ENVIRONMENTAL LAWS AND THE EVOLUTION OF THE IMPLEMENTATION OF ENVIRONMENTAL POLICY

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Introduction

In this article I wish to explore how the acceptance of environmental policy goals that incorporate values which conflict with widely held existing values require particular types of environmental laws to implement them.

It is interesting that environmental lawyers have generally adopted a restricted approach to defining their ideal environmental laws. One of the more notable efforts in this regard is Preston's postulated elements of effective environmental laws. They are (in summary) (1) An ecological view of the environment, (2) Facilitating citizen participation in different stages of development, (3) Encouraging public education about the environment, (4) Integration of traditional and modern approaches to environmental protection (see Preston, B.J. (1987) "Some elements of effective environmental laws," 4 EPLJ 280). While these points are clearly some of the elements of such laws, their procedural bias is clear. They should be preceded by elements such as the following (1) The purpose of the law is ecological sustainability, (2) Clear and specific policy objectives in which the priorities between potentially conflicting objectives are clear, (3) Non-discretionary duties for environmental protection where full compliance is uncertain, (4) Objective and justiciable standards for compliance.

My underlying thesis is that what I refer to as procedural environmental laws are limited means for implementing environmental policy and that if environmentalists and lawyers restrict themselves to such laws they are unnecessarily accepting that legislative change cannot actively transform values and alter patterns of power. However lawyers often get caught up in the fascination of law and overlook the policy goals which they they are, in theory at least, trying to achieve.

Mechanisms for Implementing Environmental Policy

Let us first consider the advantages and disadvantages of different mechanisms of policy implementation. These methods are, of course, not restricted to action in the environmental field, but are applicable to all forms of policy implementation[2].

Government policy may be implemented through executive action. In the area of the environment, this has been a particularly attractive option where governments lack power to legislate[3], are operating under broad

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1 **The views expressed by the author in this article are not necessarily those of E-LAW.**

2 See generally Mazmanian, D.A. & Sabatier, P.a. (eds) (1981) *Effective Policy Implementation, D.C. Heath & Co, Lexington.*

3 This has, in a general sense, been the situation with the Commonwealth government - but see Crawford (1991) "The Constitution and the Environment," 13 *Syd. L. Rev.* 11; Fowler, R.J. (1991) *Proposal for a Federal*

statutory powers[4] or where they seek maximum rhetorical value with minimum enforceable obligations[5]. The obvious difficulty with such action is that it lacks any power beyond the power of its supporters within the government. It cannot be enforced and, unless provided with a legislative basis, it is liable to be altered as political fortunes change[6]. Action not based in legislation is better characterised as a part of the policy development process rather than a means of policy implementation.

The two forms of law for policy implementation that I wish to compare are (a) procedural laws and (b) substantive laws. These terms deserve some explanation.

What I refer to as procedural laws are laws that describe a procedure to be followed in performing a statutory duty. A characteristic form of such laws are those that require consideration of certain factors before a decision can be made. As a policy implementation measure it is often assumed that the procedural requirements will result in the fulfilment of substantive policy goals.

Substantive laws, on the other hand, are laws which go beyond the mere procedures to be followed when performing a duty. They can be distinguished from procedural laws because they contain (1) explicit assertions of their desired policy outcomes and (2) a mechanism that provides a causal connection between the law and those outcomes. Examples of the mechanisms adopted in substantive laws are:

(a) commands such as those preventing an activity or mandating action[7];

(b) presumptions against certain types of activities that must be displaced before the activity can be allowed[8];

(c) nomination of particular standards to be reached by an activity[9];

(d) provision of incentives for particular types of activities[10].

This list is illustrative rather than exclusive and these categorisations are merely points on a spectrum[11]. The important feature is that the laws go beyond mere consideration of factors affecting the action to the substance of the outcome of the action.

Similarly, the categories of procedural and substantive laws are not set in stone and the characterisation of a law as one or the other is very much a matter of degree. Statutes will often contain elements of both procedural and substantive laws and the more specific the examination, the more accurate the characterisation of a law as one or the other will be.

Environmental Protection Agency - a report prepared for the Australian Conservation Foundation and Greenpeace Australia Ltd, Australian Conservation Foundation, Melbourne pp. 16-28.

4 See, for example *Fisheries and Oyster Farms Act* 1935 (NSW) s.5 and Pollard, D.A., Middleton, M.J., Williams, R.J. (eds) (1991) *Estuarine Habitat Management Guidelines*, NSW Agriculture and Fisheries, Sydney.

