study of Australian Environmental Policy, as distinct from other writing and documentation, is limited. Environmental histories have been used as case studies in reviews directed at the interest-group theory of politics; some attention has been paid to inter-governmental relations, but there are few other detailed commentaries of an interpretive kind. There has been equal neglect of policy outputs, in terms of rigorous examination of efficiency, effectiveness and impacts. More contributions at these levels are undoubtedly needed.

This study however,takes a broad perspective. It views Australian Environmental Policy (AEP) as a working sub-system of public administration. It draws selectively but widely from the whole field. Its particular focus is a search for 'structural issues'. At the same time it attempts to present a generally useful guide and reference source to documentation and literature. It is written with the idea in mind that administrators and managers may have a need for a work of this kind.

ABSTRACT

Australian Environmental Policy (AEP) has grown very rapidly in recent decades. It is now complex, diverse and influential in national affairs. It may be demarcated as that field of policy processes, with expressions in laws, programmes and institutions which:

- reflect the desire to conserve natural and cultural heritage;
- seek to preserve the amenity of commons, such as air, water and public open space; or
- are allied measures supplementing both 'common law' and common sense in the preservation of healthful, congenial and advantageous conditions; and
- reflect a common code within Australia's federal system.

The growth in AEP is largely a response to 'environmentalism', a social and political movement concerned with quality-of-life issues and generally opposed to the pattern of national development fostered by established value systems and practices. Natural resources are sources of wealth and power, while concern for environmental protection is based on deeply-felt value systems. Disputes over the conflicting claims of development and environmental protection have been bitter. Development interests are often well-placed. They have a powerful bargaining position, not least because of the economic benefits that are generally considered to flow from their activities. Conservation groups, on the other hand, have the advantage of more clearly representing a public rather than a private interest. Success in such disputes is likely to favour the coalition of interests which has or achieves political bargaining power and which then uses this to greatest effect.

In the Australian federal system, the power to make laws with respect to the environment is shared between the Commonwealth on the one hand and the States and the Northern Territory on the other. The primary (in the sense of widest) responsibility for environmental matters rests with the States and the Northern Territory. The Commonwealth has plenary power with respect to Australian external territories; seas and submerged lands beyond low water; places owned or acquired by it; and for matters referred to it by the States. However, the Commonwealth power to generally intervene in the business of environmental management is considerable. Important means available to the Commonwealth include its powers to make laws with respect to:

1. trade and commerce with other countries and among States;
2. foreign corporations and trading and financial corporations formed within the limits of the Commonwealth;
3. taxation;
4. external affairs;
5. the people of any race for whom it is deemed necessary to make special laws; and
6. the granting of financial assistance to any State on such terms and conditions as it thinks fit.

In some notable cases, the Commonwealth has overridden State policy to 'save' heritage assets.

The international expression of environmentalism has been and remains a rich seed-bed of policy for governments and non-government organizations alike. Specific outcomes of internationalism in AEP have been, (1) accession to treaties and conventions, (2) membership of international bodies or linkages to them and participation in international environment programmes, (3) international status for select Australian sites, and (4) commitments to objectives or resolutions of

international forums. The third United Nations Conference On The Law Of The Sea (UNCLOS) codified many new concepts in respect of national rights and duties. It has provided a basis for highly significant extensions to Australian territorial jurisdiction, linking this to concepts of marine conservation and protection. The Law of the Sea has under-pinned the Offshore Constitutional Settlement (OCS), a Commonwealth-State negotiation over rights and responsibilities in respect of the marine environment.

In practice, Australian federalism is essentially a matter of Commonwealth-State bargaining, from well-established and relatively balanced positions. Important arrangements which go beyond bilateral concerns, are generally agreed to at the annual Premiers' Conference or are mediated by standing Ministerial Councils, such as the Australian Environmental Council (AEC) and the Council of Nature Conservation Ministers (CONCOM).

Over the period 1970-1984 (fifteen years) there were 154 principal enactments by Australian parliaments, concerned directly or at least importantly with environmental matters. The high profile innovations of the period were undoubtedly:

1. the introduction of environmental impact assessment;
2. the extension of controls over pollutants and their consolidation in an administrative sense;
3. reforms of land-use planning;
4. the strengthening of national parks and wildlife legislation and the introduction of special heritage legislation;
5. legislation concerned with the marine environment; and,
6. other legislation in support of international treaties and conventions on environmental matters.

Australian environmental legislation is concerned with regulation, the establishment of infra-structures and the conduct of programmes and services. The implementation of AEP has required the establishment of special research and allied institutions. The development of environmental information systems is a critical and active area of growth. Criticisms of current provisions are chiefly centred on inadequacies with respect to 'development control', the coalition of land-use planning, environmental impact assessment and pollution control. Recent developments have signalled a sharpening focus on the inter-disciplinary area of environmentalism and economics. Other foci of concern are sector management traditions and rights of appeal and 'standing' in respect of both statutory and common law.

The National Conservation Strategy of Australia (NCSA) has established formal interpretations of 'development' and 'conservation' which are likely to be key concepts in the future elaboration of AEP. The Strategy has the potential to be a seed-bed both for structural change as well as for increased investment in environmental management. It will be used as a bench-mark against which to judge government performance. It has a particular present importance as an illustration of the willingness of partisan interest groups to participate in dialogue and seek common ground.

There are many candidate issues with respect to AEP and its application. The National Conservation Strategy identified some sixty 'Priority National Actions'. Each of these flags the need for at least some programme expansion, and perhaps one-third contain seed for structural change. The NCSA Interim Consultative Committee considered the list of PNAs to be 'not exhaustive'. In this study, principal findings in respect of structural issues were as follows:

1. The politics of environmental policy are marked by chronic dispute. It has exposed a weakness in inter-governmental relations within the federation and a weakness in approach to the management of public debate. In that environmental dispute has been marked by confrontation and confusion, it must be regarded as wasteful and counter-productive. There is a requirement to re-examine and elaborate existing mechanisms for inter-governmental consultation and co-operation. There are fertile opportunities in AEP to project and develop 'environmental mediation' techniques, aimed at constructive dialogue between developers and environmentalists from early planning stages.

2. Environmental policy has modified existing management regimes in respect of natural resources such as land, forests, fisheries and wildlife. It has instituted management of resources, such as air, water and historic buildings, which were previously regarded as 'self-protecting' or at least free from any management demand. However, the approach to management has tended to remain functionally specialized, rather than multi-purpose and multi-disciplinary. Management is also marked generally by a dependence on statutory regulation and is highly constrained by a limited information base. Improvements to present resource management regimes will require further reform of sector management traditions, together with intensive development of the management information base.

3. The social impacts of environmental policy are considerable. Disputes have been divisive on a significant social scale. 'Environmental services' are a significant component of the budget, and cost impacts can fall unequally on different groups and regions. Deficiencies with

respect to the present provisions for development-control have been clearly articulated. On the other hand, the benefits generated by environmental measures remain largely unquantified if not wholly speculative. It is evident that in Australia, macro-economic effects, cost-benefits and equity considerations in respect of AEP have been insufficiently studied. It is evident too that environmental monitoring of quality-of-life indicators is at an early stage of development. Adverse social impacts of AEP require greater attention to (a) effects at regional and community levels, (b) public education and informational services, and (c) reforms of development-control.

4. There is clear evidence of change in the mix of 'environmental cognitions' held at both community and individual levels in Australia. This has been reflected in the formal adoption by Australian governments of definitions of 'conservation' and 'development' emphasizing inter-dependence and parity. However, economic performance as a measure of progress and security remains a national pre-occupation. There is a substantial gap between practice and policy rhetoric; practical measures are needed if acknowledged aspirations are to be met. Public policy requires the development and projection of quality-of-life indexes or descriptors as important elements of national statistics. Governments have the means to support codes of practice and the concept of 'environmental audit' as essential parts of responsible economic management. The principle of full accounting of the social costs of production requires further elaboration.

Ultimately it needs to be recognized that AEP incorporates a clear conflict of aims. Development and

conservation are said to be inter-dependent. They are to be balanced. This may be so in aggregate, but at the work-face they chiefly represent mutually exclusive alternatives. Decisions have to be made and judgements reached, again and again. In these circumstances opportunities for dialogue and management of dispute need to be recognized as part of the development process. With maximum possible assimilation in the development process of elements of environmental balancing, the remaining debate would then be more to the point, and less socially divisive than it has so far shown itself to be.

INTRODUCTION

0.1 CONCEPT OF AUSTRALIAN ENVIRONMENTAL POLICY

A General Order issued from the Sullivan Cove settlement on the Derwent River by Lieut. Governor Collins on March 10, 1804 (the first European settlement in Tasmania was established in 1803), reads as follows:

> The Lieut. Governor understanding that the number of Swans at the upper part of the Derwent River is considerably diminished, through their having been of late much harassed and disturbed, and that it is more than probable that the resource which they might have otherwise proved will totally fail unless some steps are taken to prevent it, particularly at this season when females are known to be full of eggs; directs that, until he finds it necessary to issue further Orders upon this subject, no person in, or belonging to this Settlement, do send any boat, or employ any means any further, to molest these Birds, which, if a proper attention is paid to this Order may return to their usual haunts.[1]

Conservation, and environmental protection, are not newly discovered in Australian affairs, although the passion of 'environmentalism', the social and political movement of the 1960s and 1970s is certainly unparallelled.[2]

Environmentalism has brought about many changes, not the least of which is the recognition of 'the environment' as a distinct and proper discipline for government policy-makers. It is no longer subsumed in traditional fields of government policy such as public health or town planning, or regarded as miscellaneous measures unrelated to any general theme of government business. Not that this development impugns the work of early administrators. Lt. Collins' swans still adorn the Derwent, and have done so

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1. Commonwealth of Australia, Historical Records of Australia, Series III, Vol. 1, The Library Committee of the Commonwealth Parliament, 1921, p. 264.
2. O'Riordan, T., Environmentalism, Pion, Lond., 1976.

continuously since his wise decision of 1804. Clearly he met the challenge of his times.

The Order of 1804 is instructive in a number of ways. Its immediate instrumental effect was to establish a rule prohibiting persons from molesting swans. The Order however did not limit itself to a wording of this simple proscription, which by itself might have represented mere whim or caprice on the part of the Lieut. Governor. Instead, the rule was given a social and logical credibility through the identification of an impersonal objective (the saving of a 'resource') and premises linking this objective to the means employed (the proscription). These are the attributes of a 'policy'.

It is beyond the scope of this dissertation to provide a detailed examination of concepts of policy, a term which Rose decided was best considered a 'generic symbol' rather than a scientifically precise concept.[3] Most commentators agree, however, that public policies are the stated intentions of governments with respect to a choice of objectives and a selection of means.[4] They also agree that policy is best considered as a process, in which issue-emergence (or agenda-setting), policy-making, policy implementation and policy evaluation, for example, can be recognized at least conceptually as discrete stages. In this study, 'policy' in the term Australian Environmental Policy (AEP) is used to refer to this policy-process. AEP therefore includes the 'central constructs' (the decisions by governments concerning objectives and means), together with a whole system of administration which flows from them. On the occasions in the text where

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3. Rose, R., 'Comparative Public Policy', Nagel, S.S. (ed), Policy Studies in America and Elsewhere, Lexington, Mass., 1975.

4. Paris, D.C. and Reynolds, J.F., The Logic of Policy Inquiry, Longman, N.Y., 1983; see also, for example, Dror, Y., 'Basic Concepts in Policy Studies', Nagel, S.S. (ed), Encyclopedia of Policy Studies, M. Dekker, N.Y., 1983.

the term is employed in the more narrow sense, the context is sufficient to make the meaning clear.

Public policies, in the form of central constructs, are expressed in speeches, statements and documents. However, it is only rarely that a verbal or written statement of policy gives a full account of itself. For one thing, major policies have highly generalised objectives which, for any subsequent pragmatic purpose, have to be resolved into a field of sub-ordinate objectives, each with a semi-independent existence. For another, the means employed to give effect to policy objectives are often highly elaborated and the expressions of a major policy are diverse and complex. For these and other reasons, it follows that public policies are described in statements and documents only to the degree which is necessary or expedient for the purpose in hand; and a great deal of inquiry is generally necessary if a detailed appreciation of a major policy is required. This may be true even if policy is conceived of only in terms of 'the choice of objectives' and 'selection of means'. It is certainly true if the concept of policy extends to the whole system of administration which derives from these central constructs.

Public policies are a community, sharing many attributes in common. Australian Environmental Policy is distinguished from other major policy fields by a number of characteristics, but primarily by the subject matter which it treats. The word 'environment', like equivalent terms such as 'surroundings' and 'circumstances', is a tag or label. It achieves a definite meaning from the context in which it is used, sometimes helped by a qualification. Thus we speak or write, for example, of 'the natural environment', 'the built environment', 'the work environment', 'the business environment' and so forth.

It follows that without special pleading, all government policies could be construed to be 'environmental policy'. To do so, however, would hardly be

useful. In any event, there is a practical reality. Governments do conceive of an 'environmental policy' area. In the first instance it is policy directed at 'quality-of-life' issues not covered in other major policy fields. It includes, for example, the control of pollution, the protection of wildlife, the establishment of national parks and the assessment of the environmental impact of development. Governments have established specialized environmental agencies to carry out functions in these areas. The field of environmental policy, however, is not limited to the policy instruments of the environmental agencies. There are important provisions exercized by other agencies and a broader concept of environmental policy is realistic.

The Australian Environment Council (AEC) in its 'Guide to Environmental Legislation.... In Australia', described the subject matter of environmental law as rules for the protection of the environment from undue degradation by human activity, and rules for the conservation of natural, built and cultural items within the environment.[5] This broad concept does not align with any exclusive administrative responsibility or limit itself to only those provisions developed under the 'environment portfolio'. It includes all important 'rules' that relate to 'environmental principles'. The AEC approach is generally followed in the serious literature.[6]

Policy of course goes beyond the matter of 'rules'. The AEC description, however, does clearly establish two principal objectives which environmental law supports. These are "the protection of the environment from undue

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5. Australian Environment Council, Guide to Environmental Legislation and Administrative Arrangements in Australia (AEC Report No. 16), AGPS, Canberra, 1984.

6. See, for example, Gilpin, A., Environment Policy in Australia, University of Queensland Press, 1980. Also Bates, G.M., Environmental Law in Australia, Butterworths, Sydney, 1983, and Fisher, D.E., Environmental Law in Australia, University of Queensland Press, 1980.

degradation by human activity" and "the conservation of natural, built and cultural items within the environment". These objectives may be used to demarcate the subject matter of Australian Environmental Policy, although a more active and flexible phrasing is preferred in this study (see below).

The discussion so far has considered a number of matters, including the idea that highly generalized policy objectives require further resolution and that as a consequence a field of policies develops. There is another related matter which requires comment in respect of AEP. It will be established that 'the environment' is an area of shared power in Australia's federal system of government and that as a consequence the development of a 'national policy' requires consultation and agreement between the central and regional governments - or is represented by the net effect of the individual policies of the members of the federation. For some, 'national policy' is exclusively the province of the central government and to view it any other way is confusing and misleading. This, however, is unrealistic. In Australia there are major areas of environmental management in which the central government is not the 'operator' - but there is, nonetheless, both jurisdiction and administration. Clearly, an aggregate of regional policies, in so far as they are conflicting or inconsistent, does not constitute part of 'national policy'; but to the extent that regional policies reflect a common code and that differences at the level of detail merely reflect particular regional circumstances, then such regional policies may reasonably be regarded as expressions of 'national policy'.

Clearly, a working concept of AEP must take account not only of its subject area and its scope as 'policy', but also of its expression within a federal system of government. It needs to acknowledge that AEP as a term encompasses a field of policies, certainly linked, but

often with a semi-independent existence and, collectively, with highly elaborated means. With these provisos in mind, the concept which generally seems to meet most requirements defines Australian Environmental Policy as that field of policy processes, with expressions in law, programmes and institutions, which:

- reflect the desire to conserve natural and cultural heritage;
- seek to preserve to amenity of commons, such as air, water and public open space; or
- are allied measures supplementing both 'common law' and common sense in the preservation of healthful, congenial and advantageous conditions; and
- reflect a common code within Australia's federal system.

This concept of AEP is the subject of dissertation. It cannot be addressed,however, without some explanation of the choices contingent on a thematic review.

0.2 CHOICES OF A THEMATIC REVIEW

The objectives of this dissertation are two-fold: to develop a useful guide and reference source to AEP as a working sub-system of public administration and to inquire into structural issues which are challenges to present performance and future policy elaboration.

The concept of AEP so far developed has demarcated AEP from other public policy fields on the basis of subject matter. It has traced the recent elaboration of AEP to 'environmentalism', a social and political movement, and has noted that Australia's federal system of government has particular implications for environmental policy. These two themes are the subjects of Chapters one and two.

