AUSTRALIAN COURTS AND THE PROBLEM OF ECONOMIC CONSEQUENCES ATTENDANT ON THE ENFORCEMENT OF ENVIRONMENTAL QUALITY AND IMPROVEMENT LAWS

by

J. KODWO BENTIL*

When, about a decade ago, the world, especially the industrialised part of it, woke up to the fact that the human species had all along been playing havoc with the biosphere or its own environs, particularly through the depletion of natural resources, the so-called environment crisis would seem to have become a reality. Consequently, social and political consciousness of that crisis seemed to have been generated. It was in the wake of the emergence of such environmental consciousness on the part of the general population that the genuine, but rather misleading, debate about whether society should continue its pursuit of economic growth and development, or that society should put an end to such economic growth and development with a view to achieving a better quality of life in the form of environmental improvement and cleanliness, seemed to have passionately raged. That debate would seem to continue unabated, even though the enthusiasm and the spark with which it was begun may have somehow waned. Yet, even when that debate was being vehemently pursued, wiser counsels favouring the view that the more rational way of dealing with such an environmental crisis was the need for maintaining some kind of balance between the two extreme and simplistic views espoused by the proponents of environmental quality and improvement regardless of economic consequences and those espoused by the proponents of economic growth regardless of environmental consequences. In other words, the real, or more rational solution, of the problems created by the environmental crisis was seen by those with moderate views as lying neither in a *laissez-faire* economic growth nor in environmental quality for environmental quality's sake. As has been aptly observed by one writer, 'The misfortune of much of the silliness that has surrounded the current debate on the "environmental crisis" is that it has obscured the relevance of ecology to the planning of resource use, and hence the relevance of economics. On the one hand, we have the pessimists declaring that economics is irrelevant, as if there were no cost to solving a pollution problem, and at the other extreme we have conventional economists declaring that the "science" of economics as they understand it already

* LL.M., M.Phil., B Sc. (Econ), (*Lond.*), Of Lincoln's Inn, Barrister-at-Law. Senior Lecturer in Legal Studies, La Trobe University, Melbourne.

contains all that we need to analyse pollution problems and prescribe the appropriate remedy.'[1]

Needless to say, the moderate view that economic growth should be carefully managed in such a way as not to cause unnecessary environmental degradation or harm, would seem to have become the conventional or the received wisdom.[2] Yet, despite that, situations continue to arise in which it is seriously pressed that environmental quality and improvement should be maintained regardless of the economic consequences to society generally and to certain members of society in particular. To think that the judiciary would be insulated or removed from a confrontation of that kind would seem to be short-sighted and naive. Indeed, the superior courts of Australia have both, directly and indirectly, been confronted with that kind of problem. Consequently, it is the main aim here to examine how the Australian superior courts have proceeded to deal with this problem and to assess whether the solutions offered by them are realistic and satisfactory. But before proceeding with such a study, it would seem preferable to identify and state more explicitly and in some detail, what the relevant problem forming the subject-matter of the present inquiry is actually about.

The Problem More Explicitly Stated

In the situation where the application or the enforcement of a law for the protection and improvement of the environment may be likely to have adverse economic effects or repercussions, whether for the community at large or for particular manufacturers or producers of goods, or for both, whether the courts or the appropriate law-applying or enforcement agencies should go through with applying or enforcing such laws? In other words: is it politically and socially desirable for the various environmental law-applying or enforcing agencies to apply and enforce such laws regardless of the fact that, by so doing, some harmful or undesirable economic consequences, such as loss of employment by many workers, reduction of the standard of living of some sections of the community, drastic reduction in the level of industrial or business activity, drastic fall in the demand for certain kinds of raw materials and reduction in the quality and the quantity of goods for the consumer, would be likely to be occasioned? Put another way: should the appropriate law-applying or enforcing agencies, in their efforts to apply and enforce environmental laws, be legally obliged to take into account,

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1 D. Pearce, 'The Economics of Pollution', (in *Environment and the Industrial Society*, ed. by N. Holmes, 1976), at p. 185. For a similar view that the solution lies in between these two extreme viewpoints, see *e.g.* W. Ramsay and C. Anderson, 'Managing the Environment', (1972), at p. 32, M. Edel, *Economies and the Environment*, (1973), at pp. 85-110; J. Maddox, *The Doomsday Syndrome*, (1972), at pp. 186-214; A. V. Kneese, 'Economics and the Quality of the Environment: Some Empirical Experiences', (in *Pollution, Resources and the Environment*, (ed. A. C. Enthoven and A. M. Freeman III), (1973), at pp. 72-87.

2 Mention should be made of the fact that support for such view has come from all quarters, not least from some judges. See *e.g.*, Sir Garfield Barwick, 'Problems in Conservation', (1975) 1 *University of New South Wales Law J.* 3 at p. 7.

the economic or the socio-economic consequences of doing so — whether or not such environmental laws are meant by their originators to be rigorously applied and enforced by both administrative and quasi-judicial agencies or bodies? No doubt, before any satisfactory answer can be given to any such question, the actual nature and scope of the relevant environmental law would need to be examined and evaluated. In the same way, the actual or the potential economic effects attendant upon the application and the enforcement of such laws would require to be carefully analysed and assessed. In other words, one cannot satisfactorily answer any such question in the abstract or in a legal or an economic vacuum. Consequently, since the present study is concerned solely with Australian environmental laws and their application and enforcement, it is necessary, first of all, to examine some of the important aspects of the nature and ambit of such laws. However, before proceeding to do that, it would not be out of place to examine at some recent developments in the United States of America which may be said to provide some pertinent and interesting illustrations of the kind of problem with which the present study is concerned. It must be emphasised that these illustrations present the problem in rather acute or extreme forms, and that there are less acute or extreme forms which may represent an intermediate stage.

Note needs to be taken of the fact that, in the early years when the United States Federal Government woke up to the need for shouldering its full responsibility in ensuring an effective and a more worthwhile protection and improvement of both the human and the natural environment, a situation arose in, for example, the city of Birmingham in the United States by which the Federal Government's legislative intentions and protestations were to have been put to a severe test. There: the steel manufacturing activities of some twenty-three large companies in Birmingham which had, continuously, been belching large quantities of smoke harmful to human health, appeared to have reached a crisis point in November 1971. At that stage, the air pollution caused by the steel manufacturing activities of those companies became such that, it was forecast by, scientific experts, that human beings would be dropping dead in the streets if the manufacturing activities of the steel companies were not suspended for some time. Confronted with such a dangerous, or potentially dangerous, situation of air pollution which might assume lethal proportions, the United States *Federal Environment Protection Agency* availed itself of emergency powers provided under the, then recently enacted, *Clean Air Amendment Acts* of 1970, and obtained a temporary injunction from the courts to halt any further production of steel by the twenty-three steel companies concerned. It may be noted that one of the most important of those steel manufacturing companies was *US Steel.* As a consequence of the temporary halting of steel production in Birmingham, apparently more than 5,000 steel workers at *US Steel* alone were temporarily laid off work without pay, and indeed, thousands of other steel workers elsewhere in that same American city

were rendered idle.[3] Of course, after the air pollution crisis had passed, the injunction was revoked and work at the various steel factories concerned began again, even though some specific anti-air pollution or air-pollution abatement measures were meant to be taken by the steel companies concerned from that time onwards. More recently, in July 1978, one heard of the news on radio that, for the first time in the history of the American city of Los Angeles, legal measures were being taken to stop or suspend certain manufacturing or industrial activities in that city, in view of the fact that the air pollution level there had reached proportions dangerous to human life. Obviously, such legal measures might have had considerable economic repercussions, such as the causing of temporary unemployment for industrial workers, loss of large sums of revenue for various manufacturing industries and the like.

