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**The Honourable Justice Terry Sheahan
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Concepts of ethics and environment can be a little like the old adage about pornography – *“I can’t define it, but I know it when I see it”*.

The tension in the area under discussion is among the ethical, as in what **should** happen, the legal, what is **allowed to** happen, and the real or practical, what **actually** happens.

I was privileged to be a member of the government that introduced the ground-breaking, indeed revolutionary, 1979 package of planning and environmental legislation for this State, to later serve as the most directly relevant Minister in 1984, and to have now served almost 5 years as be a Judge on the specialised court that package established.

In that legislation *“the environment”* is defined (EPAA s 4(1)) to include:

“all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings”.

Every day, decision-makers involved in development decisions have to assess their *“environmental impact”*, or the *“environmental harm”*, real or potential, they may cause, across a wide range of human and corporate activity and interest.

Few of their considerations reduce to *“black and white”* absolutism, and subjective judgments are always necessary. Invariably, ethical considerations will come into play in such judgments.

Often, democratic processes – such as votes in councils, cabinets, party rooms, and multi-member court benches – complicate the decision-making.

Often, also, the judgment to be made is as to what is *“reasonable in all the circumstances of the case at hand”*, and will depend on the assessment of conflicting theories, evidence or opinions.

Adding an **ethical** dimension only increases the tensions, as any ethical position taken can be critically evaluated from vastly different perspectives.

When the President of the USA, in 1854, offered to buy *“Indian lands”*, Chief Seattle was puzzled at the concept that someone could offer to buy the land and the environment which had been the ancestral home of the Indians, and responded, in part:

“How can you buy or sell the sky, the warmth of the land? The idea is strange to us if we do not own the freshness of the air and the sparkle of the water how can you buy them. This we know. The earth does not belong to man. Man belongs to the earth”.

His comments surely had an ethical basis, resounding now with a relevance to this multicultural land of ours.

Aldo Leopold said in 1949 (*“A Sand Country Almanac”* p 230-6):

We can be ethical only in relation to something we can see, feel, understand, love or otherwise have faith in A land ethic, then, reflects the existence of an ecological conscience and this in turn reflects a conviction of individual responsibility for the health of the land. Health is the capacity of land for self-renewal. Conservation is our effort to understand and preserve this capacity”.

Even if nature is valuable only to the extent that it benefits humans, it needs to be conserved in order to protect and preserve human life. If society attributes to nature an inherent value of its own, there is even more reason to protect and preserve the environment.

This nation's 1992 strategy for “*ecologically sustainable development*”, or ESD as we call it, defined that term to mean “*development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends*”.

An earlier (1987) UN Commission spoke of “*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*”.

Some such ESD doctrine now underpins a lot of decision-making, locally, regionally, nationally, and internationally. As Justice Paul Stein noted in one of his many utterances on the subject (LEC Conference October 1999):

“The core principles of ESD have come into regular use by decision-makers at a federal, state and local government level. This is partly because of governmental policies and practices and in part because of statute law, the highest form of expression of government policy. The legislation of all nine governments in Australia contain numerous references to ESD and its core principles ...

There are more Acts which include ESD in New South Wales than anywhere else in Australia. Most important for our purposes are those now contained in the objects of the Environmental Planning and Assessment Act 1979 and the Protection of the Environment Administration Act 1991, as well as the new federal environmental legislation.”

Let me note at this point that the latter state and the then (1999) recent federal legislation were produced by non-Labor governments, more traditionally expected to act from a pro-business perspective.

One vehicle used to promote ESD is the “*Precautionary Principle*”, which dictates that, when faced with a lack of scientific certainty about irreversible environmental impacts or consequences, decision-makers should opt for the course which causes least environmental degradation.

Often the application of the Precautionary Principle results in a decision **not to proceed**, but usually it results in the mandating of measures which anticipate, prevent, and attack the causes of, environmental degradation.

Under the Principle, the proponent bears the burden of establishing that the proposal is environmentally benign.

The Principle has now found its way into a huge number of pieces of legislation at both State and Federal level. It also appears in many planning regulations and instruments but, in addition, judges have tended to apply it, and expect non-judicial decision-makers to do so, even if it is not mandated in the instrument most relevant to the subject matter before the court.