The purpose of Chapter one - ENVIRONMENTALISM AND POLITICS - is to describe the beliefs and concerns of the

environmental movement and to characterize the politics of environmental decision-making in Australia. Chapter two - FEDERALISM AND ENVIRONMENTAL POLICY - is concerned with the character given to AEP by Australia's federal system. It provides a guide to the relative powers and roles of the Commonwealth, State and Northern Territory Governments and characterizes federalism as a working system with respect to environmental policy. International aspects of environmentalism and environmental policy are important and have a particular relevance to any discussion of federalism. A brief discussion of Federalism and Internationalism is provided. The particular case of federalism and the marine environment is also given separate treatment in Chapter two. It is presented in part because of the insights that come from developing at least one 'case history' at a level of detail but also because it is an important and complex matter in which there has been recent, very significant developments. Because of its recency, it has not been widely reported on in the literature. The further particular case of marine and estuarine protected areas is discussed to illustrate some of the issues involved in assessing the environmental significance of the Offshore Constitutional Settlement.

In the course of Chapters one and two, particular institutions - domestic laws, international agreements, programmes and arrangements - are cited. In Chapter three - INSTITUTIONS OF ENVIRONMENTAL POLICY - the identification of important institutions is extended, both as part of the fabric of AEP broadly considered and as the basis for a focus on structural issues. The Chapter provides separate general discussion of 'law and administration' and 'environmental information'. It concludes with a treatment of particular issues of environmental law and administration.

In Chapter three, the framing of the National Conservation Strategy for Australia is described as a deliberate attempt to allow extensive, direct public participation in the setting of AEP goals. The Strategy

is the subject of Chapter four. The processes of consultation if followed are highly instructive with respect to attitudes and beliefs of governments, developers and conservation interests in Australia. They illustrate too some of the limits placed on AEP by Australia's federal system. Moreover, the strategy itself is now a formal element of AEP. For all these reasons, the NCSA is important. Because of its recency, it has yet to be critically studied by independent commentators, or at least such studies have yet to be reported on. Accordingly, a relatively detailed account is provided under the headings 'conferences, perceptions and constraints', 'profile of the National Conservation Strategy', and 'the NCSA as an agent for change'.

In Chapters one to four, Australian Environmental Policy is examined from the point of view of particular themes. These chapters collectively provide a useful guide and reference source to AEP - the first objective of the study. The focus of Chapter five - A SYSTEMS VIEW OF ISSUES IN AUSTRALIAN ENVIRONMENTAL POLICY - is the second study objective, the inquiry into structural issues. The Chapter draws on the structural issues noted or identified in the thematic treatments. It presents them in summary form only, but collates and returns these important insights to a holistic view of AEP, with added comment. The Chapter commences with a brief discussion of models of policy and policy-making. The discussion serves to introduce a systems model of AEP which is used for the purpose of synthesis. At the same time this discussion contributes additional understanding of the character of the policy process. The Chapter concludes the main body of the dissertation with an important comment on the conflict of aims embodied in AEP.

In general, the dissertation aims at a balanced treatment. Two departures, the level of detail provided in respect of 'federalism and the marine environment' and in respect of 'The National Conservation Strategy for

Australia', have already been noted and reasons given. There are necessarily many omissions. No claim is made that this dissertation treats all the subject matter of Australian Environmental Policy (that would be a very large undertaking indeed). Nor is it claimed that it exhaustively assesses structural issues (that would be an unparallelled undertaking). It does, however, within the limits of time available for study and writing, set out to be an accurate, cogent and up-to-date treatment of its objectives.

CHAPTER ONE

ENVIRONMENTALISM AND POLITICS

1.1 Environmentalism

1.2 Environmental Politics in Australia

ENVIRONMENTALISM AND POLITICS

1.1 ENVIRONMENTALISM

Environmentalism is not easily defined. It certainly has to do with 'quality of life', a term referring to biophysical surroundings - clean air, clean water, public open space, the abatement of excessive noise and freedom from exposure to harmful and unpleasant substances. It has a very particular concern with the protection of nature (particularly as wilderness) and with maintenance of the viability of ecosystems, whether natural or managed for a productive purpose.

Sympathy with these concerns, based on ethical notions or intelligent appraisal of them, is not of course exclusive to environmentalism. Community organizations can and do take up environmental issues, such as the preservation of some piece of urban open-space, or the planting of trees to contain stream-bank erosion; just as individuals, businesses and governments do, from time to time, make wise environmental decisions; just as Lieut. Governor Collins, in 1804, sought to preserve a natural resource from greed and profligacy.

It is not, however, simply a matter of emphasis, or relativity, with respect to these matters which sets environmentalism apart. Environmental organizations, and environmentalists, perceive a challenge in the conventional wisdom and conduct of affairs in modern, secular societies. Bowen characterizes the dominant mode in the western world as 'technocratic rationality' - a grab for material abundance, without regard to hidden costs, based on the exploitation of nature through technological mastery.[7] Horne, writing of Australia, says that economic growth is seen as the central dynamic of society, but a rational

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7. Bowen, J., 'Conservation And Pollution In The Maritime Environment: Political and Educational Issues', Bateman, W.S.G. and Ward, M.W. (eds), Australia's Offshore Maritime Interests, Australian Centre for Maritime Studies, Canberra, 1985.

scepticism has not been maintained.[8] The concerns of environmentalism are neatly captured in the titles of benchmark publications, such as 'Silent Spring' (1962), 'The Limits to Growth' (1972) and 'A Blueprint for Survival' (1972).[9] The cult of economic growth as the ideal of national development, when coupled with powerful new technologies is seen as leading to the erosion of quality of life, ecological catastrophe and ultimately to the destruction of society itself.[10]

Environmentalism does not reject material prosperity, though it challenges an approach which does not bring to account all costs and future penalties and which takes a narrow viewpoint of what material needs and wants are. There is, however, another point of departure. For some environmentalists at least, Nature is perceived as something more than a treasure chest of useful goods, a life-support system, a studio, a laboratory and a gymnasium: it is seen as having design attributes, the experience or contemplation of which is essential to the understanding of the human self. Nature, in short, meets spiritual as well as material, physical and intellectual needs.

Environmentalism therefore has special beliefs and is antithetical to the established priorities of government and society. It seeks reform. For these reasons Davis chose to define Environmentalism as "a social and political movement, involving specific sets of beliefs about the relationship of man and Nature; generally opposed to existing modes of technology and natural resources

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8. Horne, D., 'Resources And The Cult Of National Development In Australia', Harris, S. and Taylor, G. (eds), Resource Development and the Future of Australian Society, Centre for Resource and Environmental Studies, A.N.U., Canberra, 1982.

9. Carson, R., Silent Spring, Houghton Mifflin, Boston, 1962; Meadows, D.H. et al., The Limits to Growth: A Report for the Club of Rome's Project on the Predicament of Mankind, Earth Island, Lond., 1972; Ecologist, The, A Blueprint for Survival, Penguin, Harmondsworth, Mddx., 1972.

10. As part of this pattern, environmentalists are also concerned with population growth rates and conditions of social inequity.

utilisation".[11] Within the environmental movement Davis distinguished "earth-ethic believers" from "welfare utilitarians", corresponding to the 'ecocentric' and 'technocentric' modes of thought cited by O'Riordan, and equally to the 'deep ecology' and 'shallow ecology' (or reform environmentalism) cited by Fox.[12] These particular typologies do not imply that in functional terms there are two or more kinds of environmentalism. Within the movement, as in individual environmentalists, earth-ethic beliefs mingle happily with utilitarian argument. The eclectic nature of Environmentalism is characteristic and a source of great strength. The movement drawns freely on a wide range of intellectual disciplines. At the same time it taps deeply-felt traditions and employs powerful symbols.[13]

The contemporary movement - the new environmentalism - became a major force in developed countries during the 1960s and 1970s. Its development was undoubtedly associated, in complex ways, with the unprecedented technological development and economic growth of the times. The evidence for doomsday prophecies (of ultimate exhaustion of resources and destruction of global ecology) may not have been complete, but ecological disasters and social stresses in plenty ensured its growth as a popular cause.[14]

In many respects the signal years for the new environmentalism were 1970-72. The period saw the elaboration of

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11. Davis, B.W., Characteristics and Influence of the Australian Conservation Movement: An Examination of Selected Conservation Controversies, Ph.D. thesis, University of Tasmania, 1981.

12. O'Riordan, T., op.cit.; Fox, W., 'Towards a Deeper Ecology', Habitat Australia, 13, No. 4, 1985.

13. Certain classes of animals elicit powerful associations; other associations which are made and projected are indicated in the titles of organizations such as 'Greenpeace' and 'Friends of the Earth'.

14. Certain incidents in particular had a profound effect on public opinion. These included the London smog of 1952; the mercury pollution of Minimata Bay (1956); the massive oil spills from the Torrey Canyon (1967) and the Amoco Cadiz (1978), for example.

highly significant statutory provisions in most western countries, led by the United States National Environment Policy Act, signed into law on 1 January, 1970. The same period saw the wide recognition of global dimensions to environment issues, culminating in the 1972 United Nations Conference on the Human Environment (the Stockholm Conference). In more recent years commentators have looked for evidence of a decline in the level of popular support for environmentalism, based on a change in perceptions and priorities as a result of world-wide economic recession. However, the 1984 OECD International Conference on Environment and Economics concluded that in most OECD countries public demand for better environmental quality remained high during recession.[15] The Conference also concluded that renewed economic growth was likely to both increase and broaden this demand.

There is little evidence of environmentalism becoming a spent force.

1.2 ENVIRONMENTAL POLITICS IN AUSTRALIA

> The assault of urban amenity of the 1960s and the attrition of wilderness during the 1970s were the catalysts which produced a substantial and committed conservation movement in Australia.[16]

The demand for structural reform and of improved environmental services has inevitably conflicted with established interests. Public inquiries have been widely employed to examine issues and the findings of such inquiries have been an important source of change. Some demands have been met. Others persist at a chronic level with periodic acute manifestations. New demands arise.

Australian environmental issues are diverse and wide-ranging. Matters which have, at some point in time, attracted intense interest and national media coverage

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15. Anon., 'International Conference on Environment and Economics', Environmental Policy and Law, 13, 1984.

16. Davis, B.W., 1981, op.cit., p. 111.

have included, for example, the clear-felling of native forest; the mining of uranium; the protection of the Great Barrier Reef; the preservation of the South-West Tasmanian Wilderness; the killing of whales; the killing of large grazing kangaroos and the exploitation of rain forest; but there are others. These have been issues with a perceived single focus. On the other hand, more has collectively been written and debated on issues with multiple foci, such as pollution arising from industrial plants or land-use decisions in respect of urban expansion and re-development.

In any event, in Australia as elsewhere, environmental decision making has involved many bitter battles. Collectively, sources of tension, which may be an integral part of an issue or which may influence positions taken on it include:

1. the division of power between the federal and State governments;
2. distinctions between the perspectives of rural and urban communities;
3. regional versus 'centre' perspectives;
4. viewpoints on private versus public rights;
5. values placed on 'development' as opposed to 'conservation';
6. values placed on ethnic (particularly Aboriginal) and other minority group rights;
7. absence of critical information and differences in expert opinion on technical matters; together with,
8. the extent and nature of direct personal interest, if any.

Major disputes spread from their initial focus and draw in a wide cast of interests, secondary issues and rationalizations. Davis suggests that in most environ-

mental conflicts at least six broad groups are involved.[17] These are:

1. voluntary conservation groups and associated individuals ('eco-activists');
2. private corporations and some public agencies ('developers');
3. civil servants, "acting as regulators, catalysts or managers of the public estate";
4. politicians and legislatures "concerned with the economic and social well-being of the community";
5. the broader society in general, "not always knowledgeable about remote scenic amenity, economic opportunity or political constraints, but the audience to whom all appeals must ultimately be addressed"; and
6. the media, "which plays a crucial role as disseminator of information or misinformation".

To this list, since they too are always involved and sometimes play a very public role, might be added:

7. the scientific establishment, as originators and critics of technical opinions; and
8. trade unions, representing the viewpoints of workers believing themselves to be directly affected by outcomes, and sometimes expressing this though industrial action.

In these circumstances it is not surprizing that issues may be protracted and outcomes uncertain. Success is likely to favour the coalition of interests which has or achieves political bargaining power, and then uses this to greatest effect.

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17. Davis, B.W., 'Federalism and Environmental Politics: An Australian Overview', Mathews, R.L. (ed), Federalism and the Environment, ANU, Canberra, 1985.

Development interests are often well-placed. They have a powerful bargaining position by means of the economic benefits that are generally considered to flow from their activities. They commonly have established access to Ministers, and have a case of tangible benefits to put.

Conservation groups, on the other hand, have the advantage of more clearly representing a public rather than private interest. They may be able to call on prestigious scientific support and generally have available to them a much wider range of campaign tactics. Environmentalists engage in general lobbying tactics, challenge project evaluation procedures, exploit inter-governmental relations and as a last resort seek judicial redress.[18] Through their organizations they may be able to develop or demonstrate a wide degree of public support.[19]

Leadership has shown itself to be a potent factor in the success or failure of conservation campaigns. In notable cases, such as the Fraser Island and Franklin Dam disputes, the tenacity and skill shown during protracted campaigns by the leadership of the Fraser Island Defence Organization (FIDO) and the Tasmanian Wilderness Society (TWS) were key factors in the eventual outcomes.

Overseas trends in the organization and tactics of environmental groups include:

1. the formation of political parties ('green parties'); and
2. action directed at consumer investment and product decisions.

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18. Davis, B.W., 'The Struggle for South-West Tasmania', Scott, R. (ed), Interest Groups and Public Policy, Macmillan, Melb., 1980.

19. Total membership of conservation organizations is a matter for estimate. Davis, B.W., 1981, op.cit., p. 120, gave a 'cautious' minimum of 150,000. The Australian Conservation Foundation has prepared a directory of environmental groups - The Green Pages: Directory of Non-Government Environmental Groups in Australia, ACF, Hawthorn, Melb., 1978.

In Australia, the formation of green parties was signalled by the activities of the United Tasmania Group (UTG), 1971-74. The UTG contested the 1972 State poll and failed, by a narrow margin, to win a seat. More recently, a well-known environmentalist, campaigning as an independent candidate, was elected firstly to the Tasmanian parliament and subsequently to the Australian Senate. Senate representation has also been gained by a national group opposed to the mining of uranium in Australia, through a Western Australian candidate.

Environmental disputes have been divisive on a significant social scale. In the case of South-West Tasmania, the Franklin Dam dispute ultimately destabilized the Lowe Labor government and led to the sacking of the Premier by his parliamentary party. The Government then lost office at the succeeding State poll. The dispute involved civil disobedience by protesters through actions of trespass, and incidents of damage to property and assault. These latter infringements should not be discounted as indicators of future trends. It is in the national interest that improved methods for conducting the environmental debate be developed.

CHAPTER TWO

FEDERALISM AND ENVIRONMENTAL POLICY

FEDERALISM AND ENVIRONMENTAL POLICY

2.1 FEDERALISM

Australia is a federation of eight governments. The Australian constitution vests in the Commonwealth Government specific legislative powers.[20] These include plenary powers with respect to Australian external territories; seas and submerged lands beyond low water; places owned or acquired by the Commonwealth; and matters referred to it by the States.[21] They do not otherwise include a specific power to make laws with respect to environmental conservation and protection. (The Constitution in fact makes no reference at all to such a need: as an unspecified power it remains a constitutional province for the founding States, by intention or default.)

However, the Commonwealth Government's power to intervene in the business of environmental conservation and protection is considerable. This derives from the fact that environmental legislation, or the taking into account of environmental matters in decision-making is not excluded as a consequence of the proper exercize by the Commonwealth of its specific powers.

Important means available to the Commonwealth include its powers to make laws with respect to:

1. trade and commerce with other countries and among States;
2. foreign corporations and trading and financial corporations formed within the limits of the Commonwealth;
3. taxation;
4. external affairs;
5. the people of any race for whom it is deemed necessary

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20. Constitution of the Commonwealth of Australia Act 1901.

21. Commonwealth plenary power in respect of the marine environment was established in the Seas and Submerged Lands Act 1973 and upheld by the High Court of Australia in New South Wales v. Commonwealth (1975) 8 ALR 1.

to make special laws; and

6. the granting of financial assistance to any State on such terms and conditions as it thinks fit.[22]

All of these powers have been used as a basis for Commonwealth intervention. Through the operation of the Foreign Investment Review Board, environmental undertakings have been made a condition of particular investment approvals, chiefly broad-acre property transactions. Present Commonwealth taxation provisions allow certain capital expenditures by primary producers on soil and water conservation to be fully deducted from taxable income. While not designed as an 'environmental' measure these provisions do contribute to environmental purposes. Of greater present significance are the financial grants, made to the States and the Northern Territory for the purpose of specific environmental works and programmes.