To think that no such environmental crisis situation could come about in an Australian city or town, would only be symptomatic of unwarranted complacency and the height of näivety. After all, if the recent smog that enveloped the city of Melbourne in July 1978 is anything to go by, then the possibility or the likelihood of such environmental crisis occurring in any Australian city or town could not be dismissed with equanimity. Obviously, in any situation where the manufacturing or the production activities of various industrial concerns have a tendency to cause or occasion some noticeable degree of atmospheric, aquatic or some other type of pollution (whether of crisis or non-crisis proportions) then the taking of governmental, administrative or legal measures may have to be aimed at maintaining some kind of balance between the need for society to continue with essential economic activities and the need for protecting and improving the environment. That is, of course, not to say that there may not be occasions when the need for society to continue with essential economic activities should not be sacrificed to ensure a needed protection and improvement of the environment for the purpose of making a better quality of human life possible. Yet it may be wondered whether the need for maintaining the sort of balance envisaged between the social demand for the continuance of essential economic activities for the benefit and welfare of society and individuals generally and the necessity for ensuring the protection and improvement of the environment is a function that the courts indirectly are politically qualified and properly equipped to carry out. Undoubtedly, this is an area where policy considerations become so dominant as to require the attention of political policy-makers. Consequently, it may be asked whether, politically and socially, it is desirable and fitting to leave the discharge of such a function to the courts, however indirectly. In other words; is it politically and socially desirable for the courts to be required indirectly to become policy-makers in the discharge of their law-interpreting and applying functions and powers? Depending on one's political or social philosophy, one might either

3 For a detailed description and evaluation of that situation, see *e.g.*, W. A. Rosenbaum, *The Politics of Environmental Concern*, (1973) at pp. 4-5.

prefer to see the courts as simply law-interpreting and applying institutions or, as well as being the latter, as political and social reform institutions. But be that as it may, it becomes important, at this stage, to examine important aspects of some of the relevant environmental laws in Australia with a view to ascertaining their nature and scope which the courts have had occasion to interpret and apply in particular situations.

Some Important Aspects of the Nature and Scope of Australian Environmental Laws

Both some of the Australian States' Supreme Courts and the High Court of Australia have had occasion to decide or pronounce upon some particular mining statutes of some of the Australian States in which environmental issues would seem to be important. Although such judicial decisions and pronouncements may be, somehow, considered in the present study, it would not seem to be necessary to dwell on the individual mining legislation in the Australian States here. However, suffice it to say that, such mining legislation may or may not require the appropriate public authorities to take into account environmental effects of mining operations in the granting of mining leases.[4] That is not to say that, in the final determination as to whether or not some particular mining lease should be granted, environmental effects of proposed mining operations would not actually be taken into account within some political and social framework. Leaving aside, therefore, mining legislation in the individual Australian States, it is essential to pay more attention to various legislative provisions which directly seek to bring about protection and improvement of the environment in Australia, both at the Federal and at the State levels. In that respect, mention needs to be made of the fact that, at the Federal level, there is no legislation which comprehensively and adequately deals with national environmental protection and improvement matters which could be said to be comparable to, for example, the provisions of the United States *National Environmental Policy Act* 1969, apart from the rather limited provisions of the Australian *Federal Environment Protection (Impact of Proposals) Act* 1974-1975. On the other hand, some of the individual Australian States, such as Victoria, Western Australia, Tasmania, and, to some extent, New South Wales have passed environmental statutes of a fairly comprehensive nature, in addition to various individual statutes which seek to deal with particular aspects or areas of activity involving environmental factors or problems. The other Australian States, namely, Queensland and South Australia, have only to have passed statutes dealing with different areas of activity concerning environmental factors or problems. For the purposes of the present

4 Thus, whereas, for example, under the Queensland *Mining Act* 1968 and its accompanying Regulations, environmental effects of mining would appear to be meant to be adverted to in the granting of mining leases, such would not necessarily appear to be so in relation to the granting of a mining prospector's licence under the Tasmanian *Mining Act* 1929-1958.

study, attention will be focussed on some of the important aspects of the *Environment Protection (Impact of Proposals) Act* 1974-1975, at the Federal level, and at the State level, on those of the *Environment Protection Act* 1970, as amended by the *Environment Protection (Amendment) Act* 1972 and the *Environment Protection (Noise Control) Act* 1975 of the State of Victoria. However, in considering the relevant aspects of environmental legislation in Victoria, attempts will be made to draw the necessary comparisons, where appropriate, with those of the *Environment Protection Act* 1971, as subsequently amended in 1972 and 1975 of the State of Western Australia, and those of the Tasmanian *Environment Protection Act* 1973. Equally, but to a very limited extent, some relevant aspects of the New South Wales *State Pollution Control Commission Act* 1970[5] which may be said, in a way, to have considerable affinities with those of the environmental legislation in Western Australia, and may be brought to bear where necessary.

As far as the *Environment Protection (Impact of Proposals) Act* 1974-1975 passed by the Australian Federal Government is concerned, what needs to be noted, first of all, is that, in relation to the formulation of proposals or the carrying out of works or projects by, or on behalf of, the Australian Government, and, in relation to such works or projects undertaken or proposed to be undertaken by or with the approval of the individual Australian States' Governments with financial assistance from the Australian Federal Government, matters which affect the environment to a significant extent are fully examined and taken into account to the greatest extent that is practicable.[6] Put simply, that means that, governmental and other public bodies or authorities are legally bound to take environmental factors or effects into consideration in authorising or permitting certain economic and other publicly-oriented activities to be undertaken or carried out. However, it is quite clear that it is only where the environmental effects of particular economic activities or projects of a public character would appear to be significant that the appropriate Federal Government Minister may refuse to give the go-ahead for such activities or projects to be carried out. The implication from that would seem to be that the Federal Government Minister is, as a matter of law, entitled to ignore, or pay very little attention to, the economic consequences of particular projects or works as envisaged under that legislation, if the Federal Government Minister concerned takes the view that the detriment to the environment is likely to outweigh the economic or other benefits that may accrue from the carrying out of such works or projects. Of course, the appropriate Federal Government Minister has to rely on expert assessment as to the

5 It needs to be noted that s. 11 of that statute charges the State Pollution Control Commission with the general responsibilities of ensuring that all practical measures are taken in accordance with the provisions of that statute or in accordance with those of any other appropriate legislation, to control, abate or mitigate the pollution of the environment, to control or regulate the disposal of waste, and otherwise to protect the environment from defacement, defilement or deterioration.

6 S. 5.

likely environmental effects of works or projects of the kind in question before coming to a decision as to whether the likely detriment to the environment would be out of all proportion to the potential economic and other benefits that may be derived from such projects or works. In that respect, Australian Federal legislation empowers the Federal Government Minister to establish a Commission of Inquiry to conduct investigations into all or any of the environmental aspects of any given project or works.[7] Needless to say, it is on the basis of the report of such a Commission of Inquiry that the Federal Government Minister may be able to decide legally whether or not a particular project or works of the kind envisaged under the legislation should be allowed to proceed.

It may be seen that, whether directly or indirectly, the appropriate Federal Government Minister is legally allowed to make environmental considerations override economic ones when deciding whether or not particular projects or works should be given the go-ahead. Such indeed, would appear to have been confirmed by the High Court of Australia in the recent case of *Murphyores Incorporated Pty. Ltd. and Others* v. *Commonwealth of Australia and Others.*[8] Since an attempt will be made subsequently in the present study to examine that case, there would appear to be no need, at this stage, to enter into a discussion of it. Suffice it to say, that it is obvious that, in the exercise of the statutory discretionary power entrusted to the appropriate Federal Government Minister, he would inevitably, or be likely to, evaluate the economic or the socio-economic consequences of a refusal to allow some project or works to be carried out as well as any likely environmental effects of such project or works before coming to a conclusion. In the end, therefore, depending on the scale of social values of the Minister, and perhaps, depending also on Governmental policy, a Minister might opt for one or the other consequences. Moreover, highly political considerations, such as the likely effect of public opinion in a given context, may be taken into account by the Federal Government Minister in reaching a decision as to whether or not to allow a particular project to go ahead.

Quite clearly, the legal character of the discretionary power entrusted to the appropriate Federal Government Minister, in the circumstances envisaged, exists independently of whatever political and social pressures he may be subjected to, and the kind of decision he may reach. In other words, legally, the Minister is entitled to take environmental considerations into account, but, politically, he may come to the conclusion that economic considerations should be accorded pride of place over environmental ones and *vice versa.* Consequently, whereas the courts are in a position to pronounce on, or decide on, the exercise of such statutory discretionary powers, they are not in a position to pronounce or decide on the kind of factors taken into account, in the final analysis, by the Federal Government Minister concerned. It is, therefore, essen-

7 S. 11.
8 (1976) 9 A.L.R. 199; (1976) 50 A.L.J.R. 570.

tial, in the context of the present study, to maintain a distinction between the strict legal requirement for the taking into account of environmental consequences or effects by the appropriate Federal Government Minister on the one hand, and the socio-political pressures that may actuate that Minister to decide, finally, that economic considerations or consequences should be accorded pride of place over environmental ones, on the other.