5 See, for example, R.J.L. Hawke (1989) *Our Country Our Future: statement on the environment*, AGPS, Canberra.

6 An example in the Australian context is the National Conservation Strategy (see Commonwealth of Australia (1984) *A National Conservation Strategy for Australia*, AGPS, Canberra).

7 These include laws such as endangered species protection legislation that impose criminal penalties (*Endangered Species Act* (US) 16 USCA §1538, *National Parks and Wildlife Act* 1974 (NSW) s.99), and most pollution laws (for example *Environmental Offences and Penalties* Act 1989 (NSW) ss. 5-10)

8 Such as the presumption against non-water dependent development on certain wetland sites under s.404 of the *Clean Water* Act (40 CFR §230.10(3) made under 33 USCA §1344).

9 Standard setting is not an easy process. It is most effective when there is a clear environmental standard that needs to be met, such as the survival of species (see *Flora and Fauna Guarantee* Act 1988 (Vic) s.4(1)(a)). Non-empirical standards incorporate notions such as practicality, practicability, best available technology economically achievable, the absence of a prodent and feasible alternative. Because of the uncertainty surrounding the content of such concepts they can very easily lose their substance by becoming discretionary and in effect non-justiciable.

10 This includes measures that use market mechanisms to achieve their policy goals as well as environmentally targeted taxation measures.

11 Albeit, perhaps, a multidimensional spectrum.

Procedural Laws

Procedural laws in the environmental field usually relate to the process by which decisions may be made. The most prominent form of procedural law are those statutes that provide for environmental impact assessment[12]. Such laws require that the environmental impacts of certain proposed actions be formally assessed. As well as the requirements for consideration of particular matters in an environmental impact statement, the ultimate decision maker may also be required to take particular matters into consideration[13].

The reason for the procedural requirements is the hope that the adherence to a procedure of consideration of environmental impacts will result in certain desirable substantive outcomes in the final decision. In environmental legislation the presumption is that consideration will result in less environmentally damaging activities.

It is generally assumed that a better decision will result from a more informed decision maker. The role of the environmental impact assessment procedure is to alert decision makers to those impacts[14]. Public notice allows other interest groups to present further information for the decision maker's consideration. Other procedural requirements[15] are generally aimed at putting a wider range of information before the decision maker.

If such a process is to change the behaviour of decision makers then there must be a valued causal theory by which the legislation brings about change[16]. The causal link that is supposed in procedural laws is that rational decision makers, taking all the information into account in making the decision, will be swayed by the evidence before them and will act in a manner that reduces the environmental impact of their decision.

This, of course, founders on two points.

(a) Failure of the "force of fact" theory

The first is that the placement of more information before a rational decision maker has no necessary link to the final decision that is made. The "force of fact" theory suggests that if environmental information is placed along side other information relevant to a decision then a decision maker will tend to prefer less environmentally harmful activities[17]. However even with this extra information, rationality does not indicate how various elements of the information are to be weighed against others. "The environmental norm is neither decisive nor paramount"[18] and rational decision makers will still have a wide range of options open to them that depend upon the values that they place on the information before them[19].

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12 *Environment Protection (Impact of Proposals)* Act 1974 (Cth), *Environmental Planning and Assessment* Act 1979 (NSW), *Planning and Environment Act* 1987 (Vic), *Environmental Protection Act* 1986 9WA), *Environmental Assessment Act* 1982 (NT), *Planning Act* 1982 (SA), *Local Government (Planning and Environment)* Act 1990 (Qld).

13 For example, *Environmental Planning and Assessment* Act 1979 (NSW) s.90, *Planning and Environment* Act 1987 (Vic) s.60, *Local Government (Planning and Environment)* Act 1990 (Qld) s.4.4.

14 *Calvert Cliffs Coordinating Committee Inc v United States Atomic Energy Commission* (1971) 449 F.2d 1109, 1114; *Prineas v Forestry Commission* (1983) 49 LGRA 402, 417; Johnson, J. (1991) "Environmental impact assessment and community perceptions," 24 *Impact* 1, 3.

15 Such as consultation with other ministers or notification of relevant statutory authorities, for example ss 113, 115 *Mining Act* 1973 (NSW).

16 Sabatier, P.A. & Mazmanian, D.A. (1981) "The implementation of public policy: a framework of analysis," in Mazmanian, D.A. & Sabatier, P.A. (eds) *Effective Policy Implementation,* D.C. Heath & Co, Lexington, 11.

