Subsidiarity and Local Environmental Governance: A comparative and Reform Perspective

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Ever since provinces were established by the ancient Assyrians, probably during the reign of Shalmaneser III (858-824 BC), rulers and emperors have, over the ages, used the invention to control distant and often unruly portions of vast empires through local administration of the law and the effective funnelling of resources to a central government. Roberts has remarked of this ancient invention that: [1]

> To the modern ear, this concept sounds so basic that it hardly seems to merit discussion, but the idea of dividing a large area of land into smaller components, each governed by one specific individual who was responsible to the central government and sub-ordinates who were responsible to him, was a startling innovation for government. With this achievement, there appeared to be a way to supervise a large empire without the king actually having to be everywhere at once.

While the ancients employed this device as the foundation for the success of empire based on a system of tax collection and the subjugation of local peoples for the enrichment and benefit of the central administration, discussion in the European Union (EU)[2] in the new millennium is centred on the opposite premise of a central authority with greatly diluted powers and a local authority with new areas of autonomy. According to this vision, the central authority is at the service of the people. The main beneficiary is said to be democracy,

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1 TR Roberts, *Ancient Civilisations – Great Empires at their Heights*, (Friedman/Fairfax Publishers, 1997) p 69.

2 The Treaty on European Union (TEU) 1992 introduced the term 'European Union' to describe the union of Member States under the foundational treaties. As such it is not strictly speaking applicable to matters of law relating to the European Community Treaty (EC Treaty) 1957. The term 'European Community' is applicable in this context.

buoyed by the twin concepts of legitimacy and transparency of decision-making.

The EU experience of the 1990s paints a picture of an increasingly local dimension in a range of policy areas including Structural and Cohesion Fund policy[3] and environmental policy. Debate on power-sharing has been converted into the constitutional principle of subsidiarity[4] which seeks to redefine the separation of powers between the levels of authority within the EU. Although in practice imperfect, this principle, together with other developments including the establishment of the Committee of the Regions (CoR), through which the regions and local areas can express their views on proposed legislation, suggest an enhanced role for sub-national actors in formulating policy. The EU is subject to serious constitutional and institutional limitations, yet it appears to be making progress towards fixing the imperative of local empowerment to the EU architecture. Even if this architecture proves to be transitional, evidence of a deep-seated commitment to local government as an independent institution or force will remain.

The strength of these developments in the EU and the potential they possess for further refinement and evolution are remarkable, all the more so because they emanate from a not-yet-federal supranational structure in which the majority of the Member States are unitary in constitutional tradition. Yet even in the unitary states of the EU, it would appear that local involvement in national environmental decision-making is on the increase, ostensibly in response to the emphasis on regionalism in the EU. At the same time borders appear to be losing some of the meaning traditionally ascribed to them, facilitating

3 Structural Funds are intended to deal with the problem of regional disparities and structural handicaps of certain regions within the EU. Cohesion Funds provide support for environmental and trans-European transport infrastructure projects in four member states: Spain, Portugal, Ireland and Greece.

4 Subsidiarity has its foundation in Catholic tradition. Its philosophical underpinning is the sovereignty of the individual. Thus only those matters that are beyond the individual's capacity or means to perform adequately may be taken up by the level of social organisation directly above the individual. Subsidiarity may be seen to represent 'a bottom-up approach, always empowering the respective lowest competent level' while 'higher levels are subsidiary or auxiliary to the lower level': K Gretschmann, 'The Subsidiarity Principle: Who Is to Do What in an Integrated Europe?' in *Subsidiarity: The Challenge of Change*, Proceedings of the Jacques Delors Colloquium, (EIPA, 21-22 March 1991, Maastricht,) at 47. On this analysis, if the lower level fails, then the next higher level (local, regional or national) may intervene. The relevance of the subsidiarity principle to the environmental policy area in particular is immediately evident – problems that cannot be dealt with at the national level should be entrusted to the EU.

cross-border and inter-regional cooperation on matters of local or common concern and 'mutual projects of large geographic units'.[5]

Europe is propelling itself on a path to political union. However, progress toward this end appears to have been founded on function, rather than design, as per the following scenario:[6]

> Create a single market and you find you need a single currency to make the market work properly. Create a single currency and you find you need a single economic policy to make the currency work properly. Create the political institutions needed to make a single economic policy work properly, and they will start doing all sorts of other unforeseeable things as well.

This is not to suggest that there is no blueprint for European political union. Indeed there have been many since the 1950s. The EU does not suffer from a lack of ideas. The debate is ongoing. Contemporary policymakers may have been inspired by Monnet, Spinelli or like minded European integrationists, but they recognise that many of the EU's citizens are fearful that the EU might be transformed into a centralised, strongly interventionist superstate. They therefore guard against accusations of federalist plots. Thus *evolution* to political union is vital. Furthermore, European political union does not necessarily imply a high degree of centralisation. Debate is firmly focussed on a political union displaying the strong federative characteristics of democracy, decentralisation and legitimacy. Legitimacy is a wide-ranging notion that embraces concepts of validity, efficiency, transparency and democratic accountability.

In contrast to the EU and most of its Member States, Australia is a federation. This factual statement is devoid of universal meaning. It does not necessarily follow from this fact that a certain form of governance is provided for or even envisaged. There are numerous federal models in the world today, each one different from the rest. Vibert suggests that federalism is practised in so many guises that it has lost its core meaning.[7] Thus, while federalism essentially contemplates the forming of a union of states by agreement, whereby each

5 V Chiti, 'Italy between old and new federalism' (1998) *Edizioni della Regione Toscana* at 30. Chiti states: 'The process has already begun and it is definitely irreversible: the bonds that already unite Languedoc-Roussillon and Catalonia, Rhone-Alps-Cote d'Azur, Val d'Aosta, Piemonte and Liguria are only examples of the progress the regions have made in recent years'.