With respect to the relatively comprehensive environmental legislation in the State of Victoria, it must be said that, unlike its counterparts in Western Australia and in Tasmania, it has become, in the recent past, the subject of judicial interpretation at both the State and the Federal levels. That is all the more reason for selecting it for special examination in the present context. At the outset, the environmental legislation in Victoria, as with its counterparts in Western Australia and in Tasmania, appears to treat the general issue of environmental protection and improvement as of primary political and social concern. Obviously, various political and social pressures have forced the Parliament of Victoria, just as they may have forced the Parliaments of Western Australia and Tasmania, into passing such legislation. First of all, not only does that legislation bind the Crown,[9] but it also contains an initial fundamental inconsistency or repugnancy provision, by which the provisions of any other statute, or those of any regulation or by-law made in pursuance of a statute which happen to be inconsistent with those of that environmental legislation, would render the latter overriding in its application or operation.[10] It may be said, to follow from these latter environmental legislative provisions, that, in the application of those statutory provisions, all other considerations, whether of a political or of a socio-economic character, are meant to be subordinated or give way to environmental considerations. Indeed, all functions and powers meant to be exercised under that environmental legislation are required to be effectuated, 'in relation to State environment protection policy', which, in turn, is meant to be all-pervading *vis-a-vis* all other policies in the affairs of the State. No wonder Gillard J., sitting in the Supreme Court of Victoria in pronouncing in the case of *Protean (Holdings) Ltd.*

9 S. 2 of the environmental legislation in Victoria; s. 6 of the environmental legislation in Western Australia; and s. 4 of the environmental legislation in Tasmania. It may also be mentioned, in passing that, s. 3 of the *State Pollution Control Commission Act* 1970 of the State of New South Wales makes a similar provision.

10 S. 3 (2) of the environmental legislation in Victoria; s. 7 (1) of the environmental legislation in Western Australia; and s. 3 (2) - (3) of the environmental legislation in Tasmania. It is however, to be noted that, in the case of the environmental legislation in Western Australia, s. 7 (2) of it excepts statutes ratifying agreements to which that State is a party, from the operation of those overriding provisions of the said environmental legislation of that State. It is equally interesting to note, in passing that, under s. 4 of the *State Pollution Control Commission Act* 1970 of the State of New South Wales, similar inconsistency or repugnancy provisions are stipulated, although the provisions of that State's own Prevention of Oil Pollution of *Navigable Waters Act* 1960 are excepted in that context.

v. *Environment Protection Authority*,[11] considered those statutory provisions as constitutionally or legally objectionable.[12] Arguably, depending on how one views the whole issue of environmental quality and improvement, the inconsistency or the repugnancy provisions of the environmental legislation may or may not be treated as legally or socially tenable.

A second important feature of the environmental legislation in Victoria is the fact that such legislation is basically and generally aimed at controlling or regulating the discharge, disposal or emission of all kinds of waste into the environment. In that respect, the different forms of pollution, such as air pollution,[13] water pollution,[14] soil pollution,[15] pollution by noise,[16] and pollution by litter,[17] are sought to be controlled or regulated.[18] For the purpose of giving effect to that basic aim, a licensing system, by which the discharge, disposal or emission of waste may be permitted or prohibited, has been established.[19] Indeed, the licensing system may be said to be central to the whole operation of

11 [1977] V.R. 51. In that case, the company concerned applied, in accordance with the relevant provisions of that environmental legislation, to the EPA for a licence to discharge waste into the environment from two chimney stacks serving two boilers used solely to heat water for sterilising and cleansing purposes associated with abattoirs situated on land leased to that company by a Melbourne local authority. The EPA granted the licence asked for, whereupon two residents in the area concerned, appealed to the EPA in accordance with the provisions of s. 32 (5) of that State's 1972 environmental amending legislation, against the granting of such licence. Later, the EPA partly allowed the appeals of those two residents and consequently attached a condition to the use of that licence to the effect that no obnoxious or offensive odours should be allowed by the grantee company to come out of the confines of the premises concerned, being odours which, in the opinion of the EPA, might detrimentally affect the surrounding area or affect persons living in or using that area. Curiously enough, not only did that company appeal to the EPAB, but also the two residents referred to, equally appealed to the EPAB, the latter apparently complaining about the issue of the licence at all. The EPAB allowed the appeal of the company and ordered the condition imposed by the EPA on the licence to be deleted. However, the EPA requested the EPAB to state a number of questions for the legal opinion of the Supreme Court of Victoria. Leaving aside the other questions stated by the EPAB for the opinion of the Supreme Court of Victoria, the main issue was whether the EPA was legally entitled to impose conditions on the issuing of a licence, but which conditions were not directly or particularly associated with the particular discharges or emissions of waste forming the subject-matter of the application for a licence. Gillard J., sitting in the Supreme Court of Victoria, took the view that the EPA was not legally entitled to impose conditions on the issuing of licences where such conditions happened to be extraneous in character.

12 Ibid, at p. 55.

13 Part VI, ss. 40-43.

14 Part V, ss. 38-39.

15 Part VII, ss. 44-45.

16 Part VIII, ss. 46-48.

17 Part IX, ss. 49-53.

18 It may be noted that, the environmental legislation in Tasmania, and to a considerably lesser extent, the environmental legislation in Western Australia, each contains similar provisions.

19 A similar licensing system, albeit operated somehow differently, has been established under the environmental legislation in Tasmania. On the other hand, a rather vague and limited form of licensing procedure appears to have established under the environmental legislation in Western Australia.

that environmental legislation.[20] There would seem to be hardly any doubt that the licensing system might generally tend to impinge on individual economic and other activities, and more particularly on certain individual freedoms or rights. Generally, business, commercial and industrial concerns may be the most affected by the application of the provisions of environmental legislation. Concerning the fact that individual economic freedoms or rights may be directly affected by the application and the enforcement of that environmental legislation, the observations of Gillard J. in the *Protean (Holdings) Ltd.* case, are worthy of some note. His Honour had this to say:

> It provides... for the imposition of certain prohibitions and limitations in the employment of rights of a personal and proprietary character where it might be thought the exercise of such rights might be hurtful to the physical well-being of the community in general.[21]

From the institutional point of view, three main bodies, namely: the Environment Protection Authority (EPA), the Environment Protection Council (EPC) and the Environment Protection Appeal Board (EPAB) have been established.[22] The EPA is charged, in the main, with the administration of that environmental legislation and all regulations and orders made in pursuance of it. It is also entrusted with the power of regulating all activities in the State of Victoria concerning the discharge, disposal or the emission of wastes, and of preventing or controlling pollution with a view to improving the quality of the environment in Victoria. It is in the latter regard that the EPA would appear to have been vested with very wide discretionary powers for administering and operating the licensing system. In that respect, the EPA may issue licences for the discharge, deposit or the emission of waste into the environment in Victoria. Moreover, when it decides to grant any such licence, it is entitled to impose conditions, limitations or restrictions on such grants. Obviously, economic operators, such as manufacturing companies or industrial and business organisations, would be the most likely applicants for such licences. In that case, it is usual to expect that, a business or commercial enterprise which feels aggrieved by a determination of the EPA should be able to have recourse to some kind of appellatt body to deal with its grievance. Incidentally, it must be borne in mind that the EPA is meant to and, indeed, does exercise, not only administrative functions and powers, but also exercises some kind of executive functions and powers, as well as quasi-judicial ones. Leaving aside therefore, the EPC which is a purely advisory body meant to

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20 The same could be said of the environmental legislation in Tasmania, but not of the environmental legislation in Western Australia.

21 [1977] V.R. 51 at p. 54.