In some notable cases, the Commonwealth has overridden State policy to 'save' heritage assets. In the Fraser Island case, the Commonwealth used its absolute power over exports to effectively prevent a mining venture. In the Franklin Dam case the Commonwealth prohibited a massive power generation scheme threatening to destroy a wilderness. In this case the wilderness had been nominated and, during the course of the dispute, was listed as a World Heritage site under the Convention for the Protection of the World Cultural and Natural Heritage. The High Court of Australia upheld as valid the Commonwealth intervention on the basis of Commonwealth power over external affairs.

All this is not to say that the Commonwealth has undertaken or achieved within the Australian Federation a predominant role in environmental protection and conserv-

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22. Zines, L., 'The Environment and the Constitution', Mathews, R.L., (ed), op.cit.

ation. Indeed it is the State governments and the Government of the Northern Territory (footnote) which have accepted primary responsibility for environmental matters and which have enacted the broadest provisions.[23] There are definite constitutional limitations to the role of the Commonwealth in this area. Moreover, the "rights" of States are perceived as important by citizens, and a Commonwealth government is likely to lose in an electoral or political sense, if its intervention directly challenges this perception.

In practice, Australian federalism is essentially a matter of Commonwealth-State bargaining, from well-established and relatively balanced positions. The role of the Senate as a States' house in the Commonwealth parliament has been largely suppressed by the strength of the political party system. However, other institutions are employed to facilitate the business of the federation. Important arrangements which go beyond bilateral concerns, are generally agreed to at the annual Premiers Conference or are mediated by standing Ministerial Councils.

The Premiers Conference mediated the important 1979 Off shore Constitutional Settlement (see this Chapter part 3) and was the forum for consideration of a set of principles and procedures for Commonwealth-State consultation on international treaties (see Appendix 1).

The Ministerial Councils primarily concerned with environment and conservation are the Australian Environment Council (AEC) and the Council of Nature Conservation Ministers (CONCOM). The Commonwealth, all States and the Northern Territory are represented on each Council and heavy agendas of business are reviewed annually. The Councils are supported by Standing Committees and Working Groups of officials. Both are important forums for co-ordination and the development of national policy. In

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23. Following passage of the Northern Territory (Self-Government) Regulations 1978.

1982 AEC and CONCOM jointly prepared and endorsed a major statement of objectives of Australian Environmental Policy ('Joint Declaration on Environment and Nature Conservation' - see Appendix 2).

2.2 FEDERALISM AND INTERNATIONALISM

The intellectual leadership for the 'new environmentalism' developed in Europe and North America. This leadership, for reasons inherent in its concerns, has always been strongly supra-national in outlook. It has been markedly successful in influencing existing international organizations and has established its own special institutions. For all these reasons, the international expression of environmentalism has been, and remains, a rich seed-bed of policy for government and non-government organizations alike.

Specific outcomes of internationalism in AEP have been:

1. Accession to Treaties and Conventions (see Appendix 3);
2. Membership of or Linkages to International Bodies and Participation in Environmental Programmes: bodies of prime importance to Australia in this respect include the Ecosystem Conservation Group - UNEP, UNESCO, FAO, IUCN - the OECD, IOC, IWC and ESCAP but there are many more; international programmes include GARP, GEMS, INFOTERRA, MAB and activities mediated by SCAR and SCOR; but there are others;[24]

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24. See Trzyna, T.C. and Coan, E.V. (eds), World Directory of Environmental Organizations (2nd ed.), Public Affairs Clearing House, Claremont, Calif., 1976; also UNEP Report Series e.g. UNEP No. 6 (1980); UNEP No. 1 (1981); UNEP No. 2 (1981) and Annual Reports of Australian Government Departments. The full titles of acronyms employed in this section of text are listed elsewhere (refer Table of Contents).

3. International Status for Select Australian Sites: a number of Australian sites have been granted special international recognition; these include World Heritage Sites (Convention for the Protection of World Cultural and Natural Heritage), Biosphere Reserves (UNESCO's Man and the Biosphere Programme), and International Wetlands (Convention on Wetlands of International Importance especially as Waterfowl Habitat);[25]

4. Commitment to Objectives or Resolutions of International Forums: an important example is The Declaration of Anticipatory Environmental Policies of the Environment Committee of the Organization for Economic Co-operation and Development (OECD). Another is the International Charter for the Conservation and Restoration of Monuments and Sites (ICOMOS or 'The Burra Charter'). The OECD Declaration is attached as Appendix 4.

The linkages that exist between international organizations, governmental, non-governmental and mixed, as well as the linkages between the activities of these organizations, international treaties and sources of expertize are exceedingly complex. Two examples are sufficient to give the flavour. The international magazine 'PARKS' is produced jointly by UNESCO, UNEP, FAO, OAS, Parks Canada, the U.S. National Parks Service, IUCN and WWF. In the case of the Convention on Wetlands of International Importance Especially as Waterfowl Habitat, the depository is UNESCO, IUCN provides bureau services and scientific input comes from IWRB, itself a sub-organization of ICBP. The formal provisions for doing international conservation

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25. Davis, B.W. and Drake, G.A., Australia's Biosphere Reserves, AGPS, Canberra, 1983. For current listings of World Heritage Sites, Biosphere Reserves and International Wetlands see Annual Reports Australian Heritage Commission, Australian National Parks and Wildlife Service and Department of Arts, Heritage and Environment.

business may conceal labyrinthine networks of a complexness reminiscent of imperial courts.

Australia (and Australians) have participated eagerly in the international forums. Perks and prestige have not been the only motivations for doing so. In some cases there have clearly been material benefits to gain, or very particular interests to protect. At the very least, there has always been ethical justifications for making the best possible contribution.

The risk of disbenefits is probably slight, although if intellectual leadership in environmental matters is to derive principally from international forums, then principles or norms may be accepted which are not finely tuned to Australia's particular circumstances. Australia, and Australians, need to be prudent and selective about what they accept of international wisdom.

On the other hand it is quite clear that environmental internationalism has placed strains on inter-governmental relations within the Australian federation. State governments, some more notably than others, fear increased Commonwealth interventionary power arising from Australian accession to international agreements. General suspicion has been deepened by the actions of environmental groups, now highly conscious of the leverage to be gained in any dispute by seeking or citing 'international recognition' of the subject matter.

The effect of this suspicion is certainly not in the interest of the federation. It is an issue which deserves serious attention. Both levels of government have a case to put. The Commonwealth government does have a responsibility to fairly represent Australian aspirations to contribute to and gain benefits from internationalism. It should not be obstructed in that duty by State provincialism. On the other hand, States have a right to be able to conduct their affairs without fear of constitutional challenge or

the arbitrary exercize of Commonwealth power to override State law. Present inter-governmental arrangements for treating international aspects of environmentalism need to be re-examined and elaborated.

2.3 FEDERALISM AND THE MARINE ENVIRONMENT

2.3.1 Law of the Sea

The period 1945-82 has seen fundamental changes to concepts of national interest in the marine environment. The reasons for these changes include, in the first instance, massive increases in the world demand for natural resources and quantum increases in the technological capability of industrialized countries. To these may be added both the rise of environmentalism and the establishment of a new world community including many former colonial dependencies as sovereign States.

The 'freedom of the seas' is, or was, the right of all nations to use the high seas without let or hindrance, subject only to the duty of paying reasonable regard to the interests of others.[26] From the beginning of the seventeenth century the 'high seas' were all parts beyond a narrow 'territorial sea' within which coastal States could exercize certain rights. The territorial sea was narrow indeed; it was generally if not unanimously considered to extend seawards for three nautical miles. For centuries the primary concern of international maritime law was rights and duties in respect of safe navigation, the rendering of assistance at sea and contingencies arising therefrom.

Commercial production of petroleum commenced in Pennsylvania in 1859 and the first exploitation offshore

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26. Pardo, A., 'The Emerging Law of the Sea', Walsh, D. (ed), The Law of The Sea: Issues in Ocean Resource Management, Praeger, N.Y., 1977. Also, Shearer, I.A., 'International Legal Aspects of Australia's Maritime Environment', Bateman, W.S.G. and Ward, M.W. (eds), Australia's Maritime Horizons in the 1980s, Australian Centre for Maritime Studies, Canberra, 1982.

took place in 1926. The discovery of oil 1.6km from shore off Louisiana in 1938 signalled the advent of the new era. In 1945 President Truman proclaimed United States jurisdiction and control over the resources of the continental shelf and the right to adopt measures for the conservation of living resources in areas adjacent to the territorial sea.[27]

The United States action was followed by other States. In the Santiago Declaration of 1952, Chile, Ecuador and Peru proclaimed sole sovereignty and jurisdiction of sea, sea-floor and subsoil to a distance of 200 nautical miles from their coasts.[28] The race to property rights over the resources of the sea was on in earnest. Australia proclaimed sovereign rights over the continental shelf in 1953.[29]

All these claims were of course a clear contravention of the established freedom of the seas. They led in 1958 to the holding of the first United Nations Conference on the Law of the Sea (UNCLOS I). The Conference established four important Conventions which codified much of the existing 'international law' as well as providing new rights.[30] Under the Convention on the Continental Shelf (in force 10 June 1965), coastal States exercize sovereign rights over the continental shelf. Under the Convention on the Territorial Sea and the Contiguous Zone (in force 10 September 1964) the sovereignty of coastal States over a territorial sea and, for certain purposes, over a contiguous zone, is acknowledged. The Convention fixed the breadth of the contiguous zone as being no more than twelve nautical

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27. Oda, S., The International Law of the Ocean Development: Basic Documents, Vol. 1 & 2, Sijthoff, Leiden, 1976.

28. ibid.

29. Attorney-General's Department, Offshore constitutional settlement: A milestone in co-operative federalism, AGPS, Canberra, 1980.

30. Includes Convention on the High Seas and Convention on Fishing and Conservation of the Living Resources of the High Seas.

miles from the territorial sea base-line; but neither UNCLOS I, or UNCLOS II convened in 1960, were able to resolve the extent of the territorial sea.

Australia, as a coastal State with a potentially vast area of claim, with no capacity or need to exploit offshore resources in other parts of the world, had no difficulty in accepting and acceding to the new Conventions. The first application to domestic law concerned the regulation of offshore petroleum exploration and development. Drilling had commenced in the Bass Basin during 1964. The Petroleum (Submerged Lands) Acts 1967 enacted by the Federal and each State Government established a 'common mining code' with comprehensive provisions governing rights and duties in respect of exploration and production. The federal Act applied to all areas; each State Act applied to only a prescribed 'adjacent area': the explorer or producer therefore obtained two 'rights' - one from the Commonwealth and one from the State - each with identical provisions. The issue of permits and licences for each adjacent area was in the hands of a 'designated authority', in practice a State Minister, and the basic royalty of 10% wellhead value was shared between State (6%) and Commonwealth (4%).

The mirror legislation of 1967 was specifically devised to circumvent the constitutional issue of the respective rights and powers of State and Federal Government in offshore areas. This issue was, however, too important to be left unresolved, particularly as it was a source of contention between the States and the Commonwealth. The Commonwealth Seas and Submerged Lands Act 1973 declared sovereignty over both the continental shelf and the territorial sea 'in right of the Commonwealth'. As expected and intended, the constitutional validity of the Act was challenged by the States. The High Court of Australia upheld the legislation by a majority - and therefore determined that other than in respect of certain 'internal waters', State jurisdiction in a plenary sense ended at low water mark.[31]

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31. (1976) 135 CLR 337.

The Seas and Submerged Lands Act 1973, while providing a bench mark resolution of Commonwealth legislative capacity, still left many issues unresolved. It clearly called into question the validity of many State laws, although Pearce v. Florenca established that States do possess the power to enact legislation with an extra-territorial operation in offshore waters, provided that such laws are for the peace, order and good government of the State and are not inconsistent with a valid Commonwealth law.[32] On the other hand, there were grounds for thinking that the Commonwealth power to legislate in respect of fisheries did not extend to fisheries within three miles of the shore.[33] Moreover, the Seas and Submerged Lands Act, while providing for proclamation, did not in itself establish the extent of the territorial sea to be claimed by Australia.

The third United Nations Conference on the Law of the Sea convened in 1973. By 1980 some 450 articles had been assembled and the Law of the Sea Convention was finally adopted by an overwhelming majority at the 11th Session on 30 April 1982.[34] The Convention establishes the right of coastal States to an exclusive economic zone (EEZ) over an area beyond the territorial sea extending seawards up to 200 nautical miles (370km) from the coast. Within the EEZ the coastal State may exercize sovereign rights over resources of sea and sea bed, subject to the duty to assess the total allowable catch of fish and to make available to other States any harvestable surplus. The Convention fixes the maximum breadth of the territorial

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32. (1976) 135 CLR 507.

33. As a consequence of S.51(x) of the Constitution.

34. Australia has signed but not as yet ratified the Convention, which enters into force 12 months after 60 states have ratified. Even so, many of the Convention's provisions are now emerging as customary international law - see Warner, R.M.F., 'Law of the Sea and Offshore Resource Development', Bateman, W.S.G., and Ward, M.W. (eds), 1985, op.cit.

sea at twelve nautical miles and protects traditional rights of passage and overflight in respect of straits and archipelagos. It retains the right of States to navigate, overfly and lay cables and pipelines in EEZs, as in the high seas. It establishes rules in respect of determining base-lines and boundaries. It defines the limits of the continental shelf and the extent to which coastal States have sovereign rights over shelf resources; it grants to coastal States rights over the EEZ in respect of the conduct of research and the power to enforce controls over pollution. Finally, it provides for certain sea-bed resources beyond the continental shelf to be regarded as the 'common heritage of mankind' and establishes mechanisms for collective international participation in resource development and the sharing of benefits. The Convention is fundamental and far-reaching.

Notwithstanding that UNCLOS continued in session from 1973 to 1982, a growing number of States during this period asserted various rights in respect to coastal seas. At the eighth meeting of the South Pacific Forum in August 1977, member States agreed to establish a regional fisheries agency - now the South Pacific Forum Fisheries Agency (FFA) - and to declare 200 nautical mile fishing or economic zones as soon as practicable.[35] The Commonwealth Fisheries Amendment Act 1978, in respect of the Australian Fishing Zone (AFZ) proclaimed in the Commonwealth Gazette of 26 September 1979, came into force on 1 November 1979.[36]

Australian marine policy search during the 1970s has been diverse, both in subject area and the kinds of issues involved. It has included questions in respect of:

- foreign participation in fisheries within the AFZ, the development of an offshore surveillance capacity and the promotion of Australian marine science;

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35. Senate Standing Committee on Trade and Commerce, Development of the Australian Fishing Industry, AGPS, Canberra, 1982.

36. The Fisheries Amendment Act 1968 (Cth) provided for a 12 n. mile Fishing Zone.

- the management of Australian fishery stocks and Government aid to and intervention in the industry;
- the promotion of offshore oil search by private enterprize, the case for a State enterprize and the regulation of exploration and production;
- controls over marine dumping and sources of marine pollution, contingency plans for dealing with oil spills and the implementation of international conventions dealing with ship-based sources of pollution;
- the revision and application of laws concerning shipping and navigation, and concerning crimes committed at seas;
- environmental issues such as the conservation of whales and the protection of the Great Barrier Reef;
- heritage and heritage-related matters such as historic shipwrecks and manned lightstations;
- the establishment of marine and estuarine protected areas; and
- coast protection and management including controls over developments with adverse ecological and social impacts.

Inquiries have been conducted and Conferences held on all of these matters. Each, from time to time, has been the subject of public debate. In most, if not all cases, policy resolutions or implementation have been contingent on the prior settlement of jurisdictional claims by State and Commonwealth Governments.

2.3.2 Offshore Constitutional Settlement

The Offshore Constitutional Settlement was mediated by the Premiers' Conferences of 1977, 1978 and 1979. The issue before the State Premiers, the Chief Minister of the Northern Territory and the Prime Minister of the Commonwealth was to

settle respective rights and responsibilities in Australian offshore areas, in a manner consistent with Constitutional powers, and with particular reference to the issues of the day.

The States (and the Northern Territory) were concerned to preserve direct regional access to economic benefits arising from proprietorship or jurisdictional power. They considered it essential for States to be able to legislate in the coastal zone without fear of constitutional challenge or the arbitrary exercize of Commonwealth power to override State law. They had, to bargain with, an important functional capacity and some political capital - the electorate perceives 'States' rights' to be important, and any Commonwealth Government is likely to suffer politically if it too directly challenges this perception.