6 The Economist Review, Books-in-brief: dissecting the euro – 'Love it, like it, hate it, adore it' *The Economist*, (May 15 1999) p 10, citing Michael Emerson, *Redrawing the Map of Europe* (Macmillan Press).

7 F Vibert, *Europe: A Constitution for the Millennium* (Dartmouth, 1995) p xiv.

member subordinates its power in certain crucial areas to a central political entity, federalists have traditionally offered no agreement on which polities are the most useful models. Federalism may be understood to mean a form of governance that admits local government involvement in national decision-making, although the Australian federation, by its very form, does not do so.

It is submitted that a form of federalism or a federation that assigns responsibilities to local government in national decision-making is more likely to uphold certain values such as democracy and transparency. In theory, federalism reinforces democratic values through the imperatives of local participation and responsibility. Moreover, the decentralisation of state structures through power-sharing and cooperation between the different levels of government, arguably increases efficiency as decisions are taken as close as possible to the citizen affected by the measure. Federalism, as an organisational model, 'presupposes the spread of subsidiarity'.[8] However, local government in Australia does not have constitutional legitimacy, although its role in Australian policy formulation was quite exceptionally recognised by the Inter-governmental Agreement on the Environment (IGAE) 1992. While local government is not sovereign, the importance of its role in environmental management has been recognised,[9] as has its potential to contribute in a significant way

8 Chiti , note 5 above, at 31.

9 See GM Bates, *Environmental Law in Australia* (4th ed, Butterworths, 1995) p 101 citing TASQUE Report, 'The Role of Local Government in Environmental Management' (University of Tasmania, March 1992). TASQUE identified the following three broad categories of local government activity: regulation; capital works programs; and community services. In more recent times, local councils have been adopting local Environmental Management Plans to manage the human impact on their environments. This has been in response to the principles of Ecologically Sustainable Development (ESD) outlined in the National Strategy for ESD published in 1992 and to Agenda 21, formulated during the UNCED Earth Summit in Rio de Janeiro in 1992. Some local councils have taken on an environmental leadership role. Particularly noteworthy have been the efforts of Newcastle City Council whose policy has been: to prevent pollution; to manage and minimise waste; the sustainable use of energy and natural resources; the establishment and implementation of best practice environmental performance; to regularly measure, audit and review environmental performance; to communicate with the community and undertake employee training; to develop and promote services and technologies which are ecologically and economically sustainable and to encourage others to do the same (partly through environmental achievement awards); and to integrate environmental protection in development processes (see Newcastle Environmental Management Plan, which was adopted by Newcastle City Council on 8 August 1995: http://www.ncc.nsw.gov.au/environ/envpol/envpol.htm).

to national environmental policy making and administration.[10] Notwithstanding, it is submitted that this position is in need of reform to secure the democratic integrity of local government in a new era full of challenges.

There is an acknowledged danger in separating institutional form or constitutional development from the historical and cultural setting to which such institutions or constitutions belong.[11] The dialogue in Australia does not, indeed cannot, run along parallel lines to the debate on subsidiarity in the EU. The EU is not a federal state, nor does it have a constitution, strictly speaking. The idea of a Europe of the regions with greater decentralisation from Brussels, featuring the dismantling of borders, forms the backdrop to the debate on subsidiarity in the EU. This vision coincides with regional movements asserting themselves in Italy, Spain and Belgium among other States. The unique nature of the EU, its institutions, national and subnational actors and circumstances ensure that subsidiarity will evolve in a purely European context and will be shaped by actors having vastly different roles and interests to those in Australia. However, from an Australian perspective, insights may still be gained from the constitutional experiences of other federal or federal type systems such as the EU. The European Community Treaty (EC Treaty) 1957 allocates powers to the Community, leaving residual powers to the Member States.[12] Obvious parallels to the Australian Constitution

10 See P Mitchell and E Brown, 'Local Government: a Social Resource for Environmental Control' (1991) 8 *EPLJ* 41. Mitchell and Brown state that:

'The role of local government in environmental control can manifest itself in at least three ways:

First, it can provide an efficient and effective means of administering national policies and controls in a manner which is attuned to and consistent with regional needs.

Secondly, local government can ensure that, in the formulation of national policy, the interests of its community are represented and regional concerns are taken into consideration.

Thirdly, local government is capable of providing an essential balance in the consideration of development proposals' (at 41).

11 Vibert, note 7 above, at xv.

12 The EC Treaty vests authority in supranational institutions over a range of policy matters, either exclusively or concurrently with the Member States, in accordance with the principle of subsidiarity. Through its institutions the EC Treaty has established a unique system which permeates the political, economic and social fabric of its 15 Member States. The four main institutions of the EU are the Commission, the Council, the European Parliament and the Court of Justice. Other institutions include the Court of Auditors, the Economic and Social Committee and the CoR: see J Steiner and L Woods, *Textbook on EC Law* (5th ed,

may therefore be drawn. While at vastly different stages of constitutional development, Australia and the EU are both, to varying degrees, attempting to define or allocate appropriate powers and responsibilities to each sphere of government or level of authority. Both polities are concerned to preserve and enhance the legitimacy of their respective systems of governance. Moreover, subsidiarity, as an organisational principle, has the potential to contribute to defining the federal balance. Subsidiarity or devolution is featured in both systems, thereby inviting comparison. Thus, the similarities warrant discussion, as do the differences. Within both systems there appear to be institutional, constitutional or other restraints (political or social) that impact adversely on the development of environmental law and policy. This article seeks to:

- ascertain the nature of the shortcomings that may have this result;
- examine the status of subsidiarity and whether institutional and policy developments in the EU purporting to legitimate sub-national action facilitate, at least conceptually, the formulation of environmental law and policy;
- compare and contrast the position in Australia within both a constitutional and political framework.