22 *Cf.* the establishment of the Environment Protection Authority (EPA), the Environment Protection Council (EPC), and the Environment Appeal Board (EAB) under the environmental legislation in Western Australia; and the establishment of the office of the Director of Environmental Control, and the setting up of the Environment Protection Advisory Council (EPAC) and the Environment Protection Appeal Board (EPAB) under the environmental legislation in Tasmania.

advise the EPA on general environmental matters, the EPAB becomes an important body, especially for the purpose of administering and operating the licensing system. Indeed, the EPAB is entrusted with the function and the power of determining all appeals from the decisions or the determinations of the EPA or from those of the protection agencies set up by the latter body with regard to the licensing or the non-licensing of discharges, deposits or the emission of waste into the environment of Victoria. From the EPAB, appeals on questions of law may lie to the Supreme Court of Victoria.[23]

As to whether one agrees with the establishment of environmental institutions vested with exceedingly wide discretionary powers for the purpose of ensuring effective protection and improvement of the environment, would seem to depend on how strongly one feels about that issue. To some, for example, to Gillard J. of the Supreme Court of Victoria: 'Although it may be readily conceded that the purposes and objects of this Act are praiseworthy, the means adopted to achieve them seem to be quite authoritarian, if not draconian in character.'[24] To others, even such authoritarian or draconian means for ensuring environmental quality and improvement may be a necessary evil, if not a necessary facility that society must accept or endure in the interest of the general or public welfare.[25] While, therefore, on the one hand, one may not entirely agree or sympathise with Gillard J. in his strictures on the 'authoritarian or the draconian' character of the means adopted, or meant to be adopted, under the environmental legislation in Victoria for protecting and improving the environment; on the other hand, one would agree with his Honour's assessment of the draftsmanship of that legislation. In his Honour's words: 'The legislation is couched in technical terms, and in various sections, it is difficult to determine precisely what rights or priveleges and what duties or obligations were conferred or imposed by the Act.'[26] Mention should be made of the fact that, in

23 Whereas appeals to the Supreme Court of Western Australia on questions of law are allowed under specified conditions concerning the interpretation and the application of the environmental legislation in Western Australia, there is no such provision under the environmental legislation in Tasmania.

24 As made in the *Protean (Holdings) Ltd.* v. *Environment Protection Authority* [1977] V.R. 51 at p. 55.

25 See *e.g.*, W. T. Blackstone, 'Ethics and Ecology', (in *Philosophy and Environmental Crisis*, 1974 ed. by W. T. Blackstone), at p. 31, where it is argued thus: 'Freedom is, of course, one of our basic values, and few would deny that excessive State control of human action is to be avoided. But such restrictions on individual freedom now appear to be necessary in the interest of overall human welfare and the rights and freedoms of all men. John Locke with his stress on freedom as an inalienable right recognized that this right must be construed so that it is consistent with the equal right to freedom of others. The whole point of the State is to restrict unlicensed freedom and to provide the conditions for equality of rights for all.' See also, L. K. Cardwell, *Environment — A Challenge to Modern Society*' (1971), at pp. 213-219.

26 [1977] V.R. 51 at p. 55. See also, *e.g.*, a Note on that case in (1977) 51 A.L.J. 146 at p. 147, where it is argued that, 'The Act may be seen through the analysis of Gillard J. to have been a product of an excess of legislative zeal undisciplined by the precision of demarcation which Australians are entitled to expect of their Act of Parliament'.

somehow endorsing that view, in the more recent case of *Phosphate Co-operative Co. of Australia Ltd.* v. *Environment Protection Authority*,[27] Stephen J., with whom Mason J. agreed in the High Court of Australia, equally had occasion to observe that: 'That Act's provisions are often inept in drafting and contain many ambiguities and a considerable degree of incoherence of language...'[28] Quite obviously, the language in which the provisions of that environmental legislation in Victoria is couched, would seem to suggest that, ordinary domestic and human activities, such as, breathing, gardening and the like, may be capable of constituting 'pollution' in respect of which a licence may be required.[29] Moreover, certain basic concepts, such as, 'environment', 'pollution' and 'waste', may be said to have been ambiguously and incoherently defined. No wonder, therefore, that, in the *Phosphate Co-operative Co. of Australia Ltd.* case, Aickin J., in delivering his dissenting judgment in the High Court of Australia, pointed out that:

> The Act is thus not concerned merely with the discharge of industrial wastes in the ordinary sense of the term, though it plainly includes them in its ambit, but on its clear words calls for a system of licensing affecting many activities of daily life, whether it is in domestic, industrial, or agricultural fields or whatever other field one cares to name.[30]

But be that as it may, what needs to be considered now is whether, in the administration or the application of the various Australian environmental laws generally or in particular areas, and, particularly, in the operation of the various licensing systems for controlling environmental pollution, the various administrative or quasi-judicial bodies charged with such tasks are legally bound to take into account the economic consequences of the imposition of controls, limitations or restrictions on various individual or group activities in business, commerce or in industry. Since there would appear to have been situations where the courts have been called upon to pronounce on issues of that kind, an examination of some of the statutory provisions and the judicial pronouncements made in respect of them will be necessary. In that respect, since the courts would appear to have somehow treated maintenance of a balance between economic and environmental considerations as necessary in law, and there have been other occasions where the courts have felt that environmental considerations should override economic ones, those two different sets of situation must be examined against the background of the relevant judicial decisions and pronouncements.

Situations Where Some Sort of Legal Balance is Meant to be Maintained Between Economic and Environmental Considerations

As has already been argued, administrative decision-makers and political policy-makers (such as government departments, statutory

27 (1978) 18 A.L.R. 210.
28 Ibid, at p. 216.
29 Per Aickin J., in the *Phosphate Co-operative Co. of Australia Ltd.* case, supra, at p. 220.
30 Ibid, at p. 221.

bodies, Government Ministers and the like) are perfectly entitled, and, indeed, normally do take into consideration both economic and environmental factors in determining the viability and the practicability of particular industrial, business or commercial projects or activities, and in approving or disapproving of any such projects or activities. What is important for the purposes of the present study is to find out whether, in law, decision or policy-makers are bound to maintain some sort of balance between economic and environmental factors in approving or disapproving of particular business, commercial or industrial projects or activities. Quite obviously, individual provisions would have to be examined in their own contexts to be able to answer that question satisfactorily. Consequently, one may turn to certain specific statutes concerning environmental protection and improvement or involving environmental quality implications, and the relevant judicial decisions or pronouncements made in respect of them. Turning, therefore, to, for example, mining legislation in Australia, the *Mining Act* 1968 of the State of Queensland and its accompanying mining Regulations, it would seem fair to argue that their provisions envisage that the mining warden, in hearing objections as to his recommendations to the appropriate State Government Minister involving whether or not a mining lease should be granted, is legally bound to pay a great deal of attention to environmental considerations of particular, proposed mining operations. In so doing, the mining warden would appear to be legally bound to weigh such environmental considerations against the economic implications of all proposed mining operations in that State before making his recomendations to the appropriate State Government Minister as to whether or not a mining lease should be granted by the latter. That, indeed, would seem to be borne out by the fact that the Mining Regulations require the mining warden to consider the 'effect on the public interest' of recommending the granting of a mining lease in respect of an application by individuals or enterprises.

Indeed, in, for example, the case of *Sinclair* v. *Mining Warden at Maryborough and Another*,[31] such a view would appear to have been confirmed by the High Court of Australia. In that case, a mining company made application for mining leases of Crown land on Fraser Island for the purpose of carrying out sand-mining operations there under the relevant Queensland mining legislation. The highly economic character of the proposed operations, which could be said to have involved the provision of jobs for numerous workers, revenue to the State Government of Queensland, an infrastructure which could improve industrial and social activities in that State and other indirect benefits, could hardly be overlooked. However, since the mining warden was required by the Queensland mining regulations, not only to hear applications for mining leases from applicants, but also to hear, at the same time, objections to any such applications before making the necessary

31 (1974-75) 132 C.L.R. 473; (1975) 5 A.L.R. 513; (1975) 49 A.L.J.R. 166.

recommendations to the appropriate State Government Minister, the appellant in the case, both on his own behalf and on that of a conservation organisation, lodged objections to the respondent company's applications with the mining warden. It is important to note that, under those mining regulations, the mining warden must recommend to the appropriate State Government Minister, a rejection of any application which, in the former's opinion, would, 'prejudicially affect the public interest or right'.