17 Andrews, R.N.L. (1976) *Environmental Policy and Administrative Change,* D.C. Heath & Co, Lexington, 153; Sax, J. (1973) "The (unhappy) truth about NEPA," 26 *Oklahoma L. Rev.* 239, 240.

18 Fisher, D.E. (1980) *Environmental Law in Australia: an introduction,* University of Queensland Press, St Lucia, p.90.

19 Fairfax, S.K. (1978) "A disaster in the environmental movement," 199 *Science* 743, 745.

(b) Failure to account for organisational behaviour

The second and related point is that law is simply one of the forces "that drive institutional beasts hither and thither"[20] and the actions of institutions will depend upon the relationship between the law and these other factors. While psychological and organisational factors may be legally irrelevant to a decision, in reality such factors will play an important role in determining what the decision is[21]. These behavioural factors are at least as important to the effectiveness of laws as the statements of policy within them[22].

There are many factors that influence how decision makers respond to procedural laws and hence how effective those laws are in producing substantive changes.

The organisation in which a decision is made is not simply an empty vessel into which information required by a decision making process flows. It will have its own goals and will have its incentives and rewards aligned to fulfil those goals. In a government department, recognition, success and promotion will be related to fulfilment of the mission of that department. In corporations with correctly aligned incentives, managers will achieve success by maximising the profits of the company. In democratic institutions elected representatives will achieve success if they ensure that they retain their positions of power[23].

Because of these organisation goals, actors within an organisation will only respond fully to procedural requirements if those requirements are in line with the goals of the organisation. If the substantive goals of the procedural laws are not in line with the substantive goals of the organisation then it is the organisational goals that will prevail. This is because it is to these goals that the incentives and rewards within the organisation are aimed[24]. Similarly, if there is a choice between an action that is certain to achieve the organisational mission and one that is less certain then actors will favour the more over the less certain[25].

How Procedural Laws Work

If there is, at best, only a weak causal link between procedural laws and the implementation of the environment policy behind them how do they work? Their value lies not so much in that they produce substantively better decisions but instead that they allow decisions to be resolved politically through the process of public controversy[26]. The more controversial a decision is, the more strictly the procedural rules will be applied to the decision. The legal result of a successful challenge to a decision is not that the substantive decision is changed but that the decision is invalidated and must be made again. However, when the decision is a matter of public controversy the political result of litigation is often that the decision is not made again because, at a political level, the battle is lost[27]. Consequently it is the political victory rather than the legal one that will make any impact on the substance of organisational action[28].

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20 Sax (1973), *supra*, note 17 at 239.

21 This is really just another way of saying that institutional factors will determine what weight will be given to the legally relevant considerations by the decision makers.

22 See Jenkins, I., (1980) *Social Order and the Limits of Law*, Princeton U. P., Princeton, 118-119, 153.

23 Although this may seem a relatively pessimistic assessment of the democratic process, this is the ultimate source of rewards whether they come through fulfilling the electoral mandate, through wise management of the affairs of the institution or by other means.

24 Wichelman, A.F. (1976) "Administrative agency implementation of the National Environmental Policy Act of 1969: A conceptual framework for explaining differential response," 16 *Natural Resources Journal* 263, 268-273.

25 Sax (1973) *supra* note 17 at 245-246.

26 Andrews (1976) *supra* note 17, 158-160.

27 It is in this context that the push towards mediation to resolve controversial environmental issues should be viewed. In the context of largely procedural environmental laws one of the principal reasons that it has been viewed with scepticism by environmentalists is that it denies conflicts and removes deep value conflicts to a forum where it is less politically damaging to those who are in positions of power - see Brown, A.J. (1991) "Zen and the art of tactful bulldozing: the limits of alternative dispute resolution in the public interest context." (unpublished manuscript).

28 Andrews, R.N.L. (1976) "Agency responses to NEPA: a comparison and implications," 16 *Natural Resources Journal* 301, 319-320.

The reliance of procedural laws on public controversy and political processes as a mechanism for changing behaviour militates against their being effective in achieving long term change. This is because political controversy is a case by case process. It does little to alter the programmes of an organisation, its long term goals or the power balance between the parties to a conflict. The balance of power may change over time but it is this power rather than legislative policy that guides decisions.

The potential for the balance of power to be shifted in the long term is important. Procedural and information gathering requirements may require the introduction of "change agents" into bureaucracies[29]. These are people who are sympathetic to the substantive aims of the procedural laws or who have particular skills relating to the substantive issues in question. Their introduction into the decision making organisation influences the substantive decisions that result. Over time, the introduction of these people will change the overall outlook of the organisation as they may rise to positions of power within the organisation where they might readily influence major aspects of policy. As a result, although the procedural laws may not have directly changed substantive outcomes of particular decisions, in the long term they do influence organisational behaviour.

