BOOK REVIEW

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D E Fisher, *Australian Environmental Law* (Lawbook Co, 2003) 464 pp

Professor Douglas Fisher is the doyen of academic commentators on Australian environmental law from a conceptual and analytical perspective. *Australian Environmental Law* is the latest in a distinguished line of similar works in the same area, and deserves the recognition given to its predecessors.

Australian Environmental Law is a remarkable intellectual exercise in synthesis, categorisation and commentary. The author has already established his reputation by applying similar techniques, for example in his *Environmental Law: Text and Materials* (Lawbook Co, 1993). The new book can be regarded as a companion to the earlier work. However, the absence of clogging material that interrupts analytical sequences allows the author to apply his systematic techniques on a higher plane. The analysis and conceptualisation is essentially jurisprudential, being reminiscent of legal positivism of the common law variety exemplified by Bentham, Austin and Hart. To this rigorous platform, Douglas Fisher adds the spice of commentary that nudges environmental law towards legislative outcomes that will make it more coherent and effective.

I WHAT THE BOOK IS NOT

This is not a book for a lawyer to take into court. Legislation predominates, and the table of statutes is fifty pages long. Referenced legislation is not limited to the eight Australian jurisdictions, but extends to the statutes of twelve other countries. Contained in the table is an international category of treaties and declarations encompassing 34 such documents.

Within this broad scope, local statutes become building blocks in a much larger exercise. There are, for example, no passages in the text dealing with the central definition of development in s 1.3.5 of the *Integrated Planning Act 1997* (Qld), nor any acknowledgment of the lengthy and crucially important Chapter 3 of that Act which creates the novel Integrated Development Assessment System ('IDAS').

By contrast, case law is comparatively scanty. The table of cases runs for four pages and contains a mere 114 judicial decisions. It is a catholic selection which goes beyond Australian decisions and is seeded with case law from the UK, USA, European Union and other foreign sources. With few notable exceptions, the decisions referenced in the

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table of cases are subordinated to footnotes in the main text. One of the exceptions is the *Palos Verdes Estate Pty Ltd v Carbon* ('*Palos Verdes*') decision from Western Australia.[1] *Palos Verdes* is analysed by Douglas Fisher to illustrate the point that there is a clear distinction between protection of the environment from degradation and control of pollution. This is a valuable conclusion for conceptual analysis. At a lower level of reaction, *Palos Verdes* may be thought to illustrate the environmental imperialism of legislators who attempt to criminalise conduct that can theoretically include treading on a blade of grass or picking a wild flower.

II WHAT THE BOOK IS

The author's preface illuminates the character of the enterprise. Douglas Fisher wishes to step back from the clutter of operational detail of environmental law in a multiplicity of jurisdictions in order to unmask common structural elements. The author's self-imposed task has the purpose of identifying the underlying doctrines, the functions, and the instruments by which the objectives are achieved. This is a formidable exercise, akin to the work in a different discipline of medieval schoolmen. The book is not dry, despite its high ambition of conceptualisation and necessary abstraction from the Tennysonian wilderness of single instances. As Justice Murray Wilcox accurately says in his foreword, the 'result is a treasure trove of reference material and a stimulating analysis of key concepts'. Not the least of the treasure trove are select bibliographies of environmental texts and periodical literature. The latter is especially valuable, and extends alphabetically across 22 pages. Academics and doctoral students will have good reason to thank Douglas Fisher for this splendid groundwork.

To an extent the adjective 'Australian' in the title is misleading, because Douglas Fisher is concerned to contextualise our national environmental legislation. However, our hard pressed parliamentary draftsmen and legislators could profitably reflect on Douglas Fisher's analysis and conclusions before imposing the latest reactive and factitious environmental amendment upon the public. Such effect may perhaps be collateral to the essence of the exercise embodied in *Australian Environmental Law*, but would undoubtedly be a beneficial consequence.

The book is systematically organised into twelve chapters. These start with the nature of environmental law and ethical dilemmas, passing through the international framework and constitutional foundations to link with two important chapters which treat with higher order concepts of environmental law. These deal with fundamental directions and environmental instruments. Subsequent focus is on middle order concepts, including three chapters that differentiate analyses of the separate objectives of resource development, environmental protection, and environmental conservation. Chapter 10 is a clinical analysis of the otherwise fuzzy idea of ecologically sustainable development. The final two chapters encompass environmental planning, and enforcement generally in the environmental sphere.

It is important to engage with this book in terms of the author's purpose in writing it. It is, for example, irrelevant to that purpose that the Planning and Environment Court in Queensland has recently cavilled at the imposition of certain environmental conditions relating to environmentally relevant activities ('ERAs') following the roll-in to IDAS.

[1] (1991) 72 LGRA 414.

The reference to conditions in s 585 of the *Environmental Protection Act 1994* (Qld) and elsewhere in that statute involves the use of a word that is different from its dictionary meaning, namely something demanded or required as a prerequisite to the granting or performance of something else. Instead, environmental conditions are used in the sense of a goal or aspiration.[2] Further, there is a tendency to state conditions too broadly so that they are draconian in their content and potential effect.[3] These problems are not mentioned in *Australian Environmental Law*, nor are they relevant to its purpose.