So it is emerging as somewhat of a **common law** doctrine, and may require, for example, polluters to bear the full cost of containment, avoidance or abatement, by, e.g., waste disposal measures.

The cost of cleaning up pollution is heavy, and increasing, but the public purse is now meeting less and less of it. Cleaner and less wasteful industrial processes save on pollution costs and can enhance profits.

Some may think that this is all a relatively recent offshoot of increasingly public environmental campaigning, such as the arrival of Green Parties in Legislatures, but it had its beginnings in the English-speaking world many years ago e.g. Canadian discharges of sulphur dioxide were the subject of dispute with the USA from 1927-1941.

Likewise, the Precautionary Principle itself isn't of very recent origin. As Stein J noted (op cit 1999), it first appeared in the mid 1960's,

“when environmental issues were becoming a major political theme in Germany. At around the same time the hypothesis of ‘implementation shortfalls’ emerged. The hypothesis identified that there existed a clear discrepancy between legal provisions and the goals of environmental policy, on the one hand, and its practical application on the other. The precautionary principle was originally used as a yardstick by which to judge political decisions. By the early 1970's the principle could be found in domestic West German legislation in respect of environmental policies aimed at combating the problems of global warming, acid rain and maritime pollution.

...

The earliest international agreement which explicitly refers to the precautionary principle is the Ministerial Declaration of the Second International Conference on the Protection of the North Sea, issued in London in November 1987. It was accepted that:

...in order to protect the North Sea from possibly damaging effects of the most dangerous substances, a precautionary approach is necessary which may require action to control inputs of such substances even before a causal link has been established by absolutely clear scientific evidence.

The precautionary principle has since been widely used in international environmental law and has been applied to areas such as climate change, waste and ozone layer depletion, biodiversity, fisheries management and general environmental management.

The 1992 UN Conference on Environment and Development in Rio de Janeiro made a comprehensive declaration of 27 principles, in which ESD and the Precautionary Principle feature, moving the environment/development dilemma to the centre of political and economic decision-making, internationally.

The Rio agenda was very broad in its scope.

The so-called “*Kyoto Protocol*” of 1997 had its genesis in the Rio discussions on climate change, and its subsequent history indicates how difficult it is to cement a lasting coalition, across **international** divisions, when some major players seek to opt out of, or avoid, what others see as major international imperatives.

Complex federal systems such as ours – and **none** is more complex or more difficult to change than ours – make even **national** consensus difficult to achieve, and “*lowest common denominator decision-making*” tends to be the norm.

The theory of federalism is that legislative and executive power is distributed to the level of government most knowledgeable and responsive to local conditions and expectations. So, Australia now has federal funding of state administered services in local areas, with complex funding formulas and consultative machinery to disperse the funds, and set the criteria.

However, Australia's national-state-local operation has suffered from the joint ravages of, on one hand, its Constitution enshrining practical state supremacy in those areas of power not specifically allocated to the nation, while, on the other hand, the High Court has ensured that most of the economic and financial or taxation powers have accrued to the national government, leaving only regressive taxes, associated with land, payroll and everyday transactions, at the disposal of the states, and the right to levy “*rates*” on the value of land, and charges for services, at the disposal of municipal governments.

This peculiarly Australian situation has resulted in enormously frustrating and continuous administrative negotiations between Commonwealth and state on a whole range of matters in regard to those “concurrent” areas of power. At the same time the local level of government has striven for a seat at all the tables, and has negotiated at both state and national levels for some defined share of the financial cake.

The average Australian citizen has only a basic understanding about which level of government is most relevantly involved with which public function or service - a simple pothole in the road outside his house is as complicated a political problem as he can ever have, and he simply cannot understand why it should be so. The local council will fix it if the state will approve the work and the federal government provides the funds.

The governments of NSW and Victoria have recently agreed to work towards having a single local government authority to look after the municipal type needs of the “twin” cities of Albury and Wodonga, which sit one on each bank of the Murray River, and both on the nation’s major highway and rail link. All observers see this as a sensible, if complicated, initiative, yet the Australian Constitution specifically forbids going the next logical step of including the two cities in the same federal electorate.