The Commonwealth, by reason of the Seas and Submerged Lands Act 1973, held the high ground. It was however anxious to avoid being left with functions which would strain resources, which were better carried out by States and which were of regional rather than national scale. The Fraser (Liberal) Administration, representing the Commonwealth, advocated 'co-operative federalism'. It contrasted this with what it claimed were the 'big-government' centralist tendencies of the preceding Whitlam (Labor) Administration. Whatever the rhetoric, the key to a solution was provided by the Commonwealth decision to grant to the States (while preserving certain Commonwealth rights and powers) effective title and control over the sea and sea-bed, from low water mark to a seaward distance of three nautical miles beyond the base-line of the national territorial sea. The effect of the Coastal Waters (State Powers) Act 1980 (Cth), the Coastal Waters (State Title) Act 1980 (Cth) and the Seas and Submerged Lands Amendment Act 1980 (Cth), taken together, is to place the States as nearly as possible in the same position regarding coastal waters as they had believed themselves to be in since Federation.[37]

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37. These provisions extended to the Northern Territory through the Coastal Waters (Northern Territory Powers) Act 1980 etc.

The 'Agreed arrangements' of the Offshore Constitutional Settlement, in addition to granting States title and powers, dealt with offshore petroleum and other minerals, fisheries, historic shipwrecks, marine and estuarine protected areas, crimes at sea, shipping and navigation and ship-sourced marine pollution. In each case, the arrangements provide for both Commonwealth and State legislative capacity. These capacities however are circumscribed in one or other of three general patterns. The patterns are exemplified in the principal development and conservation issues.

1. Minerals and Energy: The OCS provides for 'mining' within th outer limit of State title, whether for petroleum or other minerals to be regulated by State legislation, albeit on the basis of a 'common mining code'. Beyond State title, mining is regulated by Commonwealth legislation, retaining the common mining code (Petroleum Submerged Lands Act 1967), the sharing of royalties, and day to day administration by the State Minister as the 'Designated Authority' for the 'adjacent area' of each State. However, amendments to the legislation provide for the establishment of a 'Joint Authority' for each adjacent area consisting of the Commonwealth Minister and the State Minister (Commonwealth-Victoria Offshore Petroleum Joint Authority, and so on) to oversee the general administration of the legislation. In the event of disagreement within the Joint Authority, the view of the Commonwealth Minister prevails.

   These arrangements were give effect by passage of the Petroleum (Submerged Lands) Amendment Act 1980 (Cth), the Minerals (Submerged Lands) Act 1981 (Cth) and the Petroleum (Submerged Lands) Acts 1982 of the States and Northern Territory.

2. Fishing: The OCS provides for a single fisheries management regime, with provision for particular fisheries, whether carried on within the area of State title or beyond, to be managed by one set of laws, Commonwealth or State as agreed between the Commonwealth

and the State or States concerned. There is further provision for the establishment of 'Fisheries Joint Authorities' and in particular for a South-Eastern Fisheries Joint Authority consisting of the Commonwealth Minister together with State Ministers of New South Wales, Victoria, South Australia and Tasmania; a Northern Australian Fisheries Joint Authority; a Western Australian Fisheries Joint Authority; and a Northern Territory Fisheries Joint Authority. By agreement between the Governments concerned a particular fishery may be assigned to the management of a Joint Authority. In the event of disagreement within a Joint Authority, the view of the Commonwealth will prevail. Foreign participation in fishing in the AFZ is regulated by the Commonwealth Law.

These arrangements were given effect by passage of the Fisheries Amendment Act 1980 (Cth) and complementary State legislation, as for example the Fisheries Amendment (Commonwealth-State Arrangements) Act 1981 (Tasmania).

3. Marine and Estuarine Protected Areas: The third pattern in the OCS is represented in the arrangements for marine and estuarine protected areas (MEPAs). In the first instance the special status of the Great Barrier Reef is retained. The rights and titles in respect of the sea and sea-bed granted to the States are subject to the operation of the Great Barrier Reef Marine Park Act 1975 (Cth). With this exception, legislative responsibility and power within the areas of State title rest with the States and beyond it with the Commonwealth, so that a proposed marine park or reserve lying across the boundary of State title might be established in two portions. The OCS does envisage that it might be agreed that certain areas within State title were of 'international significance'. In that event, and in the circumstance that the State did not wish to legislate, the Commonwealth would do so. The power of the Commonwealth to so legislate is

generally founded in its external affairs power (Section 51(xxix) of the Constitution).

The 1979 OCS was mediated by the Fraser (Liberal) Government. It was conceived as a 'package', with each part reflecting the whole, and therefore not subject to separate negotiation. Most of the necessary Commonwealth, State and Northern Territory legislation was in place by 1982, the final year of office of the Fraser Administration. In early 1983 the Hawke (Labor) Government announced that an internal review would be made of the Offshore Constitutional Settlement. The party platform, established at the 1984 National Conference, affirms as Labor policy, the restoration of "effective Commonwealth power over and title in the three mile territorial sea" and legislative intention "to ensure that ultimate responsibility for the administration of the offshore Mining Code resides with the Commonwealth Government".[38] Notwithstanding this party policy, the federal Labor Government has since completed its review. It has concluded that the existing arrangements should remain in place "so long as no State acts contrary to the national interest using powers obtained under OCS".[39] It remains to be seen whether this decision will become a matter or serious party contention. Whatever the outcome, the OCS in respect of marine and estuarine protected areas at the very least, is likely to be subject to critical appraisal by the environmental movement.

2.3.3 Marine and Estuarine Protected Areas

Australia's first marine park - Green Island Reef in the Great Barrier system - was established by the

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38. Australia Labor Party, Australian Labor Party Platform, Constitution and Rules, National Secretariat, Canberra, 1984, p. 174.

39. Source: The Department of The Prime Minister and Cabinet, 17 January, 1985.

Queensland Government in 1938.[40] This was a signal development. It was not until the 196os that the extension to the marine environment of terrestrial National Park concepts was generally recognized as logical and necessary. The Great Barrier system is of huge size, extending over some 15° of latitude. Its remarkable features made it a natural focus for the environmental movement of the 1960s and 1970s.

Following the passage of the Seas and Submerged Lands Act 1973, the Commonwealth parliament passed the Great Barrier Reef Marine Park Act 1975. The Act established the Great Barrier Reef Marine Park Authority. It defines a broad planning region extending from low water mark to a line just beyond the outer edge of the system, from latitude 10°41' to 24°30' South; an area of approximately 348,700 square kilometres. It is the function of the Authority to define areas within this region which should be included in the Great Barrier Reef Marine Park, and to prepare zoning plans and regulations. The jurisdiction of the Authority extends over marine areas to low water mark. The many islands in the system remain part of the State of Queensland and most are national parks under State legislation. In 1979 the Commonwealth and Queensland Governments established a Great Barrier Reef Ministerial Council to provide, inter-alia, for joint management programmes.

The Commonwealth parliament has also provided for the establishment of marine protected areas outside of the Great Barrier Reef region. The National Parks and Wildlife Act 1975 established the Australian National Parks and Wildlife Service (ANPWS). Under the Act, National Nature Reserves have been proclaimed in the Coral Sea (Coringa-Herald and Lihou Reef NNR) and in the Territory of Ashmore and Cartier Islands (Ashmore Reef

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40. Robinson, K.I.M. and Pollard, D.A., Marine and Estuarine Reserves in Australia with Particular Reference to New South Wales, Wetlands, 2, 1, 1982, (Coast and Wetlands Society, Sydney).

NNR). Historic Shipwreck Protected Zones have been established under the Historic Shipwrecks Act 1976 (Cth).

Within State Administration, responsibility for the establishment of marine and estuarine protected areas is variously divided or shared between Fisheries and National Park agencies. While most States have now established considerable systems of terrestrial reserves and have adopted wide-ranging provisions in respect of environmental protection and conservation, the argument for marine protected areas has been either unacknowledged or neglected. The State of New South Wales, for example, with a recent commendable history in the expansion of its terrestrial park system, boasts only 3,675ha of protected marine area, more than half of which is made up of just two sites.[41] Many of the current State protected areas listed by Ivanovici (1984) are of small extent or qualify as 'marine protected areas' on very narrow grounds.

There is however evidence of State agencies seeking a more systematic and purposeful approach. In its July 1984 meeting, the Council of Nature Conservation Ministers (CONCOM) endorsed principles for the selection and management of marine and estuarine protected areas (MEPAs) which were developed at a CONCOM-sponsored Workshop held in 1982. A further CONCOM Workshop on MEPAs was convened in 1985 and another is planned.[42] The Workshops have provided CONCOM and agencies with a variety of recommendations including, for example:

- criteria for selection and principles of management;
- criteria for classifying and for assessing the 'national' and 'inter-national' importance of MEPA sites.

In the Offshore Constitutional Settlement, the Commonwealth evidently judged that the special status it

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41. Ivanovici, A.M., (ed), Inventory of Declared Marine and Estuarine Protected Areas in Australian Waters, Vol. 1 & 2, ANPWS, Canberra, 1984.

42. Council of Nature Conservation Ministers, Summary Report of Second CONCOM Technical Workshop on Selection and Management of Marine and Estuarine Protected Areas, (unpub.), Dpt. of Arts, Heritage and Environment, Canberra, 1985.

had accorded the Great Barrier Reef region was a matter of some importance; it was not prepared to surrender or diminish that status in any way. Conservationists would undoubtedly applaud the Commonwealth judgement, both as a practical position and as due recognition of the Reef's national and inter-national importance. They would however be less appreciative of the Commonwealth failure to show in the OCS its interest in the establishment of marine protected areas elsewhere in the three mile zone. It is generally recognized that the most productive, most utilized and most sensitive areas of the marine environment are to be found in that zone.

This is not to say that many conservationists would seriously argue that marine parks and protected areas should be wholly a Commonwealth function. Clearly there are many practical grounds which strongly support the exercize of responsibility at State level, and certainly many issues are matters of regional rather than national concern. It remains true, however, that some sites are of national importance and certainly, conservationists would argue, the establishment of a system of marine protected areas, safeguarding representation of the range of marine habitats found in Australia, is a national concern. The feelings of conservationists would be strengthened by the absence at this time of any clear commitment by most State Governments to the systematic and purposeful establishment of marine protected areas.

The argument for an early focus on extensive systems of marine reserves is, however, largely premised on terrestrial concepts of conservation practice. This direct transfer is appealing but simplistic. The marine environment is very different. Concepts of just what kind of conservation regimes are required in the marine environment are likely to undergo considerable development.[43] Models which seem very suitable include

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43. Consider, for example, the discussion on marine pollution by Bowen, J., 'Conservation and Pollution In The Marine Environment: Political and Educational Issues', Bateman, W.S.G. and Ward, M.W. (eds), op.cit. 1985, pp. 100-105.

study and planning approaches adopted in the case of the Great Barrier Reef region itself. Comparable approaches, albeit on a different scale, have been adopted by States, as in the case of Port Philip and Western Port Bays, Victoria, and Cockburn Sound in Western Australia. There is every reason to believe that resource-rich and sensitive marine regions such as Bass Strait should be the subject of greatly expanded study with a view to ensuring integrated and balanced regimes of management. Such study, in the case of Bass Strait, would require commitment and coordination involving the Commonwealth, Victorian and Tasmanian Governments.

The failure of the OCS to provide a special mechanism, or at least signal the need for cooperative regional planning of this sort, is a matter for regret. It is not of course precluded by the OCS but the Commonwealth appears to have unnecessarily discarded a leadership role. If not an abrogation of Commonwealth responsibility, it was certainly an important opportunity lost.

CHAPTER THREE

INSTITUTIONS OF ENVIRONMENTAL POLICY

INSTITUTIONS OF ENVIRONMENTAL POLICY

3.1 LAW AND ADMINISTRATION

The federal election of December 1972 took place at a time when 'conservation' and 'environment protection' had clearly emerged as national issues for government action and reform. The new Government was certainly reformist. Special inquiries instituted by the Whitlam Government included:

> Committee of Inquiry into the National Estate;
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> Environmental Inquiry on Uranium Development in the Northern Territory;
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> Fraser Island Environment Inquiry;
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> Inquiry into the Risk of Damage to the Great Barrier Reef by Drilling for Petroleum;
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> Interim Council for the Study of Australia's Biological Resources; and
>
> Lake Pedder Committee of Inquiry.[44]

The outcome at federal level of reformist zeal included the Australian Heritage Commission Act 1975; the Environmental Protection (Impact of Proposals) Act 1974; the Great Barrier Reef Marine Park Act 1975; and the National Parks and Wildlife Conservation Act 1975.

The establishment of important Ministerial Councils, such as AEC and CONCOM, also dates from this time, as does the establishment of Parliamentary Standing Committees such as the Senate Standing Committee on Science, Technology and the Environment and the House of Representatives Standing Committee on Environment and Conservation.

The impetus given to environmental management during 1972-75 owed more to the times and the style of the

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44. Prasser, S., 'Public Inquiries in Australia: An Overview', Aust. Journal of Public Administration, XLIV, 1, 1985, 1-15.

Whitlam administration than to any party quirk of ideology. The federal commitment to the environment was consolidated by the succeeding Fraser (Liberal) Administration and State governments of various party persuasions were hardly less active over the period of both administrations.

Over the period 1970-75 (6 years) there were 61 principal enactments by Australian Parliaments, concerned directly or at least importantly, with environmental matters. From 1976 to 1980 (5 years) there were 52, and, over the period 1981-84 (4 years) there were 41. Clearly, given that current Australian statutes included 168 principal enactments made prior to 1970, over a period of some 75 years, and allowing even that some or many of the new enactments repealed existing statutes, the pace had quickened.[45]

The high profile innovations of the period 1970-84 were undoubtedly:

1. the introduction of environmental impact assessment;
2. the extension of controls over pollutants and their consolidation in an administrative sense;
3. reforms of land-use planning;
4. the strengthening of national parks and wildlife legislation, and the introduction of special heritage legislations;
5. legislation concerned with the marine environment; and
6. other legislation in support of international treaties and conventions on environmental matters.

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45. Australian Environment Council, Guide to Environmental Legislation and Administrative Arrangements in Australia, AEC Report No. 16, AGPS, Canberra, 1984.

The independence of each Australian Parliament within constitutional bounds is reflected in the legislation brought down. Apart from a commonality in general principles and some plagiarizing, real or apparent, there is considerable diversity. This diversity is perhaps least in the area of National Parks legislation. The duties and powers of managing authorities, and the duties of the public are broadly, if not exactly, comparable. Particular legislative and administrative arrangements, however, fall into one or other of six possible groupings. In the first instance National Parks legislation is, or is not (Victoria and Western Australia), combined with wildlife legislation in the one enactment. In the second instance, management responsibility may be the function of a statutory authority (Western Australia and the Northern Territory). Finally, National Parks may have full departmental status (New South Wales and Tasmania) or may be subsumed as a branch of a larger department.

More diversity is evident in the area of special heritage provisions; and in the important area of land-use planning, environmental impact assessment and pollution control. In the latter case there are broadly four models of administrative arrangement. In the South Australia model, land-use planning at the State level, environmental impact assessment and pollution control are consolidated in one enactment administered by the Department of Environment and Planning, although water pollution and waste management are administered separately. In the New South Wales-Victoria model, land-use planning and environmental impact assessment are combined; but pollution control is the function of a separate statutory authority. In the Western Australia-Queensland model separate statutory authorities are concerned with water quality, air pollution and noise abatement and other functions are variously dispersed. Finally, in the Tasmania-Northern Territory model, environmental impact assessment and

pollution control are administratively combined, but land-use planning is otherwise co-ordinated and arranged.

Land-use planning, environmental impact assessment and pollution control are often referred to as 'development control'. Development-control is politically sensitive. Accordingly, in comparison with other environmental legislation, it is more likely to be marked by special provisions for public hearings and for right-of-appeal against administrative decisions. It also commonly includes extensive provision for the exercize of Ministerial discretion. Environmental impact legislation is further characterized by extensive reliance on published 'procedures', 'guide-lines' and other devices of quasi-legal status.

Australian environmental legislation is not only concerned with regulation and the establishment of necessary infra-structure. It also, through specific provisions or the setting out of general duties of managing authorities, provides for constructive activities, to be carried out as a routine. Such activities include management of public estate, the conduct of research and education, the dissemination of information and the provision of assistance to the public on a co-operative or other basis. In some cases common interest results in co-ordinated action under a National Programme, the 'National Soil Conservation Programme' for example. Such national programmes are in turn likely to benefit from special Commonwealth funding appropriation.

The flow of federal funds is not limited to government activities and programmes. In 1983-84, for example, the Commonwealth distributed $649,950 to 34 voluntary conservation organizations. Non-government organizations also received a share of $2,500,000 disbursed as 'National Estate Grants'. In the same year a sum of $500,000 was expended on the 'National Tree Programme', a programme of tree planting for amenity purposes designed to support extensive participation by community groups.[46]

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46. see Australian Heritage Commission and Department of Arts, Heritage and Environment (formerly Home Affairs and Environment) Annual Reports, AGPS, Canberra, 1984.