This hypothesis is undeniably true to some extent. It is undeniable that individuals do have some influence within organisations. However the effectiveness of such long term agents of change is reduced by the same forces that make procedural laws ineffective on a case by case basis. First, the system of goals and rewards within an organisation is aligned to fulfilling its primary objectives Where there are conflicts between those implementing primary objectives and those acting as change agents, those advancing the primary objectives will usually prevail. Moreover it is unlikely that the same rewards will flow to those who conflict with the primary objectives of the organisation even if they are successful in fulfilling their responsibilities. This is because their status within the organisation is likened to the status of the objects that they pursue. So long as there is no change in the overall distribution of power and priorities within the organisation the impact of the change agents will be restricted.

Just as there is resistance to internal change agents, so too with external change agents. The enforcement of procedural laws is by courts. Adverse decisions by courts may prevent an organisation pursuing or allowing a particular activity. However, because the primary objectives of the organisation are unaffected, the organisational response remains to minimise the impact of the imposition of conflicting secondary objectives. Thus compliance is oriented toward making the compliance process "court proof" rather than examining the substance of the decision. It is often the case that the internal change agents are occupied in ensuring compliance is achieved in a manner designed to exclude judicial review[30].

Despite all this criticism, the introduction of procedural requirements is a great improvement on having no legal requirements at all. Changes do result from procedure albeit change largely within the scope of existing value and power structures. Furthermore, the requirement to disclose information is an important prerequisite to more substantive change[31]. As an evolutionary step in policy implementation its value should not be underestimated. However, although as a relative advance it is important, in an absolute sense it remains a relatively blunt instrument by which to implement environmental policy.

Substantive Laws

Environmental policy is central to environmental law because without "any relevant indication of policy ... there is no substantive restraint on the exercise of statutory powers."[32] In contrast to procedural laws, substantive laws, to a greater or lesser degree, mandate the policy outcomes which must result from the performance of a statutory duty. While this may be achieved in a wide variety of ways, the result is that parliament alters the structure of the power of the decision makers by requiring them to conform with particular standards.

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29 Liroff (1980) "NEPA- Where have we been and where are we going?" 46 J. *American Planning Association* 154, 156-7.

30 This in turn reduces the value of the statements as instruments to inform decision makers - Pollack, S. (1985) "Reimagining NEPA - choices for environmentalists," 9 *Har. Env. L. Rev.* 359, 379.

31 Andrews (1976) *supra* note 17, 154, 157.

32 Fisher (1980) *supra* note 18, p.84.

This is an important shift in power to the legislature. Procedural laws delegate power to a process - the substantive policy that results is a product of that process. In making substantive laws, the legislature lays down the policy and may delegate implementation and enforcement of that policy to a process.

To do this legislatures have to be able to decide substantive policy questions within legislation rather than merely delegating the questions. A close relationship between the legislature and the executive militates against such an approach. However unless parliaments are willing to do this then there is little hope that their desired policy outcomes will result.

Not unreasonably, those with power in a procedural system will not be receptive to change that diminishes or substantially alters that power. Without very clear instructions from legislatures they will not be forced to change. Similarly, courts that operate within a system of values built around existing power structures minimise the deviation of the laws from those values if this option is available. Even if courts were not a product of such a system of values, the legislative intention would need to be unambiguous to achieve a consistent implementation of the values that it sets forth.

The practical implication of this is that there must be a clearer understanding and articulation of policy goals within legislation. To change the behaviour of existing institutions three elements must be present to make substantive laws effective (a) specificity, (b) justiciability and (c) enforcability.

(a) Specificity

Statutory specificity makes clear the legislative intention and the policy outcomes that are required rather than hiding a public duty behind a vaguely worded grant of power. Such specificity is uncommon because of the "chronic disinclination of legislatures to confront the hard political decisions that underlie legislative precision."[33] The lengths to which it is necessary to go depends upon the extent of behavioural change required. The more extensive the change the greater detail the requirements of the law must be spelled out.

(b) Justiciability

To ensure that the law is enforceable there must be both clear, justiciable standards and agencies to enforce the law. Not only must laws be specific but it must be clear that the laws are justiciable. There is no point in laying down specific standards if the courts consider them to be little more than guides for action[34]. Similarly, discretions in legislation will turn substantive laws into essentially procedural ones by allowing the person to whom the legislation is directed to determine the standards with which he or she has to comply.