The objections raised by the appellant in the case to the applications of the respondent company for mining leases, would seem to have been mostly based on environmental and social grounds. Yet, despite those objections, the mining warden recommended to the appropriate State Government Minister that the applications in question be granted. Consequently, the objections of the appellant were dismissed, but on the rather specious ground that the views of the appellant did not, and could not be said to have represented those of a section of the public, and consequently that, the interests of the public, as a whole, could not be said to have been prejudicially affected by the recommendation that the applications should be granted. The appellant therefore, sought to apply to the Supreme Court of Queensland for a writ of *mandamus* to direct the mining warden to hear the applications and the objections in question in accordance with law. But the appellant's application for a writ of *mandamus* was turned down by the Supreme Court of Queensland. Subsequently, the appellant appealed to the High Court of Australia against the latter court's refusal to grant the writ of *mandamus*. In allowing that appeal, the High Court of Australia would seem to have thought that the mining warden ought to have seriously weighed the environmental considerations, as raised by the appellant, against the obvious economic factors involved, before making any recommendations to the appropriate State Government Minister as to whether or not the mining leases should be granted. In other words, the High Court considered that the mining warden was under a legal duty to weigh both the relevant economic and environmental considerations relating to the proposed sand-mining operations on Fraser Island, before making any recommendations to the appropriate State Government Minister in the context envisaged.

In somehow stressing the need for the taking into account of the relevant environmental effects of the proposed sand-mining operations, Barwick C.J., for example, observed as follows:

> The evidence given in support of the objection was very extensive, given by persons who appeared to be well-qualified in respect of the opinions they expressed, and was directed to the damage to the environment likely to be done by mining to the irreversible nature of that damage and to the desirability of maintaining the terrain and its vegetative cover in its virgin state. It is no concern of mine to dilate upon the detailed nature or the acceptability of this

> evidence. Suffice it to say that, quite obviously, it was directed to the public interest in the conservation of the area.[32]

No doubt, if the mining leases concerned were not to be granted, the economic consequences of a refusal might be quite substantial in terms of employment prospects for many a would-be worker and of the general level of industrial and business activity in the State concerned. Yet, although the High Court of Australia could not be said to have directed the mining warden in the case under examination that the latter ought to have refused to recommend to the appropriate State Government Minister that the mining leases in question should be granted, the legal requirement that environmental factors would need to be taken into account in those circumstances, could be said to act somehow as a break on the development of economic or industrial activity. At the same time, it should be recognised that the final decision in granting or refusing an application for a mining lease would lie with the appropriate State Government Minister. In that respect, the discretionary power of the latter would be a purely political one and not at all a legal one. Consequently, no matter how the latter exercises that discretionary power or makes the necessary determination, the courts would be powerless to question or overrule any such decision or determination.

Although the decision of the High Court of Australia in the more recent case of *Stow and Others* v. *Mineral Holdings (Australia) Pty. Ltd.*,[33] decided in strict accordance with the relevant provisions of the Tasmanian *Mining Act* 1929-1958, may be said to have gone in the opposite direction, yet it was on the basis of the strict construction of the relevant provisions of that legislation that such a different decision was arrived at. Consequently, the question as to whether the Tasmanian Director of Mines, on whose recommendations a special mining prospector's licence could be issued by the appropriate State Government Minister, was legally bound to weigh environmental considerations against economic factors or consequences touching particular proposed mining operations, was not decided by the High Court. The main reason, among other reasons, why that question was not decided, was that the appellants who objected to the granting of a mining prospector's licence to the respondent company were not deemed to have had an estate or interest in land in respect of which the proposed mining operations could be said to have had any detrimental environmental effects, in accordance with the strict interpretation of the Tasmanian mining legislation. Interestingly enough, Barwick C.J., in delivering his individual judgment in that case, observed in passing that 'No express and certainly no mandatory provision is made for the consideration in relation to the grant of mining licences or tenures of the impact of that activity on the more abiding features and values of the environment.'[34] It is equally of

32 (1974-1975) 132 C.L.R. 473 at p. 477; (1975) 5 A.L.R. 513 at pp. 515-516.
33 (1977) 14 A.L.R. 397; (1977) 51 A.L.J.R. 672.
34 (1977) 14 A.L.R. 397 at pp. 398-399.

some interest to note that, in considering in passing, the nature of the discretionary power of the appropriate State Government Minister in that context, the learned Chief Justice observed as follows:

> The Minister's discretion in that respect is not hedged round with stipulated considerations which he must have in mind or by reference to which he must decide whether or not to grant the licence. I would see no reason derived from the terms of the Act why the Minister should not be moved to reject the application on environmental grounds.[35]

From the discussion in the foregoing and the other preceding paragraphs of this section, there would appear to be enough evidence to suggest that, in the granting of mining leases or licences, the relevant public or statutory authorities are legally bound to weigh environmental considerations carefully against economic ones before determining in individual cases or situations whether or not grants should be made. The balance between the two which such public or statutory authorities are legally minded to maintain could hardly escape attention.

Leaving aside, therefore, the interpretation of mining legislation by the Australian courts, attention may now be directed to the particular question of land-use or development of the Australian Capital Territory as envisaged under the *National Capital Development Commission Act* 1957-1960, and to the two particular court hearings which related to the construction of a tower on Black Mountain in Canberra. That legislation had sought to entrust the National Capital Development Commission with the task of 'the planning, development and construction of the City of Canberra'. However, the *Enforcement of Public Interests Ordinance* was promulgated in 1973, by which the Minister of Works, the Postmaster-General and the Commonwealth of Australia sought to erect a communications tower on Black Mountain in Canberra. Considering that the proposed tower would have the effect of encroaching on the amenities of a public park, as well as being capable of having other environmentally undesirable effects, the plaintiffs, being public-spirited individuals with a strong sense of the need for conserving important aspects of the environment, presented an application for an interlocutory injunction to prevent the building of that tower from being proceeded with, pending the hearing of the suit. However, on the pure grounds of statutory construction, Fox J., sitting in the Supreme Court of the Australian Capital Territory, refused to grant the application.[36] In dismissing the application, his Honour held that neither the despoliation of the natural bushland nor the adverse effect on flora and fauna would justify the granting of an injunction where those were the necessary result of work done under statutory authority. Consequently, Fox J. did not pronounce on whether or not environmental factors had to

35 Ibid, at pp. 400-401. In so observing, the learned Chief Justice of the Australian High Court compared that situation with the situation which arose in *Murphyores Incorporated Pty. Ltd. and Others* v. *Commonwealth of Australia and Others c, supra.*

36 (1973) 1 A.C.T.R. 43.

be weighed against the economic viability of the building of the tower.

On the other hand, when the same case came before Smithers J., also sitting in the Supreme Court of the Australian Capital Territory, on an application by the same plaintiffs for a full injunction,[37] the latter Supreme Court judge considered that the granting of such an injunction was justified. That was because, *inter alia*, his Honour felt that: first, unless adequate arrangements were made to control traffic so that persons wishing to visit the reserve in Canberra could have reasonable access, a public nuisance would be occasioned by the building of the tower; and, second, that it was not within the statutory powers of the Postmaster-General to erect a tower, a substantial purpose of which was to obtain revenue from tourist facilities. On the other hand, his Honour did not consider an alleged possible disfiguring of the skyline or an alleged possible introduction or spreading of fungus diseases or of exotic plants, as amounting to a public nuisance in respect of which judicial relief could be granted. At the same time, his Honour conceded that the building of the tower was within the statutory powers of the Government, and, therefore, that, if there had been no illegality in the way such powers were sought to have been exercised, the construction of the tower could be carried out by the Department of Public Works as the authorised agency. It could be seen that, while Smithers J. would appear to have attached more importance to environmental, as opposed to economic considerations or factors, yet, at the same time, he could be said to have left that some kind of balance had to be maintained between the two opposing considerations. Nevertheless, if there is one thing that would seem to be unmistakable about his Honour's judgment it was that his Honour implicitly may have made his preference for environmental quality and improvement in that context known. Witness his Honour's detailed description of the beauty of the particular Canberra scenery involved and the aesthetic appeal that such scenery or landscape might have had for a number of people. Yet the judge would not appear to have been unmindful of the political realities involved in that case. Indeed, the fact that the Governor-General had power, in the final analysis, to determine the policy to be adopted in any such situation, and which policy would then have to be carried out, was adverted to by Smithers J. Consequently, in situations of this kind, political decision-making may make nonsense of judicial determinations as to whether or not environtal factors should be accorded pride of place in opposition to economic considerations or consequences in relation to particular business, constructional or industrial activities or undertakings. After all, when it comes to the making of necessary political decisions in any such situation, environmental factors may be subordinated to economic considerations, without the courts having any power to question the determination or decision.