Government support to community conservation organizations is far from a one-sided relationship. Some organizations, National Trusts and the two National Park Foundations, for example, are community fund-raising bodies and make a significant contribution to the acquisition of property and the management of estate items. Modest government support for the Royal Australian Ornithological Union (RAOU)'s 'Australian Bird Atlas Scheme' was rewarded with a key database, unattainable through the ordinary operations of government scientific services. The Gould League of New South Wales, and other organizations, have developed excellent environmental education materials which are widely used in schools and by government agencies.

The secondary inter-actions of Australian Environmental Policy with other areas of Government policy, with business and industry and with organizations, whether purely private or only semi-independent of Government, are important. One example concerns tertiary education. By 1980, ten Australian universities were offering higher degree studies in Environmental Science.[47] Professionally qualified people are essential for both Government and Industry, and the availability of such training is critically related to the objectives of AEP. Professional Associations in turn have oriented to the needs of AEP. Expert societies convene symposia and, from time to time, provide Government with important information or advice.

The cultivation of co-operative programmes and the utilization of general community skills, so as to achieve a broad base for environmental action, is an often overlooked element of AEP. This is perhaps because it has been pursued at a relatively modest level. However, the framing of the 'National Conservation Strategy for Australia' (NCSA) in June 1983 was hardly a modest initiative. It was a deliberate attempt to allow

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47. Ingle Smith, D., Directory of Regional Tertiary Environmental Courses, AGPS, Canberra, 1980.

extensive and direct public participation in the setting of goals for the conservation of Australia's living resources. It was, moreover, designed to bring together representatives of development and conservation interests, so as to actively explore points of difference, common ground and means of communication. The National Conservation Strategy for Australia is the subject of Chapter four.

3.2. ENVIRONMENTAL INFORMATION

Australian Environmental Policy is a potential consumer and generator of information on a formidable scale.

The demand is for environmental statistics, registers and inventories and the necessary inputs (chiefly environmental and socio-economic) for management systems and decision-making.

The institutions traditionally supplying both primary information and expert evaluation are Universities and other tertiary education bodies; State Museums and Herbaria; the Commonwealth Scientific and Industrial Research Organization (CSIRO); and the research units of government administrative departments. Additionally, the collection, compilation and dissemination of a vast body of national statistics is undertaken by the Australian Bureau of Statistics (ABS). Supporting services include National and State public libraries and government cartographic agencies.

The volume of published material is very great. The current annual growth in the Australian environmental and socio-economic fields is of the order of many thousands of items. Searching such quantities of information dispersed through a great range of journals and other sources is difficult, particularly if material is not also referenced through secondary sources (bibliographies, subject abstracts, catalogues) as is

often the case with departmental technical reports. Even so, the particular requirements of environmental management are unlikely to be fully met from published sources. Commonly, the best available numeric information is held in unpublished files and reports, and authoritative search needs to extend to potential sources via research-in-progress listings or simply extended personal inquiry. Even if found, there may be difficulties with respect to the release of such unpublished information.

The problem of rapid and efficient information-search has been greatly aided in recent years by the development of computer-aided systems of information storage and retrieval. The 1984 Directory of Australian Data Bases lists 101 currently available, or planned, public data bases accessible through telecommunications network.[48] Coverage of special subject areas is strongest in the area of business and finance but many other areas are represented. Such data bases are commonly bibliographic but others are sources of numeric data and some provide full texts.

Important initiatives, supportive of or aimed directly at the needs of Australian Environmental Policy include:

1. The establishment of special research or allied institutions, to supplement the flow of critical information from Universities, CSIRO, and other traditional sources. Important examples include the Australian Institute of Marine Science; Museum of Australia; Institute of Aboriginal Studies; Bureau of Fauna and Flora; and The Supervizing Scientist and the Alligator Rivers Region Research Institute.

2. The development of an Australian Environmental Statistics project by the Commonwealth Department of Arts, Heritage and the Environment and an expansion by the Australian Bureau of Statistics of a reporting

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48. Anon., Directory of Australian Data Bases, Australian Data Base Development Association, Hawthorn, Victoria, 1984.

of social indicators, based on information categories established by the Environment Committee of OECD (OECD Social Indicators Development Programme).[49]

3. Joint study by the Australian Environment Council and the Council of Nature Conservation Ministers of an 'Environmental Survey of Australia' programme and the establishment of a major computer-based 'Australian Environment and Conservation Database'.[50]

3.3 SOME ISSUES OF LAW AND ADMINISTRATION

3.3.1 Administrative Traditions

The Australian Environment Council considered environmental law to include four main categories. Environmental planning and protection legislation comprises diverse measures adopted to protect the environment from the on-going activities of production and consumption. It aggregates sub-categories of law respecting land-use planning; environmental impact assessment; pollution control; waste disposal; and hazardous substances. Legislation concerning the conservation of natural and cultural resources is a second category. It has as a principal objective the protection of specific natural, built or cultural resources: in general there is a presumption that particular places or things will be 'set-aside' and exempted from alteration or consumptive exploitation. The third category, resource-allocation legislation, concerns rights to resources such as land, water, minerals, fisheries and forests. Its principal historical bases lay in the need to regulate between

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49. Department of Arts, Heritage and Environment, Select Bibliography of Environment Reports and Papers, AGPS, Canberra, 1985. See, for example, Australian Bureau of Statistics, Social Report Tasmania 1985, Cat. No. 4101.6 ABS, Hobart, 1985.

50. Anon., Environmental Survey of Australia, AGPS, Canberra, 1985. Infoscan, Australian Environment and Conservation Database Feasibility Study, AEC Report No. 15, AGPS, Canberra, 1985.

competing users and to promote development in the public interest. The final AEC category is development legislation, which provides for specific development activities or projects. It aggregates sub-categories of public development legislation (the provision of highways, the supply of energy, for example); special purpose 'fast-track' legislation; and indenture or franchise agreement legislation designed to give legal effect to particular agreements between a State government and a private developer.

Development legislation and resource-allocation legislation are in many respects antithetical to the protective categories of environmental law. They are nonetheless part of that law by reason of their impact and significance for the condition of the natural, built and cultural environment. This aside, as a result of growing awareness, legislation, particularly of the resource allocation kind, has been revised and amended so as to incorporate principles of conservation and protection. There is a trend toward better alignment and accommodation. Even so, commonly the traditions if not the charters of government authorities remain narrow, and resources such as land become an arena of competition between functionally-specialized authorities pursuing single-purpose objectives. In practice, progressive concepts of resource management, recognizing individual resources as parts of complex systems requiring multi-disciplinary and multi-objective approaches, remain neglected.[51]

3.3.2 Appeal and Standing

Sources of environmental law are not limited to statutory law or necessarily to the decisions reached by

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51. Burton, J.R., 'Resource Management in The Maritime Environment', Bateman, W.S.G., and Ward, M.W. (eds), Australia's Maritime Horizons in the 1980s, Australian Centre for Maritime Studies, Canberra, 1982.

officials in accordance with its provisions.[52] In principle, common law governing nuisances, trespass, negligence, strict liability and riparian rights may be employed as a final resort in cases of grievance. There are also, especially in respect of land-use planning and pollution control, statutory provisions for tribunals or specialist courts to review the merits of administrative decisions.

In practice, the utility of common law as a resource for environmentalists is highly constrained. In the first instance, it is essentially a post hoc remedy. In the second instance, it may involve time-consuming and expensive litigation, beyond the means of individual persons or environmental organizations.

Undoubtedly, however, the issue for environmentalists of greatest importance in respect of both statutory appeal systems and of common law, is the question of 'locus standi', the question of recognition by a court of the right of a plaintiff to be heard. In essence, the rules of locus standi require a plaintiff to establish a direct interest in the issue of concern. This may extend to establishing a proprietary interest and of proving that damage to his property or person is both peculiar to himself and unreasonable. Although there is a rarely employed provision for the Attorney-General to intervene on the public behalf, the difficulties facing environmentalists concerned with questions of 'public good', and seeking redress through common law or statutory appeal provisions, are evident. Even so, the matter has been

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52. Sources of environmental law are discussed in Fisher, D.E., Environmental Law in Australia, op.cit., and Bates, G.M., Environmental Law in Australia, op.cit. Davis. B.W., Characteristics and Influence Of The Australian Conservation Movement: An Examination of Selected Conservation Controversies, op.cit., Chpt. 6 reviews literature and considers case histories.

put to the test on a number of occasions and there are clear indications of general recognition of the need to liberalise questions of standing. The Environmental Planning and Assessment Act 1979 (N.S.W.) is of particular significance in this respect. It has removed the test of property interest as a right to standing. Section 123 of the Act provides that "Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach."

3.3.3 Development Control

Land-use planning, environmental impact assessment and pollution control are often referred to as 'development control'. They are central constructs of environmental policy operating in the mainstream of community economic life and are politically sensitive.

Present criticisms of development-control legislation and administration include:

1. absence of sufficient 'locus standi' for community groups in respect of participation in judicial and administrative appeal;
2. the wide discretionary power given to Ministers, that may be exercized in an arbitrary way;
3. Variation, inconsistency or absence of national target standards;
4. absence of a two-stage procedure, so that early warning and dialogue can occur between interested parties, prior to documentation;
5. poor quality preparation of documentation, or abuse of its purposes, as a result of inadequate guide-lines and formats; and
6. the multiplicity of procedures and approvals, to be followed and obtained by developers, leading to

confusion, delays and other costly waste.[53]

The circumstances of 'standing' have already been discussed. The question of uniform (national) standards, in pollution control for example, is a complex issue. Uniform standards have sometimes been supported by developers, on the basis that present variations may cause confusion and uncertainty with respect to business decisions. Environmentalists have also argued that regional differences mask technical incompetency or political disregard of welfare hazards. Harris and Perkins, however, note that regional differences do exist, both in the assimilative capacity of the environment and in community preferences for a particular level of environmental amenity. In general they concluded that there is a strong case for regionally differentiated environmental policies but that need exists for supra-regional policy decisions where inter-regional linkages (externalities) occur.[54]

In any event, difficulties and inadequacies in present provisions for development control have been clearly articulated. At the same time, extensions to the ambit of development control have been proposed, and implemented, as in the case of the recent South Australian Vegetation Clearance Controls. Development control is likely to remain a controversial centre of AEP for some time to come.

3.3.4 Fiscal Means of Achieving Environmental Objectives

Regulation through statutory law is the cornerstone of environmental protection policies. It is not however the only means of coercion, nor is it necessarily the

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53. Davis, B.W., 'Federalism and Environmental Politics: An Australian Overview', Mathews, R.L. (ed), op.cit.

54. Harris, S. and Perkins, F., Federalism and the Environment:Economic Aspects, CRES Working Paper 1984/22, Centre for Resource and Environmental Studies, ANU, Canberra, 1984.

most efficient. Fiscal measures are widely employed in government both as penalty and incentive. In general terms, the predominance of statutory regulation as an environmental policy instrument has been made necessary by (1) the urgency of bringing extensive controls into effect; (2) considerations of social equity; and (3) the difficulty of modelling and proving systems of taxes, subsidies, credit and interest rates with broad application to environmental objectives.

Even so, economists have pointed out that there is no inherent constraint to the employment of fiscal measures to achieve environmental objectives and that in some cases they may be applied with clear gains.[55] Subsidies in the form of credit facilities and taxation relief have been employed to encourage soil and water conservation works by rural producers. Special sales tax penalties are imposed on motor vehicles with a large engine capacity and a corresponding high demand for fuel. Taxes on disposable containers such as soft drink bottles have been used effectively to reduce littering and recycle materials. Other examples could be given.[56] Fowler recommended that attention should be directed to investigating the validity of economic approaches to pollution control in Australia, as an accessory to existing regulatory methods, particularly with respect to the use of economic incentives to encourage voluntary abatement action by industry.[57]

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55. Harris, S.F. and Ulph, A., 'The Economics of Environmental Services', Tucker, K.A. (ed), The Economics of the Australian Service Sector, Croom Helm, Lond., 1977, p. 104.

56. Department of Home Affairs and Environment, Fiscal Measures and the Achievement of Environmental Objectives (unpubd.), Submissions to the House of Representatives Standing Committee on Environment and Conservation, August 1984 and July 1985.

57. Fowler, R.J., Environmental Impact Assessment, Planning and Pollution Measures in Australia, AGPS, Canberra, 1982.

The price of goods and services is of course the market mechanism for adjusting patterns of consumption. Australia, with other OECD countries, has accepted the 'polluter-pays' or concept of internalizing the 'social costs' of production. This can be achieved through regulation, fiscal measures or a combination of both. Whichever option or mix is employed, it is in effect the 'residuals tax', where the residuals are the unwanted outputs (waste, pollutants) of the production process. Environmental economists, in response to the wider concerns of the movement with the depletion of finite stock resources, have proposed systems of 'resource-depletion' and 'throughput' taxes, to regulate the rates of resource exploitation and to promote recycling and other conservation practices.[58]

A sharpening focus on the inter-disciplinary area of environmentalism and economics has been signalled by the 1984 OECD International Conference on Environment and Economics. The House of Representatives Standing Committee on Environment and Conservation is currently conducting an Inquiry into Fiscal Measures and the Achievement of Environment Objectives. The Committee is expected to report its findings in September, 1987.

3.3.5 Costs and Benefits of AEP

Despite its central interest to pragmatically minded governments, it is remarkable how little has been established concerning the macro-economic effects of national environmental policies. Foster and Whitham report that the relationship between environment protection policies and economic activity in Australia has not been studied in any depth.[59] This has evidently not been from want either of good reason or of

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58. O'Riordan, T., Environmentalism, op.cit.

59. Foster, M.A., and Whitham, W.S., 'An Emerging Role for the Economic Assessment of Environment Protection Policies', Search, 12, No. 7, 1981, 214-7.

recognition. They refer to new pressures for the economic justification of environmental policies as a consequence of world economic recession and note that the AEC has accorded high priority to research into relationships between environment, industry and the economy. Commonwealth activities are described as proceeding along two lines. In the first instance, periodic conferences and workshops have been held to stimulate interest and bring specialists together. In the second, special studies have been commissioned or undertaken. At the time of publication, these included:

- a cost study of industry pollution abatement;
- a global econometric modelling project, the Australian Resources and Environmental Assessment Model (AREAM), the objective of which is assessment of the effects on the Australian environment of anticipated changes in trade, migration and economic conditions;
- a national environmental statistics project;
- study of the economic impact of mandatory deposits on beverage containers; and
- regional environmental assessments of alternative energy developments.

In general, the principal difficulties encountered in economic assessment of environmental policies were clearly established in the workshops and conferences. These were simply, but very fundamentally, a general absence of quantitative information, and a particular absence of data on benefits (or damage costs), occasioned in part from difficulties of measurement.

Harris and Ulph developed a simple social choice model relating environmental amenity to the flow of material goods.[60] From this model they defined

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60. Harris, S.F., and Ulph, A., 'The Economics of Environmental Services', op.cit.

'environmental services' as the sacrifice in material welfare required to obtain a given level of environmental amenity. They then specified a precise schedule of private and public sector components.

Harris and Ulph found that only fragmentary data were available on private sector costs, although they were certain that these were substantial. Their analysis showed that public outlays on a range of component services rose over the decade to 1974-75, from 1.1 percent of Gross Domestic Product (GDP) to 1.5 percent GDP.[61] In 1974-75 total public outlay was estimated at $817.3m. Additional analysis suggested that with respect to the average annual growth of total public expenditure on environmental services, 62 percent was due to rising costs, 27 percent was due to rising per capita output and 11 percent to population growth. Harris and Ulph speculated that total private sector costs were between 50 and 100 percent of public sector outlays at least, and that therefore total environmental service expenditure in Australia amounted annually to at least 2 to 3 percent of GDP. An estimate of this order is generally consistent with OECD figures.

These are substantial expenditures. It is proper to inquire what benefits are obtained, in terms of either gain in environmental amenity or avoidance of environmental damage costs. Harris and Ulph note, as others before, that the costs of 'environmental damage' are not easy to measure, and relevant aggregate data for Australia are unavailable. However, information from other OECD countries does show that the damage costs of air pollution, for example, are considerable. Harris and Ulph cite a United States estimate that a 50 percent reduction in air pollution levels in major urban areas would save over $2,000m annually, in terms of reduced morbidity and mortality alone, calculated on the very conservative basis

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61. These figures are subject to the particular schedule of 'services' adopted by Harris and Ulph and to the qualifications acknowledged by them.

of earnings foregone. Such an estimate cannot be directly transposed to Australia, even on a pro rata basis, but it does serve to illustrate that environmental damage may be extremely significant in economic terms. There are certainly indicators in plenty for Australia. The national Collaborative Soil Conservation Study 1975-77, for example, showed that 52 percent of the land in rural use in Australia needs some form of treatment for land or vegetation degradation.[62] In the case of the crucial extensive cropping zone, the granary of Australia, some 68 percent was found to be degraded. The loss of productive capacity that may be inferred suggests in turn that a considerable level of expenditure on remedial action for this sector would be justified.