Subsidiarity and Institutional Reform in the EU

The principle of subsidiarity has been the subject of much debate and controversy in Europe, both for what it does and for what it fails to do, as well as for what it might do. In its broadest definition (encapsulated in Article 1 of the Treaty on European Union (TEU) 1992), with its rhetoric of closeness to the citizen, it mandates government as close as possible to the people, whether at EU, national or local level. In Article 5 of the EC Treaty,[13] on the other hand, it attempts to mediate the exercise of power between the Community institutions and the Member States. This principle directs that the Community will take action 'only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community'.[14] Many learned writers, including Emiliou, have emphasised subsidiarity's dual potential for 'guar-

Blackstone Press Ltd, 1996) pp16-28 for discussion of the roles and responsibilities of the EU institutions.

13 EC Treaty Articles renumbered in accordance with the Treaty of Amsterdam 1997.

14 Article 5, EC Treaty.

anteeing' the liberty of the new European citizen,[15] as well as preventing the 'over-extension' of the Community system.[16] Discussion of a so-called 'democratic subsidiarity'[17] in the context of democratic federalism (reflected in Article 1 of the TEU) expresses the subsidiarity idea as a mechanism for the protection of citizens' rights, while conversely the notion of 'executive subsidiarity',[18] as it appears in Article 5 of the EC Treaty text, invokes an interpretation protective of executive prerogatives, whereby Member States' powers are apparently protected against Community expansionism.

De Búrca observes that EU constitutional law has largely been 'taken up with the search for ways of resolving the tensions and balancing the interests of integration and differentiation, of harmonisation and diversity, of centralisation and localisation or devolution'.[19] Many have written about subsidiarity's potential to regulate the exercise of power between the supranational, national, regional and local levels. The proposition that institutions have greater legitimacy the closer they are to the people has been re-stated routinely in discourse on European integration this decade. If it were possible to demonstrate the proposition by the level of interest with respect to the question and the willingness to debate it, then the volume of discussion on the principle of subsidiarity and the role to be played by sub-national actors in the EU political system would surely substantiate it.[20]

Subsidiarity has the status of a constitutional principle in the EU and has, since its introduction (in the Single European Act (SEA) 1986 and then extended by the TEU), been subject to diverse interpretations. Much of the debate on subsidiarity has focused on the protection or re-invigoration of Member State sovereignty. Competing views have been framed in terms that challenge the devolution of power to the national level in preference to concerted EU action.

15 N Emiliou, 'Subsidiarity: An Effective Barrier Against the Enterprises of Ambition?' (1992) 17 *EL Rev* 383 at 407.

16 Ibid.

17 G de Búrca, 'Reappraising Subsidiarity's Significance after Amsterdam', Jean Monnet Working Papers, Harvard Law School internet site http://www.law.harvard.edu/Programs/Jean Monnet/Papers/99/990701.html

18 Ibid.

19 Ibid.

20 It would be pointless to attempt to set out in an exhaustive manner the large number of books, articles, Commission communications, conferences, workshops and seminars on subsidiarity that have been written, published or organised in the EU Member States and elsewhere since 1992 when the principle was elevated to a Treaty principle of general application.

The precise meaning of subsidiarity remains elusive in recognition of the enormous diversity of interests that characterises the EU in most areas. It appears that each actor within the EU system ascribes a meaning to the term 'subsidiarity' that best achieves the particular purpose sought. The protocol to the Treaty of Amsterdam,[21] signed on 2 October 1997,[22] fails to remove the ambiguities and leaves the door open to further evolution and definitional debate. Clearly, the debate has major ramifications for regional and local government authorities in the EU. Notwithstanding this, discourse in the EU has centred on the perennial difficulty of dividing power between supranational institutions and the Member States. Zito remarks that the 'ramifications for regional and local government receive less attention'.[23]

Whether applied to a federal system, such as Australia, or a multilevel system of governance, such as the EU, subsidiarity can potentially provide a useful tool for determining the appropriate level of action. However, in the absence of clear guidelines as to its application, the principle remains as malleable as plasticine. A tendency on the part of several unitary EU Member States (eg the United Kingdom and Denmark) to define subsidiarity 'as reserving power to the national level [is] less likely to foster an orientation towards shared responsibility with the local level'.[24] Furthermore, Zito has observed that an interpretation of subsidiarity that effectively devolves power away from Brussels to the national governments of the Member States 'may increase the differentiation between regional systems'.[25] He opines that a definition that favoured national government responsibility would preclude, or at least restrict, the opportunities for networks to develop between pro-environment actors in regional government, private organisations and the Commission.[26] In a similar vein, Golub suggests that subsidiarity has resulted in a net reduction in EU environmental legislation and placed a premium on framework directives which provide Member States with maximum flexibility on

21 Protocol on the application of the principles of subsidiarity and proportionality.

22 The Treaty of Amsterdam 1997 came into force on 1 May 1999.

23 AR Zito, 'The evolving arena of EU environmental policy: the impact of subsidiarity and shared responsibility' in U Collier, J Golub and, A Kreher (eds), *Subsidiarity and Shared Responsibility: New Challenges for EU Environmental Policy* (Nomos Verlagsgesellschaft, 1997) p 27.