Whilst the general law regulates standards of inter-human behaviour, environmental law does not deal exclusively with human-human interactions. Because environmental law deals also with human-environment interactions there is potential to link legislative standards to particular environmental indices that may be objectively measured. Compliance with such standards could then be one of scientific assessment rather than value determination. Such an approach is particularly suited to areas where there are relatively few different types of human-environment interaction and the impacts are evident on relatively restricted areal

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33 Rosenbaum, N. (1980) "Statutory structure and policy implementation: the case of wetlands regulation," in Mazmanian and Sabatier (1980) *supra* note 2 at 64; one need only look at the objectives of the *Environment Protection (Impact of Proposals)* Act 1974 (Cth), the *Environmental Planning and Assessment Act* 1979 (NSW) and the *Forestry* Act 1916 (NSW) to see, to varying degrees, how vague, contradictory and confused even the objects of legislation can be - see discussion in Fisher (1980) *supra* note 18 at 79-81.

34 When confronted with environmental laws that allow a choice between interpreting statutory provisions as either objective justiciable standards or as discretionary non-justiciable exhortations of policy courts will often (and, arguably, quite rightly) favour the interpretation that presumes least desire on the part of the legislature to change existing power structures and values. See, for example, *Yates Security Services v Keating & Ors* (1990) 98 ALR 68 per Pincus J in relation to section 30 of the *Australian Heritage Commission* Act 1975 (Cth).

and temporal scales[35]. However such standards can nevertheless be applied to more complex and long term interactions[36].

(c) Enforceability

In terms of policy implementation much the same requirements for enforcement apply to substantive as procedural laws. There is no magic to substantive laws that makes them self enforcing. Indeed, the acute conflicts that arise make enforcement even less politically attractive than for procedural environmental laws.

A key requirement if the laws are to be enforced is that there should not be unreasonable restrictions on who can do it[37]. Of course, the primary responsibility should lie with a government agency, preferably one that is committed to the implementation of the policy goals contained in the law. However, whether or not the agency is independent of government or committed to the policy goals of the legislation there will always be situations in which the enforcement process fails. It is in these situations that open standing is important in allowing other people or organisations to enforce the law. Without open standing the executive is able to frustrate the intention of the legislature by not adequately enforcing its legislation.

In contrast to procedural laws, substantive laws make explicit the values that are required by mandating particular policy outcomes. In this manner the organisational and behavioural difficulties that are present with procedural laws can be avoided. Instead, when the policy is explicit and that policy is enforced, substantive laws are a source of conflict. This is to be expected since in any arbitration between values, whether by a court or by a legislature, one set of values must be given priority over another[38]. When this is done it is unlikely that the party to whom the arbitration was adverse will accept the decision easily[39].

The Evolution of Environmental Laws

The choice of mechanisms for policy implementation does not exist in an historical vacuum. Instead, it is possible to characterise procedural and substantive laws as being part of an evolution of laws. The growth of environmental law has been the result of an increasing awareness of environmental problems and an objective increase in the magnitude of those problems. Although common law provided some restriction on human activities, these restrictions were based in the rights of other humans rather than a general notion of environmental protection. The first legislative responses to environmental problems have been to establish institutions to regulate certain activities and procedures to be followed in making a range of environmental decisions[40]. This might be characterised as an initial response which is the result of a recognition of environmental problems. These procedural laws provide, to varying degrees, a means of ensuring consideration of environmental issues rather than dictating either the type or degree of response to those issues.

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35 This encompasses laws relating to modification of what is largely natural environment such as forestry, wilderness protection and even agriculture. In these situations the human-environment interactions are of few different types and the impacts are usually readily identifiable.

36 Interactions such as those occurring in the urban environment are considerably more complex. Not only are there many different types of human-environment interaction but also human-human interactions which are also relevant. Despite this, so long as the overall environmental objective is clear it is possible to accommodate these different interactions into a justiciable environmental standard. This may be done by, for example, stating a general standard in the statute and providing that regulations be made, consistent with the standard, specifying the details of compliance.

37 Boer, B. (1984) "Social Ecology and environmental law," 1 EPLJ 233, 251-252; Toohey, J. & D'Arcy, A. (1989) "Environmental law: its place in the system," Paper delivered at Lawasia/NELA International Conference on Environmental Law, 16 June 1989, p. 20; Buckley, R. (1991) "Environmental planning legislation: court backup better than ministerial discretion" 8 EPLJ 250, 250.