Recognition, however, of the economic scale of some of the penalties incurred by environmental damage, does not provide cost-benefit information on present levels of expenditure or suggest optimal levels of investment. At the present time it is not possible to satisfactorily answer the question as to whether AEP in aggregate has characteristics of effectiveness, efficiency and equity and, if so, in what degree.

Undoubtedly such matters will be pursued, and will increasingly contribute to policy decisions at both strategic and tactical levels. Ultimately, however, decision-making will remain a value judgement, drawing on many different sources. In this respect, the development of environmental monitoring and information systems is as important as the improvement of economic data and models, if not more so. The growth paradigm has focussed national attention on Gross National Product (GNP) and GDP as the measure of national welfare. The focus persists, despite the gross limitations of these statistics for such

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62. Department of Home Affairs and Environment, National Conservation Strategy for Australia, Proceedings of the National Seminar, Canberra, 30 November - 3 December 1981, AGPS, Canberra, 1982.

a purpose. Reforms have been proposed. O'Riordan cites a revision of GNP termed Measure of Economic Welfare (MEW).[63] Morris developed a Physical Quality of Life Statistic (PQLI).[64] The PQLI is a simple statistic developed for a particular purpose. It is not an alternative to GNP but serves to illustrate that, pending more fundamental reform, other indices and statistics must be examined, if policy is to be determined in a framework with any characteristic of balance.

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63. O'Riordan, T., op.cit., pp. 97-99.

64. Morris, D.M., Measuring the Condition of the World's Poor, Pergamon, Lond., 1979.

CHAPTER FOUR

THE NATIONAL CONSERVATION STRATEGY FOR AUSTRALIA

4.1 Conferences, Perceptions and Constraints

4.2 Profile of the National Conservation Strategy

4.3 The NCSA as an Agent for Change

THE NATIONAL CONSERVATION STRATEGY FOR AUSTRALIA

4.1 CONFERENCES, PERCEPTIONS AND CONSTRAINTS

Public participation in the ongoing business of government takes many forms. The most fundamental opportunity is provided by the ballot box at election times,but there are other means, institutional and otherwise, through which viewpoints can be expressed, and commonly are. Governments from time to time find it expedient, and no doubt even useful to actively solicit public inputs, if only to pre-empt constituency pressure at a later date. In such cases, the provisions that are made are, as a rule, highly regulated and the inputs gathered are accordingly selective. In this respect the approach to the framing of the 'National Conservation Strategy for Australia', sub-titled Living Resource Conservation for Sustainable Development was unusual, as it was too in its development outside of formal supervision by AEC and CONCOM.[65]

The National Conservation Strategy for Australia (NCSA) was a direct outcome of the publication of the World Conservation Strategy (WCS) in 1980.[66] The WCS was commissioned by the United Nations Environment Programme (UNEP) and executed by the International Union for the Conservation of Nature and Natural Resources (IUCN). The WCS was a response certainly to the recognition that many environmental issues had a global character, but also to the evidence that

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65. Department of Home Affairs and Environment, National Conservation Strategy for Australia, AGPS, Canberra, 1983.

66. Anon., World Conservation Strategy, International Union for Conservation of Nature and Natural Resources (IUCN), 1196 Gland, Switz., 1980.

everywhere, at regional and national levels, living resources, the basis of development, were being depleted or destroyed beyond the possibilities of renewal. The WCS set out objectives and principles to be followed in living resource conservation. It urged the development of National Conservation Strategies.[67] Australian endorsement of the World Conservation Strategy was reasonably assured by the reason of Government membership of IUCN, UNEP and other international organizations contributing to the WCS. The launch in March 1980 was an occasion for minor speech making and press releases. In Canberra and most state capitals, Ministers welcomed the Strategy and expressed satisfaction with it. In Canberra, the Prime Minister accepted the WCS "on behalf of the Government, indeed on behalf of all Australians".[68]

The matter might have ended there, but did not. In September 1980 the Prime Minister announced that a National Conservation Strategy would be developed, and that he "had been in contact with the Premiers and the Chief Minister of the Northern Territory, all of whom agreed to particpate in the development of a National Conservation Strategy in Australia".[69] In early 1981 a National Steering Committee, under Commonwealth chairmanship but with representation from

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67. Strong, M.F., The Environmentalist, 4, 1984, p. 33, reported that 30 countries have or are in the process of developing national strategies. Anon., IUCN Bulletin Supplement, 3, 1985, p. 6, reports that eight South Pacific island states announced in June 1985 the intention to develop national strategies. A National Conservation Strategy is presently being considered for formal adoption by the New Zealand government.

68. National Conservation Strategy for Australia Interim consultative Committee, Unpublished Report to the Minister for Home Affairs and Environment, March 1984.

69. NCSA Interim Consultative Committee, op.cit.

all States and the Northern Territory was formed "to co-ordinate the development of the National Conservation Strategy".[70] State Premiers may have agreed to participate, but not without reservation. The Premier of Western Australia subsequently wrote:

> Our National Strategy, however, must be a statement of conservation objectives which State Governments can accept and for which they - rather than the Commonwealth - are responsible... It must be clearly understood, however, that the State Government will not support a strategy which does not give cognisance to Western Australia's conservation initiatives, future directions and autonomy, together with the need to permit adequate economic development to be undertaken.[71]

For the most part, the senior officials comprising the National Steering Committee were also members of CONCOM or AEC Standing Committees or Working Groups. The significance of the by-pass of CONCOM and AEC in the process of the development of the NCSA was therefore more apparent than real; had these Councils been asked to co-ordinate development of the NCSA they would have employed these same officials or their agency colleagues. The particular advantage, whether by design or otherwise,that accrued from by-passing formal CONCOM and AEC control, was that it permitted a more flexible and business-like approach. CONCOM and AEC find it difficult enough to meet once a year. Their senior Standing Committees may meet twice, but have very heavy business agendas. As it was, with a single purpose National Steering Committee under the chairman-

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70. ibid.

71. Western Australian Government, Western Australian Response To Lead Papers for National Conservation Strategy Seminar, Paper circulated to National Conference, Canberra, 30 November - 3 December 1981.

ship of the head of the Department for Home Affairs and Environment, the same department providing the small task force formed to service the project, the chance of efficient and purposeful project administration was greatly improved.[72]

These matters being in place, the decision was taken to convene a National Seminar to review specially commissioned source papers. The National Seminar held in December 1981 was attended by 198 representatives of government, industry and community groups. The source papers, suitably revised, were published as its Proceedings.[73] A direct outcome of the National Seminar was the formation of a 'Consultative Group' to further advise the National Steering Committee. Membership of the Consultative Group was equally divided between industry and conservation interests.

The next step taken was the preparation by the NCSA Task Force of a Discussion Paper, "Towards a National Conservation Strategy".[74] Twenty-thousand copies were printed and distributed in May 1982 for public comment. In response, some 550 written submissions were received. Matters were then drawn together, as best they could, and a "Conference Draft" Strategy prepared. The final National Conference was convened in June 1983.

The consensus reached at the National Conference was a remarkable success. It is clear from the published record that it was achieved in the face of some very fundamental differences of opinion -

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72. Now Department of Arts, Heritage and Environment.

73. Department of Home Affairs and Environment, National Conservation Strategy for Australia: Proceedings of the National Seminar Canberra, 30 November - 3 December 1981, AGPS, Canberra, 1982.

74. Department of Home Affairs and Environment, National Conservation Strategy for Australia: Towards a National Conservation Strategy, AGPS, Canberra, 1982.

differences sharp enough to have led to calls for its abandonment. Even on the eve of the Conference some stern warnings were issued. The Chairman of the Trade Council of the Confederation of Australian Industry had this to say:

> Chairman, I do not make these statements simply to be provocative. I do so to make clear, beyond doubt, Industry's approach to the Conference. In a few words, Industry delegates are not prepared to acquiesce to any proposals which they believe will be detrimental to and not in the best interest of the Australian community.... with respect to the Background Papers - the White Pages of the Conference Document - which contain a raft of proposals, these would if implemented, even in part, effectively emasculate development in Australia with no net benefit to the community.... Any attempt by the Conference to bind the papers to the Strategy, or to transfer material from the papers into the Strategy, will not be supported.... Indeed we will oppose any such moves with all our combined vigour.[75]

Equally forthright views were expressed by the President of the Australian Conservation Foundation:

> It is, I think, no secret that many people in the conservation movement - and I am one of them - regard the present draft as inadequate. There are significant omissions. The draft has nothing on population policy.... The draft has no environmental eithic, no over-riding commitment to a conserver society.... Many of the sections on specific issues are bland and vague, capable of meaning all things to all men. They need to be sharpened up. They need to set out more specific objectives, a programme for action.[76]

Even so, there was a will to reach agreement. The

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75. Anon., A National Conservation Strategy for Australia: Summary Record of Conference held in Canberra, June 1983, Department of Home Affairs and Environment, Canberra, 1983, pp. 35 and 43.

76. ibid., p. 29.

attraction of finding genuine common ground and the chance of directly participating in major policy-making was persuasive. The Conference did not resolve differences or cause the abandonment of positions. These were merely set aside, as battles for another day. The common ground established was rather more than some would have wished, and much less than others had hoped for. Nonetheless it was agreed.

The winners in all this were undoubtedly the Governments represented on the National Steering Committee. While there was clearly considerable risk that the adopted process might fail, with most unsatisfactory implications for the objective of preparing a credible and well-supported National Strategy, matters were not entirely left to chance.

The major constraints imposed by the Government on the National Conference were two-fold.[77] The first of these was that the NCSA should adopt and incorporate certain key elements of the World Conservation Strategy, notably the definitions provided by the WCS for the terms "development" and "conservation", as follows:

> Development is the modification of the biosphere and the application of human, financial, living and non-living resources to satisfy human needs and improve the quality of human life. For development to be sustainable it must take account of social and ecological factors, as well as economic ones; of the living and non-living resource base; and of the long term as well as the short term advantages and disadvantages of alternative actions.
>
> Conservation is the management of human use of the biosphere so that it may yield the greatest sustainable benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations. Thus conservation is positive, embracing

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77. ibid., pp. 20-21.

> preservation, maintenance, sustainable utilisation, restoration and enhancement of the natural environment. Living resource conservation is specifically concerned with plants, animals and micro-organisms, and with those non-living elements of the environment on which they depend. Living resources have two important properties, the combination of which distinguishes them from non-living resources; they are renewable if conserved; and they are destructible if not.

The significance of these definitions is that "conservation" is described in the same terms of human utility as is "development", and that both are then shown, or made to be, essential and entirely complementary processes. The adoption of these definitions permits the rejection of certain ethical or other non-utilitarian viewpoints as a basis for conservation action. At the same time it validates conservation as an essential part of responsible development. In terms of environmental politics, these definitions are very favourable to government.

The second constraint placed on the National Conference by Governments was that the Strategy was not to be used as a vehicle for challenging the traditional division of responsibilities between States and Commonwealth. In the words of paragraph 10 of the NCSA:

> Consideration of the Strategy and its implementation will take place within Australia's federal, constitutional, legislative and administrative framework. In addition the implementation of NCSA recommendations should have regard for social, economic, cultural and other relevant goals.

It seems fair to speculate that strategists on the National Steering Committee, or behind it, were aware of a number of gains that might be made through

extensive public participation in the drafting of a NCSA. Clearly, the credibility and persuasiveness of a strategy developed through such a process would be greatly enhanced, given that its prescriptions were of genuine merit. However, even in the event of some degree of failure in that regard, the incorporation of key WCS terms and definitions and their endorsement by industry and conservation interests, may well have been seen to be an important objective in itself.

4.2 PROFILE OF THE NATIONAL CONSERVATION STRATEGY

The NCSA put forward by the 1983 June Conference is a 14 page published document. It defines its purpose as the provision of "nationally agreed guidelines for the use of living resources by Australians so that reasonable needs and aspirations of society can be sustained in perpetuity". It claims to identify "broad strategic measures necessary to bring about properly integrated conservation and development practices in Australia..."

Essential elements of the Strategy are identified as:

(a) the Definitions of development and living resource conservation;

(b) the Objectives of living resource conservation -

  (1) to maintain essential ecological processes and life-support systems;

  (2) to preserve genetic diversity;

  (3) to ensure sustainable utilisation of species and ecosystems;

  (4) to maintain and enhance environmental quality;

(c) the Principles of integrating conservation and development; of retaining options for future use;

of focussing on causes as well as symptoms; of accumulating knowledge for future application; and, of educating the community;

(d) a set of Priority National Requirements and Actions.

Three of these four essential elements are adopted unchanged and directly from the World Conservation Strategy. The fourth element, the set of Priority National Requirements and Actions, represents the particular contribution of the consultation process commenced in 1981 and culminating in the 1983 National Conference. There are 12 PNRs (major goals of the Strategy) and 60 PNAs (more specific measures for achieving the objectives of the Strategy).

Collectively, the Priority National Requirements (PNRs) refer to the management of land and its component resources - soil, water, plants and animals. They emphasize management directed at sustainable use, the preservation of resource quality and the optimization of future potential. Their flavour may be assessed from the following examples.

1. Ensure that productive agricultural and forestry systems are used on a sustainable basis.
2. Preserve the genetic diversity of Australia's plant and animal species and ecosystems and of those introduced species which support plant and animal based industries.
3. Ensure that increasing use of the aquatic environment is managed so that its ecological integrity is retained and its utility and productive capacity are sustained.

The 60 Priority National Actions are presented under nine headings. These are Education and Training; Policy

Planning and Co-ordination; Legislation and Regulations; Research; International; Reserves and Habitat Protection; Controlling Pollution, Wastes and Hazardous Materials; Using Living Resources; and, Conserving Soils and Water. For the most part, the PNAs, while clearly implying the need for improvements and increased levels of activity, conform remarkably well with the policies, practices and priorities already in place. Some hint of new goals or the need for structural changes is present in perhaps one third, as the following examples illustrate.

1. Review and where appropriate revise the charters of single purpose government authorities to enable them to take account of both conservation and development objectives.
2. Undertake and publish a national inventory of wetlands and flood plains and draw up a set of criteria for evaluating their conservation.
3. Establish a suitable administrative framework for the review of arid land use and management.

The 60 PNAs of the NCSA have been criticized as being, for the most part, so over-generalized or qualified, as to lack any 'cutting edge'. It is observed, too, that even should they be regarded as compelling, there is a lack of prescription as to how objectives might be met.

This may be fair commentary, but it is not valid criticism. The content of the NCSA cannot be reasonably separated from the particular process which generated it. Generalized prescriptions were inherent in an open forum debate between representatives of sectional interests. The lack of any executive authority in the Conference precluded any detailed prescription for implementation, even had not any such effort been beyond the capacities of the Conference in terms of time, skill, or willingness to reach agreement.

It cannot be said that the NCSA offers any new vision of the needs of living resource conservation in Australia, although it does draw together many important percepttions; not does it offer any original 'technological fix' for particular matters.

It follows that the essential value of the NCSA is found less in its explicit content, than in the community support it embodies. It is the acknowledgement given, and the value ascribed, to a range of measures, which is its original and most potent attribute.

4.3 THE NCSA AS AN AGENT FOR CHANGE

The 1983 National Conference was not burdened with any special authority nor were its proceedings the subject of any prior commitment by Government. Having completed its deliberations and reached its agreement, it could do no more than convey the NCSA to its sponsor the Commonwealth Government, with such entreaties as it cared to make. This is did.

The NCSA was tabled in the Commonwealth Parliament during December, 1983. In his Statement to the House, the Minister for Arts, Heritage and the Environment advised that:

1. the strategy had been referred to State Premiers and the Chief Minister of the Northern Territory;
2. the Government had taken action to establish an Interim Consultative Committee, as recommended by the National Conference, to advise on further action; and
3. the Government was considering how the strategy would be applied in areas of Commonwealth responsibility.

In May 1984, speaking at the ANZAAS Congress, the Minister said:

> I hope that... I will not be construed as suggesting Australia's Conservation Strategy is about to be pushed into a political and bureaucratic labyrith, to emerge piecemeal

> or scarred some years hence. It is a fact, however, that the Strategy is too broad to be implemented overnight as an entity... Already, many activities in Australia are compatible with the objectives of the National Conservation Strategy... The most immediate potential of the Strategy is to strengthen them and add direction to such programs... Before us now are sixty priority national actions listed in the Strategy. To attempt to implement all of these simultaneously would be a logistic impossiblity as well as prohibitively costly".[78]

At the same conference the President of the Australian Conservation Foundation said:

> The problem is to persuade each of the eight governments in Australia to adopt a principled working programme of active, complex conservation measures and to commit to that programme the resources of people and money necessary to carry it out within a reasonable period... That Committee (the Interim Consultative Committee) did not meet until February 1984, eight months after the Conference. The Commonwealth has asked the Consultative Committee how it might obtain endorsement of the Strategy by the States but it has not yet given its own endorsement.[79]

The Commonwealth Government, although it may not have acted with the enthusiasm and flair expected of it by the Foundation had certainly not abandoned the NCSA.