37 (1974) 2 A.C.T.R. 1.

It is now important to consider the Australian Commonwealth's *Environment Protection (Impact of Proposals) Act* 1974-1975, and how it has been interpreted in relation to particular factual situations. Since the relevant provisions of that legislation have already been examined in the present study, attention must be directed entirely to the case of *Murphyores Incorporated Pty. Ltd. and Others* v. *Commonwealth of Australia and Others.*[38] In that case, the plaintiffs, who held mining leases on Fraser Island in Queensland, and who produced certain mineral concentrates in consequence of the mining operations carried out there, sought an approval from the appropriate Federal Government Minister for the purpose of exporting mineral concentrates to overseas countries. It must be noted that, because the principal markets for the mineral concentrates were situated overseas, any threat to the ecological balance of Fraser Island which might be directed to the sand-mining operations of the plaintiffs, could have considerable adverse effect on their ability to export to countries overseas. It must equally be noted that, so far as the actual mining operations were concerned, and as to whether such mining operations had, or were likely to have, some detrimental effect on the local environment, would essentially be a matter for the individual State Government concerned; namely, the Government of Queensland. Thus, the Federal Government would have no power to control or regulate mining operations in that context. On the other hand, as far as the exporting of the mineral concentrates, especially to overseas countries was concerned, the Federal Government has had statutory power to prohibit exports, should it consider such prohibition necessary.[39]

Added to the strength of this statutory power, is the power of the Federal Government, exercisable by the appropriate Federal Government Minister, to take into account environmental aspects of operations of the kind in question, before allowing the exporting of products of the kind in question, to overseas countries, as implied by the Federal *Environment Protection (Impact of Proposals) Act* 1974-1975. Mention must also be made of the fact that the plaintiffs in the case had, in previous years, been permitted to export certain quantities of the mineral concentrates to overseas countries by the appropriate Federal Govern-minister. However, they had to apply for further approvals to export these mineral concentrates on subsequent occasions. Consequently, they opted to make an earlier application to the appropriate Federal Govern-Minister for further approval to export, lest any further applications for Ministerial approval at a later stage be refused, particularly in view of the likely adverse effects of their sand-mining operations on the ecological balance of Fraser Island. Apparently, the Minister, earlier, had indicated to the plaintiffs that their application to export to overseas countries would be approved. Yet, that same Minister subsequently

38 Supra.

39 S. 112 of the *Customs Act* 1901-1973 (Cmlth.) and its accompanying *Customs (Prohibited Exports) Regulations* 1973.

postponed the decision to grant the promised approval, on the ground that he wanted to consider a report to be submitted to him by a Commission of Inquiry which had been meant to conduct an inquiry into the environmental aspects of mining on Fraser Island, in accordance with the relevant provisions of the *Environment Protection (Impact of Proposals) Act* 1974-1975.

Following that, the plaintiffs, first of all, sought an interlocutory injunction, before a judge of the High Court of Australia, to restrain the Commission of Inquiry from conducting the proposed inquiry. But Mason J. only granted an interlocutory injunction restraining that Commission of Inquiry from compelling the plaintiffs to give evidence before it or produce documents before it, without necessarily granting an injunction to restrain the actual holding of that inquiry as directed by the Minister. The plaintiffs subsequently sought to convert the interlocutory motion into one for a permanent injunction and, indeed, asked the Full Court of the High Court of Australia for a declaration that, in considering any application for export approval under the relevant Federal law, the Minister was not legally entitled to have regard to the report of the Commission of Inquiry, nor to any environmental aspects of the mining operations concerned. As to the other questiton or issue, in respect of which the plaintiffs sought a declaration from the Full Court of the High Court, (namely: the issue as to whether the *Federal Environment Protection (Impact of Proposals) Act* 1974-1975 (Cmlth) was legally or constitutionally valid), that should not detain us here, since the Full Court of the High Court ruled that to have been validly enacted. More importantly, the High Court held that the Minister was legally entitled to have regard to environmental considerations in giving or refusing approval for the exporting of the mineral concentrates involved in the case. That being the case, the plaintiffs motion for a perpetual injunction was dismissed by the Court.

Clearly, what the Full Court of the High Court was implying in that case was that, much as economic considerations relating to sand-mining operations on Fraser Island may have been of considerable importance to the Queensland population generally, and to particular sections of it, in terms of, for example, job opportunities and general industrial development, those economic considerations needed to be weighed against the likely environmental effects of such mining operations, before the decision of the Minister could be reached as to whether or not to allow the export of mineral concentrates from those mining operations to overseas countries. Legally, therefore, the Minister would be entitled to weigh both economic and environmental considerations, and, if he felt that environmental considerations far outweighed any likely economic benefits from the mining operations, then he was entitled to refuse permission for the export of the products derived from the operations. On the other hand, as far as the actual decision of the Minister was concerned, once the statutory Commission of Inquiry had been established and its report submitted, the decision to be given would be purely

political with which the courts would be powerless to interfere. Indeed, that would seem to have been emphasised in some of the individual judgments of the High Court in the case under consideration here. Thus, for example, Stephen J., with whom Barwick C.J. and Gibbs and Jacobs JJ. agreed, observed that:

> The administrative decision whether or not to relax a prohibition against the export of goods will necessarily be made in the light of considerations affecting the mind of the administrator.[40]

Equally, Mason J. had occasion to point out that:

> In the very nature of things the policy considerations and reasons which may as a matter of sound judgment inspire a government to permit (or forbid) the exportation of goods are so multifarious and diverse that the scope and purpose of the Customs Act and Customs (Prohibited Export) Regulations are a fragile foundation for building a conclusion that certain policy considerations and reasons stand within that scope and purpose, and all others are excluded.[41]

While the decision of the Full Court of the High Court in the *Murphyores* case itself could not be said to have given any clear indication as to whether, in the end, the appropriate Minister actually proceeded to refuse permission to the plaintiffs to export the mineral concentrates in question, it would seem quite clear that, anyway, that the High Court could not legally have determined that. The likelihood of political and other pressures being subsequently exerted to encourage Ministers to allow mineral concentrate exports to overseas countries to be proceeded with, could not have been ruled out. Yet the fact that, legally, the latter would be bound to act on the basis of the report of an appropriate Commission of Inquiry, whose findings as to the environmental aspects of the relevant mining operations could not easily be dismissed or ignored by the government Minister, shows how economic considerations could be likely to be subordinated to environmental ones or be weighed equally with them. In the latter context, the role of the judiciary in ensuring that the relevant statutory or legal rules for appointing such a Commission of Inquiry by the appropriate Federal Government Minister, and in ensuring that he acts on the basis of the report produced by a Commission of Inquiry, must not be underestimated.

Situations Where Environmental Considerations are Meant to Override Economic Ones

In situations where environmental legislative provisions are not altogether explicit as to whether economic considerations or consequences ought to be taken into account by administrative or quasi-judicial authorities in the granting or the refusal of a licence or permit to particular persons, with respect to activities likely to occasion environmental pollution of one kind or another — what kind of interpretation of such legislative provisions ought to be adopted, and on what

40 (1976) 9 A.L.R. 199 at p. 206.
41 Ibid, at p. 215.

grounds ? Obviously, the task of interpreting such legislative provisions would fall to the courts. Consequently, depending on the construction put by the courts on such legislative provisions, economic considerations or consequences attendant upon the refusal of a licence to particular persons for carrying out activities involving some pollution of the environment, may or may not be taken into account by the relevant administrative or quasi-judicial public authorities in the making of their determination. The same may be said to apply in respect of situations where such public authorities, although proceeding to grant a licence, yet seek to impose particular conditions, limitations or restrictions on such grant, in such a way as to occasion serious economic consequences to the community at large or to some specific sections of it. Interestingly enough, that question has already come before the superior courts in *Phosphate Co-operative of Australia Ltd.* v. *Environment Protecttion Authority.*[42] It is, therefore, necessary to examine that case and the pronouncements of the courts with respect to it in more detail.