The book is not deliberately designed to give practical advice to the private sector, although it has structural utility for those in charge of public policy and the consequent conversion of policy to legislative form. However, *Australian Environmental Law* is a gold mine of analysis and commentary on statutory objects. At one level, statutory objects are merely the modern version of a long title or preamble. Douglas Fisher's careful distinctions make it clear that modern statutory objects are not necessarily merely the icing on the cake of detailed provisions. He distinguishes between different types of statutory objects. Between, for example, the obligation to consider and the necessary pursuit of generalised statutory purposes. In particular, legislation may impose a duty to achieve an identified outcome. Depending on the specificity of legislative language, a justiciable issue may arise.

Case law is deftly used to justify conclusions, for example the (*Bridgetown*, *Tuna Boat* and *Lizard Island*) decisions found at pp 182-5. The analysis casts considerable derivative light upon the objective of the *Integrated Planning Act 1997* (Qld), and explains why the purpose in s 1.2.1 of seeking to achieve ecological sustainability has only been seriously relevant in one judicial decision in the five years since the *Integrated Planning Act 1997* (Qld) came into effect. Section 1.2.1 does not represent unvarnished environmentalism, but consists of three elements: coordination and management of planning, management of the development process, and management of the effects of development on the environment. Moreover, the definition of ecological sustainability in s 1.3.3 comprises an integrated balance of three elements of protection of ecological processes, economic development, and the maintenance of the wellbeing of people and communities described by multiple adjectives.

It is not surprising that this medley of potentially conflicting elements and purposes has only received the serious attention of the Planning and Environment Court in *Sol Theo v Caboolture Shire Council*,[4] where the question of balance was crucial. A proposed industrial plant was subjected to a material change of use for sterilisation and decontamination of packaged products by radiation. The court found that the proposal took into account local, regional and State interests in a balanced way. It was not reasonable to require that packaged products for irradiation by gamma rays be exported to New South Wales and Victoria, and subsequently transferred back to Queensland. This would incur unnecessary cost and use of infrastructure in the States involved.

Of greater practical importance than the uneasy amalgam within the statutory purpose of the *Integrated Planning Act 1997* (Qld) are the nine ways of advancing the Act's purpose found in s 1.2.3. These are a melange of environmental principles and

2 *Monier PGH Holdings Ltd v Pine Rivers Shire Council* [2002] QPELR 515, [28].
3 *Sansom v Beaudesert Shire Council* [2002] QPEC 076, [32]-[35].
4 [2001] QPELR 101.

utilitarian propositions, including efficiency of decisional processes and cost effective provision of infrastructure as well as the precautionary principle. A miscellaneous list of this kind can be invaluable for an appeal court where the preferred interpretation of a particular statutory provision can be assisted by reliance on one or more of the nine elements. However, the nine categories are not in themselves a statutory purpose but instrumental methods of achieving that purpose. All this is a long way from the obligation to achieve an outcome, which Douglas Fisher identifies (p 185) as linked to a doctrine of legal responsibility that is slowly emerging from a complicated set of judicial analyses.

One of the most valuable chapters is Chapter 10 on ecologically sustainable development ('ESD'). As Douglas Fisher rightly says (p 349), ESD is essentially a simple idea that bristles with perceived difficulties. Chapter 10 is the most illuminating dissection in current Australian literature of what is generally thought of as a blurred and soggy proposition. Detractors sometimes treat ESD as a dangerous political vehicle for the aggrandisement of green interests. If both sides of the debate thoroughly familiarise themselves with Chapter 10, arguments will be conducted on an informed basis.

The Fisher analysis backgrounds ESD through identification of three related concepts within the idea, followed by international initiatives that have propelled Australian legislative incorporation of ESD. An account of its general function in this country gives a platform for detailed analysis of discrete statutory interventions. These comprise physical planning, access to natural resources and environmental protection. The precautionary principle attracts separate treatment (pp 363-369). The important point is made (p 365) that the principle is more than a guide, and additionally provides a methodology of determination.

A minor cavil may be made to the author's statement (p 366) that Australian courts have not yet had an opportunity to interpret and apply the way in which the precautionary principle has been incorporated in legislation. *Histpark Pty Ltd v Maroochy Shire Council* ('*Histpark*')[5] is a decision of the Queensland Planning and Environment Court which relies exclusively on a statutory precautionary principle. The court was not satisfied that a proposed detention basin would achieve water quality levels that would avoid serious or irreversible environmental harm to sea grass beds in a declared fish habitat area, and dismissed the developer's appeal. Admittedly *Histpark* was decided on the original customised precautionary principle in the *Integrated Planning Act 1997* (Qld), but it is a vivid if solitary example.

The analysis and approach in Chapter 10 is nonetheless masterly. Perhaps what the author describes as perceived problems can also be real difficulties, but the necessary typology for informed debate is carefully supplied.

III CONCLUSION

This book has an obvious destination. It can be highly recommended as a central text for appropriate student units in environmental law, whether at undergraduate or postgraduate levels. There is no modern Australian competitor. It is the ideal

[5] [2002] QPELR 134.

complement for cases and materials texts that are rapidly made outdated by the relentless march of legislation and judicial decisions.

It is the first coherent and focussed modern book which deals comprehensively with Australian environmental law on a national basis. Its categories are sharply delineated and wholly persuasive, while the writing style is clear and straightforward. For the student market it is excellent, and reasonably priced in contemporary terms at a softcover cost of fractionally over $89. It is also a distinguished contribution to legal scholarship.