The Government, in addition to requiring its own agencies to co-ordinate in-house reviews, had requested three reports from the Interim Consultative Committee (ICC). The first of these, presented in March 1984, concerned endorsement of the Strategy.[80] The ICC

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78. Australia-New Zealand Association for the Advancement of Science, Commonwealth Record (14-20 May 1984).

79. Wilcox, J., 'The Future of the National Conservation Strategy', (paper read to 54th ANZAAS Congress, Canberra, 1984).

80. Unpublished Report to the Minister for Home Affairs and Environment, (31st March 1984).

recommended, inter-alia, formal endorsement by the Commonwealth Government. It defined endorsement as:

> Endorsement of the NCSA is taken to mean agreement with the Objectives and Strategic Principles of the Conference document and a commitment to implement the Priority National Actions, in co-operation with development and conservation interests, taking account of Australia's federal, constitutional, legislative and administrative framework, and the general economic climate.

The second ICC Report concerned measures that might be undertaken during 1984-85.[81] The Report recommended action directed at increasing public knowledge and awareness of Strategy principles. The third and final report of the ICC responded to a broad set of references concerning general promotion and implementation of the Strategy.[82] The Report acknowledges that the NCSA will be put into effect incrementally over time. It notes that the image of the NCSA is suffering from a lack of real tangible action. In general, the ICC looks to initiatives from Ministerial Councils (AEC, CONCOM and others) to promote and implement the Strategy; and to action by individual governments in respect of co-ordinating policies and programmes with Strategy principles and objectives. Central recommendations are made concerning:

- the establishment of a NCSA Advisory Council;
- the reporting to parliaments of environmental indicators and of progress with the NCSA;
- continued promotion at a high level of the NCSA to the wider community; and
- the early development of a specific national project

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81. Unpublished Report to the Minister for Home Affairs and Environment, (15th June 1984).

82. Interim Consultative Committee, 'Final Report to the Minister for Arts, Heritage and Environment', Depart. Arts, Heritage and Environment, Canberra, 1985.

under the aegis of the NCSA.

The final ICC Report has been released for public comment. Whatever the outcome, the formal status of the NCSA has appreciated to a considerable degree.[83] As of February 1985, the Strategy had been formally endorsed by the Commonwealth Government, the Northern Territory Government and the State Governments of New South Wales, Victoria, South Australia and Western Australia.[84] Non-government organizations including the Institute of Foresters of Australia; the Institution of Engineers, Australia; the Australian Council of National Trusts and the Australian Association for Environmental Education; together with the Australian Council of Local Government Associations, have volunteered endorsement.

The National Conservation Strategy has clearly arrived as a formal element of Australian public affairs. It has limitations as an action-document. There is nothing in its content which of itself requires or is likely to originate major change.

On the other hand, it is a document which brings together many important perceptions, both of ultimate objectives and areas of need. It gives to them new status of formal recognition, together with in-principle support. It will be used as a standard against which to judge government performance. Skilfully employed it has the capacity to be a facilitator and motivator. In these senses it is a potential agent of change of considerable significance. At the very least it is an important model and test of the capacity of dialogue between development interests, environmentalists and officials.

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83. ibid.

84. State Strategy Plans are under preparation by the governments of Western Australia and Victoria.

CHAPTER FIVE

A SYSTEMS VIEW OF ISSUES IN AUSTRALIAN ENVIRONMENTAL POLICY

A SYSTEMS VIEW OF ISSUES IN AUSTRALIAN ENVIRONMENTAL POLICY

5.1 CHAPTER INTRODUCTION

In preceding chapters, four themes of Australian Environmental Policy have been examined. These chapters collectively provide a useful guide and reference source to AEP as a working sub-system of public administration. This was the first objective of the study. The focus of this final Chapter is the second study objective - the inquiry into structural issues within AEP which are challenges to present performance and to future policy elaboration.

The Chapter draws on the structural issues noted or described in the thematic treatments. It presents them in summary form only, but collates and returns these important insights to a holistic view of AEP, with added comment. The Chapter commences with a brief discussion of models of policy and policy-making. The discussion serves to introduce a systems model of AEP which may be used for the purpose of synthesis. At the same time it contributes additional understanding of the character of the policy process.

The Chapter concludes the main body of the dissertation with a final brief comment on the conflict of aims embodied in AEP.

5.2 MODELS OF POLICY AND POLICY-MAKING

In Western democracies, public policy making is generally recognized as a bargaining process.[85] The exchange may be between the Government and a single influential interest group; or it may be more complex, and usually is. In any event, if the Government acts at all, it supposedly does so on behalf of the 'public

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85. Richardson, J.J. and Jordan, A.G., Governing Under Pressure, M. Robertson, Oxford, 1979.

interest' - the interest of the whole community, to whom it answers at election times.

Contemporary case-history studies show that there are many obstacles facing groups seeking predominant influence over sectional government policy.[86] To do this major resources, effective organization and a high level of administrative skill may be required. The contemporary balance in these matters is such that Zeigler argues that groups are more often responding to policy proposals developed by government and non-government experts, than they are initiating fully independent and original proposals of their own.[87] Perhaps the most formidable constraint is that concerned with making (and retaining) a policy proposal as an issue on the political agenda. Richardson and Jordan suggest a five-stage cycle, in which procession to the second stage (emergence as a political issue) requires some dramatic, perhaps fortuitous, event so as to bring media and public recognition or focus.[88] In the absence of such an event, a very real problem may be indefinitely 'crowded off' the political agenda. The remaining three stages emphasize that a real time limit may exist within which a resolution must be obtained, before political and public attention is directed elsewhere.

These limitations on the operations of interest-groups do not necessarily imply that the view of policy as a bargain, and of the Government as broker, is wrong. They do imply that governments have abundant opportunity to avoid issues: that less public policy is made than might be expected from a simple consideration of the number of organized groups and of the range of perceived

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86. See, for example, Scott, R. (ed), Interest Groups and Public Policy, Macmillan, Melb., 1980.

87. Ziegler, H., 'Interest Groups and Public Policy: A Comparative, Revisionist Perspective', Scott, R. (ed), op.cit.

88. Richardson, J.J. and Jordan, A.G., op.cit.

public issues. They also imply that there is considerable room for the government to manoeuvre in - to lead, as well as conciliate.

There are of course limits to the Government's freedom of action. The Government can only act within constitutional and institutional bounds, both domestic and foreign. It cannot easily alter existing allocation of resources without causing numerous secondary dislocations, mostly unlooked for and unwanted. Its choices depend too on the scope and quality of information available to it, and its decisions must conform with established community values and standards, if they are to be accepted. Finally, Governments have to contend with a plain community suspicion and dislike of change.

These are rules of the game. Commonly, they limit the set of options open to the Government on any one issue at any one time. As circumstances change, or previous-made policy fails, policy making becomes a matter of seeking the minimal necessary adjustment; of selecting an alternative option from within a prescribed and known set. The development of policy features not only compromise and mediation, it is markedly 'incremented' in character.[89]

The case of Australian Environmental Policy, however, has some very signal attributes. The period 1945-85 has seen fundamental changes to concepts of national interest in the environment. There has been a very rapid elaboration of policy in which normal processes of policy making have been compressed and intensified, with considerable stresses. Constitutional and institutional bounds have been tested. Confrontation has superceded bargaining. New policy instruments have been projected.[90]

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89. Lindblom, C.E., 'The Science of Muddling Through', Public Administration Review, 19, 1959, 79-88.

90. Environmental Impact Assessment, for example.

The significance of this is not that the given characterization of public policy making is wrong: it is rather that 'the environment' has been an exceptional area, in terms of internationalism, federalism and other matters described earlier in this work. In many respects, a highly relevant concept for AEP over the last fifteen years has been Simon's concept of 'satisficing'.[91] Policy makers have looked for, and hastily assembled, 'feasible' solutions rather than 'optimal' ones.

Models of policy-making are powerful aids to constructive thought. Each of those so far considered - interest-group theory, 'satisficing', the limitations to government freedom-of-action - have particular application. Interest-group theory focuses attention on social organization as a factor or determinant of policy making. The concept of 'satisficing' emphasizes that decision-making involves a selection, conscious or otherwise, of a strategy-of-choice. Freedom-of-action emphasizes that policy options are limited by established rules, by economic resources and by the scope and quality of available information. Each gives temporary focus to part of the policy process for a particular purpose.

This study, however, is concerned with policy as 'the policy process'. The notion is itself a conceptual model. It conceives of policy as proceeding serially through functionally discrete stages. In its simplest form, four conceptual stages are recognized. The process begins with 'issue-emergence' or 'agenda-setting'. This is the stage at which a 'policy proposal' gains public recognition and political significance. The second stage is 'policy-making', a stage from which ultimately decisions are taken concerning 'objectives' and 'means'. The third stage is 'policy-implementation', the instrumental phase in which means are put into effect.

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91. Simon, H.A., 'A Behavioural Model of Rational Choice', Quarterly Journal of Economics, 69, 1955, 99-118.

The fourth stage is 'policy evaluation' in which effectiveness and efficiency in respect of targets is discerned, together with other policy impacts ('spill-overs') on community life in general. The fourth stage feeds back to stages one, two or three.

The policy process is clearly a systems view of policy. Its functional stages correspond to the stages of the generalized systems model. Issue-emergence or agenda-setting is the system input. It draws on the system outputs through the stage of policy-evaluation (the feedback loop of the policy system). Its essence is perceptions, based on values and knowledge. In the case of AEP, this kind of perception is sometimes termed 'environmental cognition'. Policy-making is the central processing of the policy system. Its essence is the taking of decisions. These decisions are political ones both in a structural sense (politiciams make, or are ultimately responsible for them) and in a functional sense (the interest-group model of policy). 'Politics' is an accurate descriptor of the common ground of central processing in the AEP system. Policy-implementation is the output of the policy system. Its essence is instrumental effect. It institutes management regimes which have both a target and a generalized impact. In the case of AEP these primary outputs may be termed 'resource management regimes' and 'social impacts'.

The systems model is uniquely suited to an operational, holistic view. It may be employed in analysis or synthesis. For the purpose of synthesis it permits the maximum aggregation of elements, while still preserving a functional classification. The system model of AEP is an effective framework for bringing together and placing in context some of the main findings of the study with respect to structural issues.

5.3 A SYSTEMS VIEW OF ISSUES

5.3.1 Environmental Cognition - a system Input

Environmental cognition is perception based on values and knowledge, in each case both personal and shared. At least three principal cognitions, described in Chapter one, are evident. There is the 'earth-ethic', which emphasizes the value of nature in meeting spiritual needs and is strongly protectionist. The 'welfare-utilitarian' view emphasizes the diversity of man's physical and intellectual needs, the capacity of the natural world to meet these, and the need to balance development with environmental protection and conservation. Finally, there is what may be termed 'the development over-ride', a cognition which focuses on the importance of gaining immediate material benefits, even if this puts at risk present levels of environmental quality. The development over-ride is the socially dominant cognition and is commonly in direct opposition to the earth-ethic or welfare-utilitarian viewpoints. Economic performance as a measure of progress and security remains a national pre-occupation.

The earth-ethic has received little if any acknowledgement in public policy. However, following 'acceptance' of the World Conservation Strategy, and the subsequent adoption of a National Conservation Strategy, a welfare-utilitarian cognition has been formally incorporated in public policy (Chapter four). 'Development' and 'conservation' are defined so as to represent equally essential and entirely complementary processes. However, it is every-day experience that 'developers', whether public agencies or private firms continue to perceive their duty, either to the public or shareholders, to be the maximization of economic returns, within the limits of government regulation and consumer investment decision. Chapter three noted that national attention to GNP and GDP as the measure of

national welfare persists, despite the gross limitation of these statistics for such a purpose. Drawing on Chapters one, three and four, the principal conclusions are summarized as follows:

1. There is clear evidence of change in the mix of environmental cognitions held both at community and individual levels. This change has been reflected in the general elaboration of AEP. It has been given particular recognition in the formal incorporation within AEP of the polluter-pays, or concept of internalizing the social costs of production, and in the adoption of the WCS definitions of 'development' and 'conservation'. However, it is equally apparent that there is a substantial gap between practice and what is now merely policy rhetoric.

2. Economic performance statistics, such as GNP per capita, remain dominant conditioners of government responses and are as yet unbalanced by equal-weight descriptors or indexes of quality-of-life.

The full accounting of the social costs of production clearly requires government intervention in the market place, but the concept of the 'environmental audit' as an essential part of responsible economic management remains foreign to Australian development interests. The employment of environmental audit and codes of practice would be consistent with the objectives of public policy. Governments have the means to support such measures, not the least of which are their own purchasing and investment decisions. At the same time, public policy requires the development and projection of quality-of-life indexes or descriptors as important elements of national statistics. Other practical measures are needed to close the gap between practice and policy rhetoric.

5.3.2 Politics - System Central Processing

The politics of environmental policy are marked by chronic dispute. It has exposed a weaknes in inter-governmental relations within the federation and a weakness in approach to the management of public debate. This is not to say that bargaining, co-operation and consensus are absent from the policy process, or that environmental policy is the only major area of public policy which has to contend with an enduring ideological schism. There is, however, a level both of conflict and uncertainty which sets it apart.

Environmental politics were characterized in Chapter one and inter-governmental politics in Chapter two. The account of the National Conservation Strategy for Australia in Chapter four gave many illustrations of political attitudes. In Chapter three, evidence was given showing that party politics, although evident, have been of relatively minor significance in the evolution of environmental policy. The primary conclusions in respect of structural political issues were reached in Chapters one and two. They may be summarized as follows:

1. environmentalism, particularly when linked to internationalism, has been a source of strain on inter-governmental relations within the Federation: existing mechanisms for consultation and co-operation have not been sufficient to remove tensions and uncertainties;

2. environmental decision-making has often been protracted and confused by numerous secondary issues and rationalizations: it has reflected deficiencies in approach by both development interests and environmental groups and governments at times have shown themselves to be inept in the management of public debate.

In that environmental dispute has been marked by confrontation and confusion, it must be regarded as

wasteful and counter-productive. In respect of inter-governmental relations, Smith considered that there was an important need for the levels of policy-making and interest to be more clearly delineated and defined, so that the location of responsibility for policy decisions can be identified. "In that area," he said, "the relationship between state and federal government, and the ways in which each ought appropriately to try to influence the decisions of the other, are crucial matters... but... it is the area of potential improvement about which once can be least sanguine."[92] Smith may well be correct on both counts, although improvements to existing inter-governmental mechanisms should not be beyond wit or skill. The chief difficulty lies in gaining objective recognition of the problem. Leadership, perhaps from scholars, is required to give the matter public focus and to show that there are benefits to be gained from serious inquiry.

The solution to the confrontation and confusion in environmental decision-making may not lie in increased levels of public participation. Watt considered that a high level of public participation is as likely to polarize as it is to aid.[93] Participation, he said, was no panacea. On the other hand, there is every reason to believe that the structuring of this participation is all-important. In general, Australian development interests have favoured an adversarial or defensive approach to public participation in development planning. Plans are developed and then thrust on the public at a late stage, on a 'take-it-or-leave-it' basis, or as a 'fait accompli'; on occasions, environmental impact statements are styled as much to deter as to facilitate debate. There are fertile opportunities in

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92. Smith, B., 'Environmental Issues and Policy', Harris, S. and Taylor, G. (eds), op.cit.

93. Watt, A.J., 'The Policy Process in the Resolution of Land-Use Conflicts on the Boyd Plateau', Australian Journal of Public Administration, XXXV, No. 3, 1976.

AEP to project and develop 'environmental mediation' techniques, aimed at constructive dialogue between developers and environmentalists from early planning stages.

5.3.3 Resource Management Regimes - a system Output

Environmental policy has modified existing management regimes in respect of natural resources such as land, forests, fisheries and wildlife. It has instituted management of resources, such as air, water and historic buildings, which were previously regarded as 'self-protecting' or at least free from any management demand. Institutions of Environmental Policy were discussed in Chapter three, including special treatment of environmental information and issues of law and administration. Drawing on Chapter three, the following conclusions are reached:

1. while natural resource management at sector level has commonly adopted conservation and environmental objectives, the approach to management has tended to remain functionally specialized. As a result fully 'integrated' management regimes reflecting a systems approach have tended to remain the exception rather than the rule;

2. natural resource management commonly has to contend with a limited information base; the limitations apply equally to inventory, monitoring, ecological study and the modelling of alternative management regimes;

3. natural resource management is commonly implemented through statutory regulation; there are sound reasons for doing so, although it is clear that in some cases other means, particularly fiscal measures, can be employed with clear gains in efficiency and (probably) effectiveness.