In May last year I had the honour of delivering the keynote address at a major judicial conference in Brazil, a US-style federation emerging from long-time military rule, where I dealt, at greater length than I can tonight, with these troubling constitutional anomalies and their implications for the environment/development dilemma.

I believe a major challenge for a free society in modern, environmentally enlightened, times is to harness, for the benefit of the whole community, the creative energy generated by the constant conflict between the separate arms, and separate layers, of its government system, and ethical considerations will play a big part in meeting the challenge.

Development decisions in this country are often of the constitutionally “concurrent” type, requiring a “tick” from national, state and local levels of government.

Each level is sensitive, in its own way, to political pressure and community activism:

- Objections find voice in stands taken by minor parties in Parliamentary Houses of Review.
- Protestors often have ready access to “spin doctors” and the media to press their points of view.
- Usually the range of issues on the table is wide and varied.
- Some proposals might attract a range of opposing points of view, resulting in conflict even among the opponents.
- Our litigious culture induces the urge to challenge in the courts, and that is a context where some of my experience and observations may be of interest to you.

Open standing in the 1979 NSW legislation has not, as some predicted, resulted in a flood of cases, but it has had a significant impact upon the quality of cases, because such cases usually provoke an analysis and testing of various provisions in the law, and usually result in valuable planning and environmental jurisprudence.

The “open standing” provisions refer to “any person” - there is no need for the applicant to establish a “relevant interest” of some particular sort in the subject matter. There is a distinction between taking advantage of the open standing provisions in appropriate cases to enforce a Statute, and/or to prevent or remedy a breach of it, and exercising “third party appeal” rights to seek administrative review of a decision on an application for “designated development”.

It is interesting to note that it is often resident action groups which take proceedings to remedy or restrain a breach. These days resident action groups are highly motivated, sophisticated, well-resourced and determined. They seem to have little trouble recruiting strong expert and advocacy assistance.

I should also like to note here too the fact that over the last 20 years, legal thought in Australia has moved concepts of legal justice and social justice closer together – a development for which the L&E court's "*open standing*" provisions, under many of the Acts which gave it jurisdiction, have prepared us well.

The spin doctor industry may not look at ethics in deciding how to advance their clients' position, and decision-makers have to sort out not only the relevant from the irrelevant information, but also the genuine from the false "*information*".

When the Land & Environment Court is vested, by a development appeal from a Council refusal, with the responsibility for determining a development application afresh on its merits, its **class 1** assessment process is adversarial – the traditional modus operandi of Australian courts - in contrast to the non adversarial process followed by the Council.

In a merit appeal, the court has by law the same functions and discretions as the council from whose decision the appeal is taken but the court often has more information before it, and more subjective views expressed to it, than the council did. Such additional information and views may be as much **for** the council's decision, as against it. The judge or commissioner reaches the decision on the basis of the evidence, and **only the evidence** - we cannot take into account what politicians, spin doctors or the media say about the project, but **objectors** to a proposal often give evidence, even if the proponent and council reach agreement on the project, and such evidence must be taken into the court's balance exercise.

The quality of the evidence and argument are paramount, and much of that depends on **experts**. To further improve the quality, and value to the court, of expert evidence, the court has recently promulgated a Practice Direction requiring experts to concentrate on assisting the court, rather than advocating their own client's cause. So ethics intrude, beneficially, again, in the development assessment process.

The Court Act (s 38(2)) provides that the court "*may inform itself on any matter in such manner as it thinks appropriate and as the proper consideration of the matters before the court permits*". The court also has the power to direct experts to confer; and it can obtain external assistance (Court Act s 38(3)).

In the end analysis, the quality of the evidence dictates the result. **If** the parties are well prepared, **if** the relevant instruments and policies are clear and unambiguous, **if** the expert and objector evidence is cogent and well presented, **if** the competing cases are well advocated, a "*better*" decision will flow, but those on the losing end of it will still often think it "*wrong*".