24 Id at p 28.

25 Id at p 27.

26 Id at p 29.

implementing measures.[27] Both outcomes are direct consequences of the current preference for an interpretation of subsidiarity that resists supranational intervention in environmental issues.

It would be possible to extrapolate from the foregoing that the current status of the subsidiarity debate has tilted the balance in favour of national competence. However, such a conclusion should be resisted as premature. It ignores the very real difficulty acknowledged by most legal writers on the subject in calculating the overall impact of subsidiarity and shared responsibility due to the 'ongoing nature of the EU institutional struggle'.[28] Each of the EU actors seeks to promote its own perspective on both environmental and other issues.

The nature and degree of constitutional divergence among the Member States of the EU further complicates the overall picture. Most of the Member States are unitary, while Germany, Belgium, Spain and Austria are federal to varying degrees. The level of formal representation enjoyed by sub-national authorities in Germany and Belgium, in particular, is greater than that enjoyed by their counterparts in the unitary Member States of the EU.[29] By definition, the unitary constitutional structure resists the devolution of power to the regions or any undermining of central authority. If unitary countries are inclined to define subsidiarity 'as reserving power to the national level',[30] then federal states may be better disposed to give close attention to the subsidiarity principle, in its broader democratic sense, namely, in the sense that best envisages the sharing of power between the different levels of authority for the purpose of protecting citizens' rights. Hence a preliminary conclusion may be reached that the notion of subsidiarity may be weighted conceptually in favour of federal political organisation. That is, it is particularly well suited, as an organising principle, to federal or quasi-federal organisations.

The Committee of the Regions

It is submitted that federal or quasi-federal systems of governance provide an opportunity for implementation of the subsidiarity princi-

27 J Golub, 'Recasting EU environmental policy: subsidiarity and national sovereignty' in Collier, Golub and Kreher (eds), note 23 above, at p 42. 'The number of new environmental proposals emanating from the Commission has been halved in the [then] three years since the TEU elevated subsidiarity to a central treaty objective'.

28 Zito, note 23 above, at p 30.

29 See Golub, note 27 above, at p 45.

30 Zito, note 23 above, at p 27.

ple. The EU reveals a multi-level governance comprising supra-national, national and sub-national players. Even where the constitutional system of a Member State does not attribute policy-making powers to the local level, the new emphasis on regionalism in the EU, most visibly evident in the establishment of the CoR,[31] gives power, albeit still largely symbolic, to sub-national players. Created as a consultative body by the TEU, the CoR is able to bring local expertise and influence to bear on the EU's other institutions. The TEU requires the CoR to be consulted on matters relating to trans-European networks, public health, education, youth, culture and economic and social cohesion.[32] However, the CoR can also take the initiative and give its opinion on other policy matters that affect cities and regions, such as agriculture and environmental protection.[33] The CoR's work is based on a structure of standing Commissions and Sub-Commissions as follows:

- Regional Development, Economic Development, Local and Regional Finances Sub-Commission: Local and Regional finances.
- Spatial Planning (agriculture, hunting, fisheries, marine environment and upland areas) Sub-Commission: Tourism, Rural Areas.
- Transport and Communications Networks Sub-Commission: Telecommunications.
- Citizen's Europe, Research, Culture, Youth and Consumers Sub-Commission: Youth and Sports.
- Urban Policies.
- Land-use Planning, Environment, Energy.
- Education, Training.
- Economic and Social Cohesion, Social Policy, Public Health.[34]

The CoR legitimates the sub-national perspective and its focus on regional and local conditions. Even if the current role of the CoR is

[31] The CoR was established under the TEU, the same treaty that elevated the subsidiarity principle to one of general application, now applicable to all policy areas covered by the EC Treaty. The demand for the establishment of the CoR came from regional authorities in Germany and Belgium (two of the EU's federal states) who ostensibly sought to strengthen their position in the EU system through the CoR. Thus the establishment of the CoR, allowed sub-national authorities to be formally represented in EU policy-making for the first time. From this representation sub-national authorities derive a measure of legitimacy in formulating policy.

[32] The Committee of the Regions: http://europa.eu.int/inst/en/cdr.htm#intro

[33] Ibid.

[34] Ibid.

limited by the EC Treaty to an essentially advisory function,[35] it is anticipated that the CoR 'will not remain so impotent in the long run'.[36] Moreover, the CoR is said to exert 'an integration stabilising [influence] through the articulation of local interests'.[37]

Of course the question of representation of local interests is complicated by the diversity of sub-national authorities within the Member States. The nature, structure and status of regional and local authorities vary significantly among the Member States to the extent that responsibilities are neither assumed nor discharged in any consistent manner by public authorities at these levels. The composition of the CoR reflects this diversity. It is by no means homogeneous and perceptions as to its obligations and functions differ among the members. Those members coming from the federal states of the EU are no doubt accustomed to participating in national decision-making processes and are better equipped to truly take part in the CoR. However, of the 222 members of the CoR, most come from regions, provinces and local governments in states with a unitary tradition. Often these members have a weak position in their domestic contexts,[38] and as suggested by Kalbfleisch-Kottsieper, are:[39]

> Very content with the merely 'representative' nature of the Committee and see the 'participation' which this affords them at European level as a way to push through their interests vis-à-vis their own national governments and, thus to circumvent the national level.