In that case, the appellant company, being a manufacturer of artificial fertilizers in the State of Victoria, undertook to manufacture its own sulphuric acid by means of chemical process carried out in contact with a particular plant. The appellant company applied sulphuric acid to phosphate rock to produce superphosphate, which could then be used as a fertilizer. The appellant company had two contact plants at its works, and the operation of one of them involved the discharge of acid gases, especially trioxides, into the atmosphere. That being the case, that company, in seeking to act in accordance with the relevant provisions of the environmental legislation in the State of Victoria, applied to the EPA in that State for a licence to discharge such waste gases from one of its contact plants into the atmosphere. Although the EPA granted the licence sought, it imposed conditions in respect of it, one of which conditions attempted to prohibit the operations carried out at the contact plant in question, if off-shore winds were blowing. The company objected to the imposition by the EPA of that condition, on the ground that it was excessively onerous, especially since it would tend severely to restrict the occasions on which the company might lawfully use the plant. Although the company would not seem to have explicitly advanced particular economic arguments in support of its objection, yet implicit in that objection, may be said to have been the various economic considerations. Arguably, the condition imposed by the EPA could be said to have been likely to affect the economic interests of the company directly in terms of a possible creation of undercapacity in relation to the contact plant concerned, and, hence, result in some loss of revenue. From the point of view of consumers of the product, as well as from the viewpoint of the suppliers of that company's raw materials, although the economic implications could be said to be somehow remote or indirect, yet they could not be lightly dismissed. Equally, from the stand-

42 Supra.

point of the economy generally, it would seem to be arguable that some kind of loss, perhaps in the form of loss of revenue to the tax office, may be occasioned to it, however remotely the latter might be. Incidentally, it may be mentioned that, Stephen J., with whose main judgment Mason J. agreed when the case under examination here came before the High Court on appeal, adverted to some of such economic factors or consequences as somehow arguable in the circumstances of that case.[43]

As was to be expected, therefore, the company, thereupon, appealed to the EPAB against the imposition of the condition in respect of the licence granted by the EPA. The EPAB, after hearing the appeal, somehow decided to vary the terms of the conditions imposed by the EPA, but not in such a way as to satisfy the appellant company. Consequently, that company again appealed to the Supreme Court of Victoria, the appeal having taken the form of an order *nisi* to review, and on that order's return, it came before Crockett J. The judge, after dealing with various legal issues, decided in a reserved judgment, to discharge the order *nisi*. However, the appellant company was subsequently granted special leave to appeal to the High Court of Australia. Apart from a question on a legal technicality of a purely procedural nature, but with which the present study is not concerned, the main issue raised in the appeal related to whether, in the exercise of powers concerning the issuing of licences for the discharge, deposit or emission of waste into the environment under the environmental legislation in the State of Victoria, the EPA or, on appeal, the EPAB could, or ought to, take into account, the economic consequences to the community, or the utility to the public of the operations affected by the terms of the licence, or the economic cost to the holder of such a licence of the imposition of a condition.

By a majority of two to one, the High Court held that neither the EPA nor, on appeal, the EPAB was legally entitled, in its deliberations concerning the granting of licences or the imposition of licence conditions, to have regard to any of the three likely economic consequences raised or adverted to in the appeal. It must be noted that Stephen and Mason J.J. constituted the majority in that context and there was one main judgment delivered by Stephen J. with which Mason J. agreed. On the other hand, Aickin J. constituted the minority in holding that the EPA was not only empowered, but also required, by the environmental legislation in the State of Victoria to take into account economic factors or consequences in the circumstances. It becomes quite clear that, whereas the majority decision may have sought uncompromisingly to treat environmental considerations as of overriding importance to the exclusion of all other considerations, especially those of an economic character, the minority judgment would appear to have sought to stress the need for maintaining some kind of balance between environmental

43 (1978) 18 A.L.R. 210 at p. 212.

and economic considerations. Thus, for example, Stephen J., in expressing the majority view, chose to regard that environmental legislation, '... as exclusively concerned, as its title suggests, with an unqualified protection of the environment, unqualified in the sense that no consideration is to be given to other desirable goals if they are nevertheless inimical to the environment'.[44] On the other hand, in his dissenting judgment, Aickin J. expressed himself thus,

> ... the Authority and the Board are not exclusively concerned with elimination of pollution (as defined) of any and every kind, nor are they committed by the Act to the elimination of discharge of all waste (as defined) irrespective of the consequences. As it seems to me they would be bound to consider at least some other matters of general public interest, including economic interests of the community, which may outweigh the preventiton or elimination of some particular example of pollution. At the very least the capacity of the environment to absorb without detriment to its quality would require consideration.[45]

The legal grounds on the basis of which the majority decision was reached by the High Courts, as well as the dissenting judgment in that case, need to be examined. Three main reasons would appear to have been given by the majority of the High Court in their decision in the case under consideration. Those may be said to have been as follows: first, the fact that the environmental legislation in the State of Victoria contained no positive direction that economic consequences or 'general considerations of the public interest' were to be taken into account by the relevant statutory authorities in relation to the discharge of their functions and powers; second, the contention that there were various provisions of that environmental legislation which rather pointed in the opposite direction; and third, the fact that it was inherent in the very nature of the task in respect of which the EPA was called upon by that environmental legislation to perform by means of the licensing system, an overriding requirement for giving effect to environmental considerations or factors.

As regards the contention that the environmental legislation in Victoria did not contain any positive direction that economic consequences or 'general considerations of the public interest' were to be taken into account by the EPA or, on appeal, by the EPAB in relation to the issue of a licence or in relation to the imposition of conditions on the grant of a licence, it could not, in the main, be denied that any explicit provisions could be found under that legislation. However, it could not, in logic, be said to follow that, because a particular statute failed to mention or refer to some specific factor or consequence, that that should necessarily be discounted in the construction or the interpretation of such statute. Moreover, it would seem curious to think that 'general considerations of the public interest', should not cover, for example, particular economic or social interests. Yet the majority

44 Ibid, at p. 216.
45 Ibid, at pp. 221-222.

decision of the High Court in this case would appear to have discounted the latter. It may, therefore, be submitted that the first reason given by the majority of the High Court, in that case, for its decision, cannot be regarded as convincing.

With respect to the argument that the various provisions of the environmental legislation in Victoria tended to indicate that economic considerations or consequences were not meant to be taken into account, there would appear to be strong grounds which could be taken in support of that view. It has already been argued in another part of this study that the inconsistency or the repugnancy provisions of that environmental legislation, which expressly treat that legislation as being capable of prevailing over any other legislation, give considerable force to the reasoning of the majority of the High Court in the instant case. Interestingly enough, in addition to the latter point, the majority of the High Court also adverted to the nature of the composition of the EPA and the EPAB as providing strong support for that majority's decision.[46] Thus, the fact that, under environmental legislation, the two statutory bodies were meant to consist, in the one case, of experts qualified in environmental control matters, as well as of persons with administrative skill and experience, and in the other, to consist of a lawyer and other persons experienced in environmental control or management, without reference to expertise in the field of economics, financial or industrial matters, would seem to have been relied on by the majority of the High Court. The plausibility of that contention cannot easily be dismissed.

In relation to the third argument of the majority of the High Court that it was inherent in the very nature of the licensing system envisaged under the legislation, that environmental considerations should be treated by the EPA as of an overriding character, it could be said to be indisputable. Yet, it would not necessarily seem to follow from the latter that other considerations, such as those of an economic nature, might not need to be taken into account by the EPA or, on appeal, by the EPAB in its deliberations on the issuing of a licence or on the imposition of a condition on the issue of any licence. Indeed, that argument of the majority of the High Court would seem to assume that, by taking economic considerations or consequences into account, the EPA or EPAB would necessarily subordinate environmental factors or effects to the economic ones. It has already been observed elsewhere in the present study that the functions and powers of the EPA, under the environmental legislation in Victoria, are too restrictive of individual activities, as well as being all-pervading in their reach. But that is not to say that, as against that background, the EPA is only meant to focus its attention entirely on environmental factors to the total exclusion of other factors, such as economic ones. Surely, the very fact that the EPA wields such wide discretionary functions and powers under environmental legislation, should entitle the EPA to take different considerations

46 Ibid, at pp. 214-215.

or factors, environmental as well as economic, into account in making its determinations in relation to the granting or the non-granting of a licence, or as regards the imposition or the non-imposition of conditions, limitations or restrictions on such a grant. Indeed, the statement of Stephen J., in giving the decision of the majority of the High Court in the case under consideration here, that, 'no consideration is to be given to other desirable goals if they are nevertheless inimical to the environment',[47] would, in itself, appear to concede that considerations or factors other than environmental ones, could be taken into account by the EPA or, on appeal, by the EPAB. That would not necessarily mean that those other considerations or factors would lead either of those two statutory bodies to allow them to override environmental ones.