There are present indications of a sharpening focus on the macro-economic effects of AEP, the co-

ordination of economic and environmental policies and the specific application of fiscal measures to environmental objectives. Improvements to present resource management regimes will require further reform of sector management traditions, together with intensive development of the management information base.

5.3.4 Social Impacts - a system Output

The social impacts of AEP are considerable. It has been estimated, for example, that between two and three percent of GDP is now devoted to the provision of 'environmental services' (Chapter three). The OECD International Conference on Environment and Economics, while noting that "cost impacts and environmental policies should consider equity aspects", concluded:

1. the benefits generated by environmental measures (including the damage costs avoided) have generally been greater than their costs;
2. the macro-economic effects of environmental policies on growth, inflation, productivity and trade have been minor.[94]

Chapter three in this study, however, noted that at the present time it is not possible to answer the question as to whether AEP in aggregate has characteristics of effectiveness, efficiency and equity and, if so, in what degree. This study also noted that environmental disputes have been divisive on a significant social scale. It referred to the destabilization of at least one State government as a consequence of environmental dispute; civil disobedience by protesters through actions of trespass and incidents of damage to property and assault which cannot be discounted as indicators of future trends (Chapter one). Chapter three also identified some important deficiencies with respect to present provisions for 'development-control'. These deficiencies encourage confusion, delays, alienation, and other costly waste.

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94. Environmental Policy and Law, 13, 1984, 39-40.

Conclusion, drawing on Chapters one and three, are summarized as follows:

1. there is an important need to improve the collection of data on environmental quality, resources, benefits and expenditures at national, regional and local levels;
2. deficiencies with respect to the present provisions for development control have been clearly articulated; and
3. it is in the national interest that improved methods for conducting the environmental debate be developed.

It is evident that in Australia, macro-economic effects, cost-benefits and equity considerations in respect of AEP have been insufficiently studied. It is evident too that environmental monitoring of quality-of-life indicators is at an early stage of development, although significant steps have been taken. Adverse social impacts of AEP require greater attention to (1) effects at regional and community levels, (2) public education and informational services, and (3) reforms of development-control provisions. All these matters are important opportunities for productive enterprize.

5.4 AUSTRALIAN ENVIRONMENTAL POLICY - THE CONFLICT OF AIMS

At the beginning of this dissertation, AEP was introduced as a field of policy processes, reflecting a common code within Australia's federal system and demarcated by particular aspirations in respect of quality-of-life. Subsequent examination of four major themes showed AEP to be controversial and a number of structural issues which are primary sources of conflict and dispute were identified. The discussion in this Chapter has returned these issues to a holistic or systems view of AEP. This synthesis has emphasized functional and collective significance within AEP as a working sub-system of public administration. Comment has been added indicating that these structural issues are open to address: they are

resolvable, at least to some degree.

This prospect of refinement and elaboration of AEP invites a further final question. Given that improvements are made, what is the potential of AEP to meet community aspirations in respect of quality-of-life? Or less grandly, can or will AEP cease to be a centre of conflict and dispute? Is there some further qualification, or point of emphasis, that it is prudent to make?

Despite the rapid development of Australian Environmental Policy and the prospects for its further refinement, it seems unlikely that the chronic disputation that characterizes AEP will lessen. One reason for this view is that public vigilance and expectation will increase, as education and awareness is cultivated. Another is that AEP incorporates a clear conflict of aims. Development and conservation are said to be inter-dependent. They are to be balanced. This may be so in aggregate, but at the work-face they chiefly represent mutually exclusive alternatives. Decisions have to be made and judgements reached, again and again. The decisions taken involve wealth, power and deeply-felt beliefs. It is inconceivable that on any one major issue, all interest-groups should reach the same judgement and be prepared to support the same decision.

In these circumstances, management of dispute needs to be recognized as part of the development process. It should be planned for. Opportunities should be developed for a structured dialogue, so that possibilities of accommodation are maximized and the area of ultimate dispute, if any, narrowed. With maximum possible assimilation in the development process of elements of environmental balancing,the remaining debate would then be more to the point, and less socially divisive than it has so far shown itself to be. Guarded satisfaction with the achievements of AEP may be warranted. Complacency is not.

APPENDIX ONE

PRINCIPLES AND PROCEDURES FOR COMMONWEALTH-STATE CONSULTATION ON TREATIES AS ENDORSED BY THE COMMONWEALTH

The Commonwealth endorses the principles and procedures, subject to their operation not being allowed to result in unreasonable delays in the negotiating, joining or implementing of treaties by Australia.

A. CONSULTATION

i) The States are informed in all cases and at an early stage of any treaty discussions in which Australia is considering participation. Where available, information on the long term treaty work programs of international bodies is to be provided to the States.

ii) Information about treaty discussions is forwarded to Premiers' Departments on a regular basis through the Department of the Prime Minister and Cabinet.

iii) As a general practice, consultation is conducted by the functional Commonwealth/State Ministers or Departments concerned.

iv) Existing Commonwealth/State Ministers' consultative bodies (such as the Standing Committee of Attorneys-General, the Australian Fisheries Council, etc.) may be used as the forums in which detailed discussions of particular treaties take place.

v) Functional Departments keep Premiers' Departments, State Crown Law Offices, the Commonwealth Attorney-General's Department and the Departments of Foreign Affairs and Prime Minister and Cabinet informed of the treaty matters under consideration.

vi) When issues are to be discussed that are of particular significance to either State or Commonwealth authorities other than those directly represented on the Commonwealth/State consultative bodies, representatives of such authorities might be invited to attend the meetings in an observer role.

vii) The procedures outlined would not preclude direct communications between Premiers (and Premiers' Departments) and the Prime Minister (and the Department of the Prime Minister and Cabinet) on particular treaties. These channels may need to be invoked in cases where inter alia there is no established ministerial channel of communication, where ministerial councils are unable to reach final agreement or where significant changes in general policy are involved.

viii) Ministers and Departments, in considering treaty matters, may draw on legal advice and, through their Law Ministers, could refer any matter to the Standing Committee of Attorneys-General for advice. It is expected that, where a major legal issue arises in a consultative body, that body will avail itself of the legal expertise of the Standing Committee.

ix) The consultative process needs to be continued through to the stage of implementation where treaties bear on State interests. Where the preparation of reports to international bodies on implementation action takes place, States should be consulted and their views taken into account in the preparation of those reports.

B. TREATY NEGOTIATION PROCESS

i) Where State interest is apparent, the Commonwealth should, wherever practicable, seek and take into account the views of the States in formulating Australian policy and keep the States informed of the determined policy.

ii) In appropriate cases, a representative or representatives of the States are included in delegations to international conferences which deal with State subject matters; subject to any special arrangements, the purpose is not to share in the making of policy decisions or to speak for Australia, but to ensure that the States know what is going on and are always in a position to put a point of view to the Commonwealth. However, State representatives are involved as far as possible in the work of the delegation.

iii) It is normally for the States to initiate moves for inclusion in a delegation, but the Commonwealth should endeavour to keep State interests in mind.

iv) Unless otherwise agreed, the costs of the State representatives are a matter for State Governments.

C. FEDERAL STATE ASPECTS

i) The Government does not favour the inclusion of federal clauses in treaties and does not intend to instruct Australian delegations to seek such inclusion. The pursuit of federal clauses in treaties is generally seen by the international community as an attempt by the Federal State to avoid the full obligations of a party to the treaty. Experience at a number of International Conferences has shown that such clauses are regarded with disfavour by almost the entire international community. Experience has also shown that a Federal clause tailored to the needs of one federation will be unacceptable to other federations. Instructing an Australian Delegation to press for a federal clause only diverts its resources from more important tasks.

ii) The Government sees no objection to Australia making unilaterally a short 'Federal Statement' on signing or ratifying certain appropriate treaties, provided that such a statement clearly does not affect Australia's obligations as a party. An 'appropriate' treaty would be one where it is intended that the States will play a role in its implementation. An appropriate form for such a statement acceptable to most States and the Commonwealth, is attached.

iii) The normal practice is that Australia does not become a party to a treaty containing a federal clause until the laws of all States are brought into line with the mandatory provisions of the treaty. However, where a suitable 'territorial units' federal clause is included in a treaty, the possibility of Australia acceding only in respect of those States which wish to adopt the treaty might be considered on a case by case basis where appropriate, perhaps in some private law treaties.

iv) The Commonwealth will consider relying on State legislation where the treaty affects an area of particular concern to the States and this course is consistent with the national interest and the effective and timely discharge of treaty obligations. However the Government does not accept that it is appropriate for the Commonwealth to commit itself in a general way not to legislate in areas that are constitutionally subject to Commonwealth power.

FEDERAL STATEMENT

Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States.

The implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise.

Source: The Department of the Prime Minister and Cabinet, 17 Jan., 1986.

APPENDIX 2

AUSTRALIAN ENVIRONMENT COUNCIL AND THE COUNCIL OF NATURE CONSERVATION MINISTERS

Joint Declaration on Environment and Nature Conservation

The Ministers of the Australian Environment Council and the Council of Nature Conservation Ministers, meeting in Hobart, Tasmania:

(a) Recognising that World Environment Day, 5th of June 1982, marks the 10th anniversary of the historic United Nations Conference on the Human Environment held in Stockholm;

(b) Agreeing that the occasion is most timely for the Commonwealth, State and Territory Ministers responsible for environment and nature conservation to make a joint declaration on environment and conservation;

(c) Recalling that governments in Australia, in response to widespread community concern about environment protection and nature conservation have enacted legislation, and established organisations and programs to protect and manage the environment for the benefit of present and future generations;

(d) Acknowledging the important progress which has been achieved in the reduction of pollution, in nature conservation and in reversing long term degradation of the Australian environment;

(e) Recognising that efforts must be sustained and in some areas strengthened;

(f) Appreciating the important contribution that the National Conservation Strategy for Australia can make in identifying priority areas for action; and

(g) Confirming that progress in environment protection and nature conservation will be enhanced through active collaboration between all levels of government and the active support of the Australian community.

DECLARE THAT:

1. In recognition of their responsibilities to present and future generations and while giving due consideration to the relevant costs and benefits, a major objective of the Commonwealth, State and Territory Governments will continue to be the protection and progressive improvement of the quality of the environment and the conservation of nature.

2. Continuing efforts will be made:

- to control all forms of pollution of the environmment in order to avoid adverse effects on human health and to enhance the beneficial use of the environment;
- to prevent the extinction of Australian species of flora and fauna and to protect their habitats;
- to incorporate, at an early stage, environment and nature conservation considerations in government decision making;
- to encourage and provide opportunities for constructive public participation in decisions with potentially significant environmental consequences;
- to ensure that the costs of preventing and controlling pollution are borne by the polluter;
- to support environmental education and to promote community awareness of environment and nature conservation issues;
- to contribute to international activities directed towards safeguarding and improving the global environment;
- to improve arrangements for monitoring and reporting on the major indicators of the State of the Australian environment.

3. The Australian Environment Council and the Council of Nature Conservation Ministers will continue to provide the main focus for co-operation and consultation between the States, the Territories and the Commonwealth on environment protection and nature conservation in Australia.

Source: House of Representatives Standing Committee on Environment and Conservation, Australia's Participation in International Environmental Organizations, Commonwealth Government Printer, Canberra, 1982.

APPENDIX THREE

INDICATIVE LIST OF TREATIES RELATING TO THE ENVIRONMENT AND CONSERVATION

International Whaling Convention

International Convention for the Prevention of the Pollution of the Sea by Oil

Convention on the Territorial Sea and the Contiguous Zone

Convention on Fishing and Conservation of the Living Resources of the High Seas

Convention on the Continental Shelf

Antarctic Treaty

International Convention on Civil Liability for Oil Pollution Damage

Convention on Wetlands of International Importance especially as Waterfowl Habitat

Convention for the Conservation of Antarctic Seals

Convention for the Protection of the World Cultural and Natural Heritage

International Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter

Convention on International Trade in Endangered Species of Wild Fauna and Flora

International Convention for the Prevention of Pollution from Ships 1973

Convention on the Conservation of Antarctic Marine Living Resources

Agreement for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment

Convention on Conservation of Nature in the South Pacific

Source: House of Representatives Standing Committee on Environment and Conservation, Australia's Participation in International Environmental Organizations, Commonwealth Government Printer, Canberra, 1982. Also Treaty Series 1979 No. 1 and 1982 No. 10, Department of Foreign Affairs, Canberra.

APPENDIX 4

ENVIRONMENT COMMITTEE OF THE OECD
DECLARATION OF ANTICIPATORY ENVIRONMENTAL POLICIES

The Governments of OECD Member countries and of Yugoslavia:

(a) Recalling their Declaration on Environmental Policy adopted in 1974;
(b) Noting the significant achievements over the past decade in reducing pollution, conserving natural resources and providing a better human environment;
(c) Recognising the need to integrate environmental, economic and social policies;
(d) Convinced that improving the human environment involves sustained long-term effort requiring policies that take into account at an early stage the environmental consequences of major decisions;
(e) Mindful of the hazards to health and the environment arising from certain socio-economic activities;
(f) Aware that market mechanisms by themselves often do not induce decisions that reflect their environmental consequences and costs;
(g) Determined to pursue vigorous environmental policies in a manner consistent with their constitutional, legal and market economy systems.

DECLARE THAT:

1. They will strive to ensure that environmental considerations are incorporated at an early stage of any decisions in all economic and social sectors likely to have significant environmental consequences.
2. They will seek more effective institutional, economic and other means to integrate environmental policy with policies in other sectors and in so doing, will attach priority to land-use planning and to the chemicals, energy and other sectors having a major impact on the environment.
3. They will, where appropriate and possible, employ economic and fiscal instruments, in combinations as need be with regulatory instruments, to induce public and private enterprises and individuals to anticipate the environmental consequences of their actions and take them into account in their decisions.
4. They will encourage the design, development and use of processes, products and urban form that conserve resources and energy, and that protect and enhance the environment.
5. They will, in proposing laws and making regulations, seek to avoid unduly complex or conflicting requirements and unnecessary delays in decisions affecting the environment.
6. They will endeavour, to the extent practicable, to develop systems to account for changes in environmental quality and related resource stocks.
7. They will encourage public participation, where possible, in the preparation of decisions with significant environmental consequences, inter alia, by providing as appropriate information on the risks, costs and benefits associated with the decisions.
8. They will support the promotion of environmental objectives and awareness in the field of education.
9. They will strengthen their co-operation in the OECD in order to encourage arrangements between interested parties on international environmental problems, and to seek harmonization of national environmental policies.
10. They will continue to co-operate to the greatest extent possible, both bilaterally and through appropriate international organisations, with all countries, in particular developing countries in order to assist in preventing environmental deterioration.

Source: House of Representatives Standing Committee on Environment and Conservation, Australia's Participation in International Environmental Organizations, Commonwealth Government Printer, Canberra, 1982.

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LIST OF ACRONYMS AND ABBREVIATIONS

AEP	Australian Environmental Policy
AEC	Australian Environment Council
AGPS	Australian Government Publishing Service
ALR	Australian Law Reports
CLR	Commonwealth Law Reports
CONCOM	Council of Nature Conservation Ministers
EEZ	Exclusive Economic Zone
ESCAP	Economic and Social Commission for Asia and the Pacific (UN)
FAO	Food and Agricultural Organization (UN)
GARP	Global Atmospheric Research Programme (ICSU, WMO, UNEP)
GEMS	Global Environment Monitoring System (UNEP)
ICBP	International Council for Bird Preservation
ICC	Interim Consultative Committee (NCSA)
ICSU	International Council of Scientific Unions
INFOTERRA	International Referral System (UNEP)
IOC	Inter-governmental Oceanographic Commission (UNESCO)
IUCN	International Union for the Conservation of Nature and Natural Resources
IWC	International Whaling Commission
IWRB	International Watefowl Research Bureau (ICBP)
MAB	Man and the Biosphere Programme (UNESCO)
MEPA	Marine and Estuarine Protected Area
NCSA	National Conservation Strategy for Australia
OAS	Organization of American States
OECD	Organization for Economic Cooperation and Development
PNA	Priority National Action (NCSA)
UN	United Nations
UNCLOS	United Nations Conference on the Law of the Sea
UNEP	United Nations Environment Programme
UNESCO	United Nations Education, Scientific and Cultural Organization
SCAR	Scientific Committee on Antarctic Research (ICSU)
SCOR	Scientific Committee on Ocean Research (ICSU)
WCS	World Conservation Strategy
WMO	World Meteorological Organization
WWF	World Wildlife Fund