It has been observed that '[o]nly in federal states do regional and local authorities on a lower level have a truly effective, constitutionally anchored, claim to participation in national policy making'.[40]

This practical problem may equally impact upon the application of subsidiarity. However, it must be remembered that subsidiarity, in its broadest context, authorises local or regional actors to act whenever they can *actually* do better than the higher levels of authority. This seems to contemplate diversity in intra-nation-state decision-making and a tailored, flexible response to the question of legislative competence.

35 See Articles 263-265 as amended by the Treaty of Amsterdam 1997.

36 U Kalbfleisch-Kottsieper, 'The Committee of the Regions and environmental policy', in Collier, Golub and Kreher (eds), note 23 above, at p 99.

37 Id at p 100.

38 Id at p 101.

39 Ibid.

40 Id at p 102.

Despite these problems and the constitutional limitations of both the EU and the majority unitary states that make it up, the debate on regionalism and subsidiarity together with the establishment of the CoR appear to be forging the path to decentralised decision-making.[41] The process of policy delegation by the Member State level has gained endorsement both through subsidiarity and the establishment of the CoR.

The CoR is being afforded the opportunity to carve out a role for itself in EU policy formulation. While not on an equal footing with the other institutions in terms of legislative powers, the CoR is legitimate nonetheless. Further growth of the CoR will take place in line with the development of political will. Importantly, the constitutional deficiencies in the EU are shared between the institutions. It is acknowledged that the functions of *each* of the EU institutions are in need of change and that they will, in time, change. Thus, it is expected that the CoR's competence will be expanded commensurate with community expectations of increased and more effective local action; the European Parliament is expected to become more democratic; and the executive functions of the EU, hitherto fragmented between the Commission and Council, will be situated unambiguously in the Commission, with the Council emerging as a Senate representing the national and perhaps sub-national interest.

The position in the EU contrasts starkly with the static state of constitutional affairs in Australia, where public debate on constitutional reform, beyond the ceremonial issue of the Head of State, has really failed to take off. The immediate fate of the *constitutional recognition of local government* issue had been tied to the outcome of the referendum on whether Australia should become a republic. A Constitutional Convention was to be convened had the referendum succeeded, and the position of local government was to be considered at that time. The proposed constitutional amendments were defeated on 6 November 1999, demonstrating once again the difficulty of achieving constitutional change in Australia, even where bipartisan political support is given to a proposal, as was the case with the proposal in that referendum for the adoption of the preamble to the Constitution. Thus, at the beginning of the new millennium, local government in Australia is no closer to achieving constitutional legitimacy.

[41] Gretschmann observed as long ago as 1991 that the Community was witnessing not only an 'upward' move in policy-making from the Member States to the supranational level, but also a 'downward' move in at least some unitary states towards regionalisation and decentralisation: K Gretschmann, note 4 above, at 46.

Australia

Local Environmental Competence

Local government is sometimes described as the third tier of government in Australia after the Federal and State Governments. However, as it 'may act only to the extent that a State legislature grants it the power to act',[42] it does not properly qualify as such. The States do regularly grant local authorities power, in recognition that they have responsibility for the development and implementation of locally relevant policies. Thus the scene is set for the development of a *subsidiarity* type approach. Although not often expressly described as subsidiarity, the concept of allocating authority among several levels of government does find expression in Australian environmental policy. The IGAE, signed in May 1992, acknowledged that the three levels of authority – Commonwealth, State and Local – each has a role to play in relation to the environment. The agreement committed each of the actors to the principles of Ecologically Sustainable Development (ESD) which were to be pursued through the integration of economic and environmental considerations in decision-making processes at all levels. To these ends the IGAE has its foundation in key international initiatives.[43] The IGAE set about analysing different policy sectors and carving up competences and areas of influence or interest over a range of environmental issues.[44] It contemplated the subsidiarity approach in the face of complex environmental issues that demand joint effort. The IGAE underscores a co-operative approach to the division of roles and responsibilities in the environmental sphere at a time when the Commonwealth's capacity to control a large range of environmental issues, particularly through the external affairs power in s 51(xxix) of the Constitution, was apparent.[45]

[42] Mitchell and Brown, note 10 above, at 44.

[43] The three tier approach evidenced by the IGAE was largely driven by international developments and instruments commencing with the United Nations Conference on the Human Environment 1972 and culminating in the principles of ESD which were adopted in Australia subsequent to the World Conservation Strategy 1980 formulated by the International Union for the Conservation of Nature (IUCN) and the Report of the World Commission on Environment and Development (WCED), *Our Common Future* 1987.

[44] See M Longo, 'Co-operative Federalism in Australia and the European Union: Cross-Pollinating the Green Ideal' (1997) 25 *F L Rev* 127 at 159-162.

[45] Id at 130-130, 145-149.