To turn to the grounds on which Aickin J., in his dissenting judgment, would seem to have relied on, there would seem to have been one main reason for his dissenting judgment. In that respect, his Honour, in assessing whether economic factors needed to be taken into account by the relevant statutory bodies, would seem to have paid particular attention to the nature and scope of the concepts of 'waste', 'pollution' and 'pollutant'. Against that background, it appeared to the judge that, the functions and powers of the relevant statutory authorities under that environmental legislation, to prevent or control pollution and to protect and improve the quality of the environment; 'is not one which requires the prevention of all pollution but one which includes the control of pollution so as to deal with such aspects as appear to be necessary and to balance the elimination of pollution against other requirements of the daily life of the community and the means by which its food, shelter, light, heat and power are provided'.[48] The logical and the businesslike approach that seems to have been adopted by Aickin J. may be said to be highly supportable. After all, it is true that the environmental legislation in Victoria could not have been intended to prohibit all kinds and manner of polluting activities, whether by private individuals or by business, commercial or industrial enterprises. Surely, only such polluting activities as may tend to have an appreciable or harmful effect on the environment, were meant to be strictly controlled by the EPA. Consequently, it would seem logical that the EPA should be legally able to take other factors, such as economic ones, into account in the making of its determinations in that context. As to whether the EPA finally decides that such economic considerations or factors should be subordinated to environmental ones, would then seem to be a purely administrative or a non-legal one, upon which the courts are not entitled to pronounce.

A Critique of the Decision in the Phosphate Co-operative Co. Ltd. *Case*

There is no doubt that, for any meaningful discussion, such as the one relating to the problem under examination in the present paper, to

47 Ibid, at p. 216.
48 Ibid, at p. 221.

be conducted, a distinction would have to be made between the construction or the interpretation of the law, on the one hand, and the making of political decisions or policies on the other. In that respect, whereas the construction or interpretation of the law becomes the function of the courts, the making of policy remains the task of political functionaries. Consequently, it is to be expected that, in relation to, for example, the environmental legislation in Victoria, the courts should purport to construe or interpret the law as it stands, without bringing policy considerations to bear. Any patent or latent anomalies arising out of such legislation would therefore, normally be expected to be made good by the appropriate political decision-makers. Needless to say, they may need to balance environmental and economic considerations together in the formulation of the necessary legislation. Indeed, as Stephen J., with whom Mason J. agreed in the High Court in the *Phosphate Co-operative Co. of Australia Ltd.* case, observed:

> For those concerned with the formulation of environmental policies there must always exist a problem in the reconciliation of conflicting aims: the individual should ideally be able both to enjoy an environment of acceptable quality and at the same time to experience as high a degree of economic well-being as possible. But the attainment of the one may prejudice the achievement of the other, the prohibition of pollutant industrial activity may lead to reduced standards of living perhaps to widespread unemployment and economic depression. However, these are the problems of legislators and, ultimately of the electorate to which they are answerable.[49]

It is, therefore, to be appreciated that, the High Court, in that case, decided to confine itself to discerning, from the provisions of the environmental legislation in Victoria, whether it was the intention of the legislators of that State that the relevant environmental protection authorities were meant to balance environmental considerations against those of an economic nature in the making of their determinations in the context envisaged. Yet, although one would be inclined to support the decision of the majority of the High Court in that case on the basis of moral and ecological principles, most of the reasons given by the High Court for that decision could not be said to sound well in logic or in terms of practicality. On a logical basis, it would seem undeniable that, since not every kind of a likely polluting activity is meant to be controlled or prohibited under that environmental legislation, a consideration of factors other than purely environmental ones, would need to be taken into account by the relevant environmental protection authorities in the making of their determinations. Although the provisions of that environmental legislation are meant to take precedence over all other statutory provisions which might come into conflict with them, yet it cannot be assumed completely from the latter that economic factors or considerations are the same as or have to be equated with statutory provisions in conflict with the provisions of the environmental

49 Ibid, at p. 212.

legislation in question. In that respect, although the contrary view may have somehow been expressed in an earlier part of the present study, such latter view should be treated as only arguable but not as a conclusive one in its own right. On the basis of practicality or reality, it would seem to be an inescapable fact that, in the actual making of their determinations or decisions the relevant environmental protection authorities would tend to weigh all kinds of considerations or factors alongside the environmental ones. Consequently, it would seem to be a mere exercise in the abstract or in theory, to state that such environmental protection authorities should exclude from their calculations in that context, economic considerations. Moreover, it may be wondered whether, in actual practice, such environmental protection authorities, when confronted with situations where governmental or other public bodies may have engaged in polluting activity of one kind or another, those environmental protection authorities would be prepared to or have to overlook all considerations or factors other than the environmental ones,[50] as would inexorably seem to follow from the decision of the majority of the High Court in the *Phosphate Co-operative of Australia Ltd.* case. Surely, other factors, such as the economic or the socio-economic ones, would necessarily be taken into account in that regard. Indeed, doing the latter would seem to be both a conscious and an unconscious act on the part of the relevant environmental protection authorities within that framework.

Although matters of environmental policy, which may obviously have considerable repercussions on various economic activities in the community, are within the exclusive preserve of legislators, the role of the courts, through their interpretative functions in relation to various environmental statutes on various economic activities in the community is not by any means to be a negligible one. That being the case, the courts themselves need to understand and appreciate the implications of that role, especially in relation to the economic consequences of their decisions or pronouncements in that context. As has been observed by one writer, albeit in the context of nuisance actions at common law, with respect to the direct influence of judicial decisions and pronouncements on economic activity; 'It would therefore seem desirable that the courts should understand the economic consequences of their decisions and should, insofar as this is possible without creating too much uncertainty about the legal position itself, take these consequences into account when making their decisions.'[51] What needs to be emphasised in the context of the interpretation and the application of, for example, the

50 As regards the view that the decision of the majority of the High Court in the *Phosphate Co-operative Co. of Australia Ltd.* case may have quite the opposite effect in a different context, especially in relation to the activities of governmental and other public bodies, see *e.g.*, R. J. Fowler, 'Environmental Law — Licensing Pollution', (1978) 6 *Adelaide Law Rev.* 311 at p. 315.

51 R. H. Coase, 'The Problem of Social Cost', (1960) 3 *Journal of Law and Economics* 1 at p. 19.

environmental legislation in Victoria is that, the fact that the relevant environmental protection authorities take or purport to take economic considerations or factors into account in making their determinations with respect to the operation of the licensing system, does not, and should not necessarily mean that environmental quality considerations or issues would be subordinated to such economic considerations or factors. Moreover, it is no use the courts trying to pretend that their decisions or pronouncements are not meant to have any impact on economic activity, whether generally or in particular situations.

Conclusion

That the courts would seem, by and large, to favour the balancing by environmental protection authorities or by other responsible statutory bodies of economic and environmental considerations in the making of the latter's decisions in various situations involving some constructional or some other industrial or business activity, may have become clear from the present study. That being the case, the decision of the majority of the High Court of Australia in the *Phosphate Co-operative Co. of Australia Ltd.* case may be treated as a particular deviation prompted by the somehow unique character of the environmental legislation in Victoria. Yet, that decision of the High Court could well be capable of being followed, somehow, in relation to cases that may be associated with an interpretation of the environmental legislation, in for example, Tasmania, and to some extent, also in Western Australia, whether by administrative, quasi-judicial bodies or by the judiciary. However, no matter how the courts decide that economic factors or consequences should be excluded in those circumstances, the reality would seem to be that, in the end, the statutory or other public authorities concerned, in their capacities, where relevant, as political decision-makers, may do the exact opposite. Consequently therefore, it may be said that, in circumstances of that kind, political decision-making would, in the end take over from where the courts may have left off. On the whole, therefore, it may be submitted that, economic considerations or consequences need to be taken into account by environmental protection and other public authorities in their efforts to protect and improve the environment. However, the latter is not to be taken as implying that such authorities should necessarily subordinate environmental considerations to them.