In determining the class 1 appeal, i.e. in giving "**proper consideration**" to the appeal, the judge or commissioner is **bound**, like the council, by s 79C(1) of the planning legislation, to:

"take into consideration such of the following matters as are of relevance to ... the development application:

(a) *the provisions of:*

*(i) any environmental planning instrument, **and***

*(ii) any draft environmental planning instrument that is or has been placed on public exhibition and ..., **and***

*(iii) any development control plan, **and***

(iv) the regulations ...

that apply to the land to which the development application relates,

(b) *the likely **impacts** of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,*

(c) *the suitability of the site for the development,*

- (d) *any submissions made in accordance with this Act or the regulations,*
- (e) *the public interest."*

The Edmund Rice initiative could spend years looking at the ethical breadth of the concept "*the public interest*" in this context, but those are our specific statutory instructions, and we cannot take into account any extraneous matters. Then, at the end of our considerations we are obliged to **publish** detailed reasons.

It is possible for two perfectly reasonable people to come to different conclusions on the same evidence. Corporate groups of humans, such as councils, have split opinions. Multi-member benches accommodate dissenting views. Judges and commissioners strive for consistency but may have differing emphases.

On the other hand, in **class 4** cases of **judicial review**, the task of the court, and its only task, is to review the decision of the council to determine if the council has, in reaching that decision, acted **in accordance with the law**. This distinction between the two classes of cases is little understood, and I see newspapers each day which criticise the court about a particular decision in the mistaken belief that the decision under challenge is the court's decision not the council's. The court's only involvement in judicial review is to review the decision solely to see whether or not it is legally valid. It does not, as in merit appeals, conduct an inquiry as to whether the decision is good or bad on the merits, and, in judicial review cases, the rules of evidence apply.

The usual basis for judicial review is that the council has failed to take into account a relevant factor, or it has taken into account an irrelevant factor, or its decision is "manifestly unreasonable", that is, it is a decision to which no council, acting reasonably, could reasonably have come. In such cases, the court is **not** permitted to substitute its preferred decision for that of the council; its only power is to declare whether the council's decision is valid or invalid.

After explaining a lot of these things to my Brazil audience last year I allowed myself some latitude in predicting some relevant aspects of Australia's future.

As I looked back over that crystal ball gazing, when preparing for tonight, I found that much of what I said had an ethical flavour, and that much of it was relevant to the question at hand tonight.

Let me quote a few of my predictions:

- I see the Australian public (and their mainstream political parties) becoming more knowledgeable and concerned about environmental questions and the protection of environmental values. Government intervention will become more non-partisan in political terms, but the pressure to maintain a high level of employment for our citizens will continue to grow and force environmental compromise in development decisions.
- Australians will probably continue to be suspicious of Australian politicians who seek to bring sensible change to our constitutional arrangements, and our over-governed system, and the state level of government will continue to be primarily responsible for environmental and developmental matters in Australia's three-level system.
- The Australian people will become more accepting of Australia being part of international efforts such as emerged from historic discussions in Rio and Kyoto.
- At the same time, they will be less critical of the nation's subscription to international covenants and treaties in matters of national significance where the Commonwealth does not have clear or exclusive constitutional powers. The High Court has cleared the way for this to be an effective way for the Commonwealth to move, including allowing the relevant decision-makers and the courts to deal with matters on the principles of ecologically sustainable development (ESD), including the precautionary principle.

· I see the exigencies of modern life forcing better co-operation and co-ordination among the three levels of government. Recent efforts in the biodiversity area, and others to secure a single "listing" system for heritage items, bode well for a more rational and more national effort in areas where the objectives are shared not only by those within the political processes, but also by the wider community.

· The traditional non-Aboriginal obsession with ownership and exclusive control over land will continue to dictate a lot of development activity, and exert influence over its environmental and planning assessment, but, as more land is held to have "native title", and more of the rest of the land is reserved for conservation purposes, the nature of our mining and agricultural economies will inevitably alter still further, with political and environmental consequences.

· I see an increasing focus not only on greenhouse issues, but also on the effective use of, and the quality of, Australia's very limited water.

Let me conclude.

The ESD principles which can be found now in so many Acts and Regulations are framed as objectives and give little guidance to decision-makers as to how to construe and apply them, or as to what weight to give them.

It will come down to the ethics and goodwill of those seeking to operate in the "*brave new corporate world*" of the "*triple bottom line*".

The community will be watching for the common good to outweigh the self interested pursuit of profit alone, and for the interests of the widening group of stakeholders to be preferred to the sole focus being on the financial interests of shareholders.

An increasingly enlightened and conscientious community will, like the student of pornography, **know it when it sees it.**