The IGAE recognised the federal truism that no single level of authority is able to properly deal with all the environmental issues in Australia, and provided a platform for the more specific national strategies[46] that flowed from the United Nations Conference on Environment and Development (UNCED) in June 1992. Traditional areas of competence for local government in Australia have included waste disposal, recycling, land and building development, community services and roads. However, there is good reason why local authorities should have a key role in environmental policy making and management generally. Local authorities 'provide information and ground-level experience on environmental issues'.[47] That is, environmental issues are transformed into environmental problems requiring practical solutions by local governments on a regular, if not daily, basis. Moreover, it is widely acknowledged that local governments, being community based, are better able to deal with competing interests since 'issues of development, conservation and adaptation cannot be isolated from the range of interests and people concerned'.[48] Thus local governments should, and often do, have significant input on those policy areas affecting cities and regions: planning, construction and preservation of the built environment; greenhouse strategies; waste minimisation and management; conservation of natural resources (including agriculture, fisheries, forest and water management); and management of the natural environment. There is a strong case for broad competence to be granted to local government authorities in Australia (together with access to financial resources commensurate with expanding responsibilities) to enable those authorities to adequately respond to the needs of the communities they serve.[49]

The absence of autonomous power in Australia's local governments is the basis for the oft-made claim that constitutional amendment is required to give recognition to local government as an equal actor in

[46] Eg: The National Strategy for Ecologically Sustainable Development, the National Greenhouse Response Strategy, the National Strategy for the Conservation of Australia's Biological Diversity and the National Strategy for Waste Minimisation and Recycling.

[47] Zito, note 23 above, at p 27.

[48] VA Brown, *Acting Locally – Meeting the Environmental Information Needs of Local Government* (Centre for Resource and Environmental Studies, Australian National University, 1992). http://www.environment.gov.au/library/pubs/local/loc_ch1.html

[49] The broad vision of local environmental competence has gained acceptance in the EU, as evidenced by the CoR's right to give its advisory opinion on all those policy areas that affect their constituents.

Australia's federal system. However, the Commonwealth's apparent lack of commitment to constitutional recognition of local government makes it difficult for local government to strengthen its role in Australia's federal system. Thus local government remains tied to State and Commonwealth political agendas.

Reform of Environment law in Australia

Consistent with the cooperative approach underpinning the IGAE, the Council of Australian Governments (COAG)[50] endorsed a Heads of Agreement on 7 November 1997, which sought to redefine Commonwealth/State roles and responsibilities for the environment. The Heads of Agreement was said by COAG to provide the following benefits:

- Commonwealth responsibilities and interests to be focused on matters which are of genuine national environmental significance;
- significant streamlining, greater transparency and certainty in relation to environmental assessment and approval processes;
- rationalisation of existing Commonwealth/State arrangements for the protection of places of heritage significance through the development of a cooperative national heritage places strategy;
- improved compliance by the Commonwealth and the States with State environment and planning legislation; and
- establishment of more effective and efficient delivery mechanisms and accountability regimes for national environmental programs of shared interest.[51]

The outcome of the COAG Review of Commonwealth/State Roles and Responsibilities for the Environment was agreement that the Commonwealth's role should be focused on matters of national environmental significance and that these matters should be the basis for the Commonwealth's environmental legislation. Accordingly the Commonwealth promised to withdraw its involvement in matters of only state or local significance. Notably, the focus on national environmental significance as the basis for Commonwealth legislation was already entrenched in the IGAE. Recently enacted Commonwealth legislation mandates Commonwealth involvement only on matters of national environmental significance, defined as:

[50] COAG comprises the Prime Minister, Premiers and Chief Ministers and the President of the Local Government Association.

[51] Communique Council of Australian Governments Meeting (Canberra, 7 November 1997)

- World Heritage properties;
- Ramsar wetlands of international importance;
- Nationally threatened species and ecological communities;
- Migratory species protected under international agreements;
- Nuclear actions, and
- Commonwealth marine environment.[52]

Whilst the attempt to clearly define matters of national environmental significance so as to clarify the circumstances under which the Commonwealth is to take responsibility for environmental impact assessment is welcome, these reforms nonetheless foreshadow diminished involvement in environmental protection by the Commonwealth. The Commonwealth *Environment Protection and Biodiversity Conservation Act* 1999 (EPBCA) is seen by the Australian Conservation movement and others as reducing the Commonwealth's commitment to many environmental issues.[53] According to Münchenberg:[54]

> [The] relatively safe, minimalist definition of national environmental significance [adopted by the Commonwealth] . . . leave[s] out matters which might be considered to be of national environmental significance, including environmental matters which traverse a number of states (for example, the environmental condition of the Murray-Darling Basin).

To this might be added climate change. Mould considered the proposed Act as restricting the role of the Commonwealth in environmental impact assessment, thus significantly impairing the Commonwealth's ability to pursue a strategy of ecologically sustainable development.[55] Certainly the Commonwealth's withdrawal from environmental issues that are not deemed of national significance

[52] *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) (EPBCA), Chapter 2, Part 3, Division 1.

[53] Horstman remarks that the list of 'matters of national significance' is very narrow. He states that: 'while the need to engage the states is a reality of the federal system, this should not compromise the ability of the national government to protect Australia's environment in the national interest. The federal government has the constitutional capacity to demonstrate strong environmental leadership, but this legislation would withhold its obligation to assess environmental impact in the case of important matters such as climate change and vegetation clearance': M Horstman 'New law fails the leadership test' (1998) 26(4) *Habitat* at 21.

[54] S Münchenberg, 'Commonwealth Environmental Legislation Review – a Small Revolution' (1998) 15 *EPLJ* 77 at 78.

[55] H Mould, 'The Proposed Environment Protection and Biodiversity Conservation Act – the Role of the Commonwealth in Environmental Impact Assessment' (1998) 15 *EPLJ* 275 at 286.

places greater responsibility for those matters on the States, which may be prone to making concessions to industry at the expense of the environment.[56] Moreover, a group of environmental law experts pointed out to the Minister for the Environment, leading up to and following the enactment of the Bill in June 1999, that the Act was flawed by the 'clear potential . . . for the Commonwealth to divest itself of jurisdiction over actions that involve matters of national environmental significance in favour of State regulatory processes by entering into bilateral agreements with each State'.[57] A Commonwealth promise of transparent legislative processes enabling greater Commonwealth accreditation of state environmental processes and,[58] in appropriate cases, state decisions would appear to give effect to 'subsidiarity' with all of its advantages. However, it is feared that '. . . the states will argue, publicly at least, that their current environmental processes satisfy the Commonwealth's requirements and that effectively the Commonwealth will have no further role to play where state laws apply'.[59] This, of course, would not be dissimilar to the consequence attending the definition of subsidiarity in the EU which favours national government responsibility over central responsibility, namely, a net reduction in EU environmental legislation (read reduced environmental protection).[60] Such an outcome is to be resisted. Despite last minute amendments to the Environment Protection and Biodiversity Conservation Bill requiring management plans to be produced and tabled in Parliament, the possibility of the Commonwealth divesting itself of jurisdiction on environmental issues remains, although the Senate has indicated that it will block any management plan or bilateral agreement having this effect.[61]

56 See Longo, note 44 above, at 155. See also P Christoff, 'Degreening Government in the Garden State: Environment Policy under the Kennett Government, 1992-1997' (1998) 15 *EPLJ* 10. Christoff asserts that 'state departments and agencies pursue policies and actions with known serious environmental impacts', citing the recent series of major transport infrastructural works such as the Eastern and Western Ring Roads and freeway construction including the South Eastern Arterial and City Link in support (at 31).

57 Letter to Senator Robert Hill dated June 1999 - http://www.acfonline.org.au/campaigns/cepbchill.htm

58 Consultation Paper *Reform of Commonwealth Environment Legislation* (AGPS, 1998) at p 12: 'The Commonwealth is committed to maximising its reliance on accredited State processes through the bilateral agreements mechanism'.

59 Münchenberg, note 54 above, at 81.

60 See note 27, above.

61 ACF Media Release, *Senate supports National approach to environmental issues* (14 October 1999).

Arguably, the proper decentralisation of central structures through delegation, accreditation,[62] power-sharing and cooperation increases efficiency. Such an outcome is conditional upon the Commonwealth maintaining responsibility and leadership for matters of national significance (suitably defined), as well as the appropriate assumption and exercise of responsibilities by the other levels of government. The federal structure, by definition, enjoys a measure of efficiency greater than alternative political systems. The tension between centralised power in policy areas demanding a national approach and decentralised power in those policy areas amenable to local control are the measure of both democracy and efficiency.[63] Such an analysis would place central and local government action at the core of federal decision-making, at the expense of the States. The Honourable Justice Michael Kirby has commented that:[64]

> There are some advocates of change who contend that a proper redeployment of power within Australia should be between the federal Parliament and government and local government, bypassing the States. If this seems too adventurous for a nation which has been described as 'constitutionally speaking, a frozen continent', the recognition and protection of the democratic character of local government could be an appropriate reform which would have many supporters.

Whilst it appears that decentralisation is occurring in Australia from the Commonwealth level to the State level, it is not without risk to the environment. The current debate is centred on the EPBCA and the Commonwealth's role in environmental protection. However, a broader debate encompassing the local dimension in environmental management is warranted, given that the objective of environmental protection cannot be attained without the adoption of law and policy at the micro level. The States, for various reasons, may not be willing and able to tackle environmental issues head on and any further decentralisation to the local level depends upon the will of the States. Moreover, the tendency to redistribute power to the State level will not necessarily encourage the sharing of responsibility with the local

62 'Whether accreditation is successful in terms of balancing an active Commonwealth role in environmental protection with an efficient system of shared responsibility, will depend on the will of the Commonwealth government to reach realistic agreements with the states which avoid unnecessary Commonwealth involvement while ensuring the standards of the Commonwealth process are met, both in form and substance': see Münchenberg, note 54 above, at 81.

63 See Kalbfleisch-Kottsieper, note 36 above.

64 The Honourable Justice M Kirby, 'The Australian Constitution – A Centenary Assessment' (1997) 23 *Mon L R* 229 at 236 (Footnote omitted).

level.[65] In the absence of constitutional legitimacy, local governments depend on the States for their decision-making capacity. Conditions favouring local participation in policy-making will vary from time to time, often reflecting a State's ideological perspective or sheer political expediency. Local government's roles and responsibilities may therefore be threatened, from time to time, or at least subjected to political scrutiny or pressure. Thus State legislation may be enacted to bring a local authority into line.

Diverse histories and uneven environmental policy developments across the different States and Territories of Australia preclude a uniformity of responses to the question of local government empowerment. However, all State governments have legislative authority over local government and thus, to varying degrees, exert control over the nature and degree of local participation in policy making. In Victoria, a Minister may recommend to the Governor in Council that all of the Councillors of a Council be suspended; the Governor in Council may by Order in Council suspend all of the Councillors and appoint an administrator to replace them, who then performs all the functions, powers and duties of the Council.[66] Additionally, local government may be dismissed by an Act of Parliament relating to the Council.[67] It is submitted that the right held by a State Government to dismiss duly elected Councils is inimical to the concepts of federalism and democracy. Such interference or control throws into question whether the advantages potentially enjoyed by three-tier federal systems are being fully exploited in the case of Australia.

Conclusions

The need for regional and sub-regional policy responses to a range of environmental issues is becoming increasingly apparent. There is being promoted, at present within Australia and the EU, a new focus of the micro-level as a means of responding more effectively to those environmental concerns that affect the cities and the regions, viz, most environmental issues. These issues demand the cooperation of local authorities and the communities that they serve, which so often have in their possession the information concerning regional localities necessary to enable effective policy development and implementation.

[65] This is equally true of the tendency to reserve power to the Member States of the EU, as has been observed: see note 23, above.

[66] See *Local Government Act* 1989 (Vic) s 219.

[67] See *Constitution Act* 1975 (Vic) s 74B(2).

Subsidiarity, devolution or shared responsibility, has gained a prominent role in Australian environmental policy as an organisational concept because this particular policy area requires a high degree of dependency and interaction among the various actors for its efficient formulation and discharge. Nevertheless, the dialogue on subsidiarity has failed to spark debate on constitutional reform to confirm local government's status in the Australian federation, despite recent opportunities to do so.[68] It may be argued that current attempts to redistribute powers from the Commonwealth to the States, in the name of shared responsibility, pose a threat both to local government and to the environment in the absence of constitutional reform and the proper allocation of competence to the local level. If local autonomy remains tenuous or unconfirmed, local competences are more susceptible to erosion. In a climate of diminished Commonwealth involvement in environmental protection and increased State involvement, it is important that local government's sovereignty be confirmed, lest the States be tempted to undermine local government's authority in this field.

Consideration of the outlook in the EU reveals similarities and differences with respect to the interpretation and application of subsidiarity. As in Australia, the preference for an interpretation of subsidiarity that reserves power to the States means that central authority over environmental issues is diminishing, potentially to the detriment of the environment. Subsidiarity in its broadest sense, focuses attention on local autonomy and in this sense has the potential to undermine state sovereignty (state sovereignty in the sense of say French and Victorian sovereignty, that is, constituents of a larger polity). Being multi-faceted and amenable to diverse interpretations, subsidiarity may on one level oversee the redistribution of power from the central authority to the States, and on another level erode state sovereignty in favour of local authority. Though logically coherent, since the principle of subsidiarity is founded on the premise that decisions should be taken as closely as possible to the citizen, the latter prospect could encounter resistance from the States. However, enhanced regional and local participation in EU decision-making through repre-

[68] The People's Convention held from 2 to 13 February 1998 failed to give proper consideration to the place of local government in the Constitution. The status of local government was to be considered at a second Convention to be held if the referendum on the republic had succeeded. See Australian Local Government Association (ALGA), *National Agenda for Australian Local Government 1999*. ALGA had been calling for a referendum on recognition of Local Government to be held no later than 2001.

sentation in the CoR should result in a greater ability on the part of sub-national actors to determine the course of developments in the EU.

In Australia, where local governments presently depend upon the States for power to act and thus wield no autonomous power, there is presently no expectation of the local level encroaching upon State powers. Notwithstanding, subsidiarity has the potential to reshape institutional structures and to engender tension between the different levels of federal or quasi-federal organisation, as the redistribution of power among the tiers of authority will often be contentious. This conclusion does not diminish the value of subsidiarity as an organising principle. It does, however, highlight the need to establish norms or guidelines for the application of subsidiarity and power-sharing, both in the EU and Australia.

More so than in Australia, the debate on subsidiarity seems to be giving the necessary impetus to the development of local autonomy in the EU, although it is still difficult to calculate the effectiveness of institutions and instruments which have come into being. The EU is in transition. The debate is forging the path to decentralised decision-making to varying degrees among the EU Member States. It remains to be seen whether this will result in a substantial devolution of power to the local level in all the Member States, overcoming the constitutional deficiencies of some of those Member States which weigh against the devolution of power to local actors. It also remains to be seen whether new norms will evolve to regulate the proper exercise of power between the supranational, national, regional and local levels of authority within a fully formed federal system. Conclusions are premature. It appears, however, that the EU is inching towards a federal parliamentary model featuring a bicameral legislature and confirming the EU as a democratic construct.[69] There is little doubt in the author's mind that when the evolution is complete, local authorities will figure highly. They remain at the core of discourse on the reform of the EU and its institutions, featuring prominently in EU promotional literature and educational programs aimed at increasing community understanding of the role of local and regional actors in the EU system.

[69] While the evolution toward this model is by no means complete, it was bolstered by the Treaty of Amsterdam, which extended the European Parliament's legislative powers. Legislative co-decision was simplified and extended to new policy areas including social policy, public health and the environment.

In short, sub-national actors in the EU have a degree of agenda-setting power. The communities they represent benefit most from this. Moreover, the EU is implementing change with imagination and courage. There are lessons here for Australia. Australians who are concerned about the issue of giving recognition to local government in the Australian Constitution were obliged to await the outcome of the referendum on a republic. If successful, the Commonwealth had promised a second People's Constitutional Convention where the local government issue was to be belatedly considered. Now that the referendum on the republic has been defeated, it is important that the issue not be shelved once again. The Australian Local Government Association has called for full recognition to be given in campaigns and educational programs to the role of local government leading up to the Centenary of Federation.[70] An informed public is the key to progress on this issue. There is an acknowledged need to review the role, functions and status of local government.[71] The review is long overdue. At issue is the very essence of modern democracy: the empowerment of local communities; and decision-making as close as possible to the citizen on matters of local concern, broadly defined.

[70] Australian Local Government Association, *National Agenda for Australian Local Government 1999*.

[71] Resolution of the Australian Constitutional Convention in Melbourne (March 1998).