38 Haywood, J.A. (1988) "Non-judicial determination of environmental issues", Paper presented at the International Bar Association Conference (Committee F Environmental Law), 17 October 1988, Auckland, NZ. The processes established by laws do not resolve value conflicts, they merely provide a forum for the implementation of one set of values over the other; see also Boer, B. (1984) *supra* note 37 at 235.

39 A good example of this is the conflict that has arisen over the protection of endangered species in Chaelundi State Forest in northern New South Wales - see *Corkill v Forestry Commission* (1991) 73 LGRA 126; *Forestry Commission v Corkill* (1991) 73 LGRA 247.

40 See, for example, *supra* note 12.

The results of this first type of environmental law are to (a) ensure that organisations make some consideration of environmental issues and (b) provide a focus for the political resolution of more controversial disputes[41]. The laws themselves are educative tools rather than standing alone as instruments of policy.

The limits on these laws exist because they are purely procedural and hence their ability to change the values of decision makers is limited. There is no challenge to existing values because no substantive values are built into the laws[42]. Yet in the evolution of environmental law they are important because it is only once the first step - the recognition of environmental questions requiring a legal response - has been taken that the second step of meaningfully addressing those problems can occur[43].

If values are to change, particularly if an environmental ethic is to be encouraged, more than mere procedure is required[44]. It is as a mechanism for changing values that substantive laws are most important[45]. This is because not only do they represent a clearer statement of legislative intent than procedural laws but they actually affect the power of those who are subject to them. As a result it is not possible for those affected to avoid external change agents through formal compliance, and internal change agents are given power beyond the fulfilment of procedure.

The adoption of substantive laws requires that one must look not only at the process by which decisions are made but the substance of the actions taken as a result. In the development of laws, the focus of debate shifts from procedural questions to questions of what substantive standards are to be imposed. In some situations, objective standards will be clear and easily determinable[46]. However in other areas, particularly those relating to the urban environment, such objective standards are not as clear[47]. Where standards are not obvious it may be argued that there is the danger of either making the law unnecessarily rigid in a changing field or pronouncing unjusticiable standards[48]. However these concerns can be addressed so long as the legislature makes its intention clear and provides standards by which to judge the implementation of its legislation.

The emphasis placed on the substance of the law does not deny that the procedure by which substantive goals are achieved is important. The procedure adopted is an important reflection on the nature of society in general and of government in particular. However it should be clear that no matter how good the means is, it is the end that counts. Such an end may be achievable without substantive laws if the ethical basis upon which consideration of environmental factors was agreed upon and accepted, but until this is the case substantive laws are needed.

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41 See *supra*, text accompanying notes 26-28.

42 This should be qualified in that the values are values such as the value of public participation, or the value of a fully informed decision. Such values do not go to the substance of the legislation.

43 This is consistent with the approach of Tribe, in that he envisages a staged approach to addressing the move towards an environmental ethic - Tribe, L.H. (1976) "*Ways not to think about plastic trees,*" in Tribe et al (eds) *When Values Conflict*, Ballinger Publishing, Cambridge, Mass. at 86-87; also (1974) 83 Yale L.J. 1315. However the proposal for substantive laws goes further in that it suggests a mechanism for at least one stage of the process; see also Tribe, L.H. (1972) "Technology assessment and the fourth discontinuity: the limits of instrumental rationality," 46 *Southern Cal. L. Rev.* 617 at 640.

44 Changes in value are essential if any significant change in the relationship between humans and the environment is to occur - see Boer (1984), supra n 37, p.244-247 and generally Nash, R.F. (1990) *The Right of Nature: A History of Environmental Ethics*, Primavera Press/The Wilderness Society, Sydney.

45 Fisher characterised this evolution not necessarily as one of a change of values but as towards the enforcement of environmental policy to statutory objects, to the development of explicit non-justicable environmental policies as one toward effective implementation. This takes "environmental policy" as given and does not adequately recognise that such policy is the result of a competition between conflicting values. However, simply in terms of policy implementation he suggested that new legal mechanisms were desirable - see Fisher (1980) *supra* note 18 pp 79-84.

46 For example, in the endangered species area there are the standards of non-interference and non-endangerment.

47 See *supra* note 36 above and accompanying test.

48 The clearest way in which a law which is substantive in form can be made non-justicable is by committing the question of substance to the discretion of the decision maker.

Because the implementation of environmental policy involves changes in values the implementation of those policies through law will lead to conflict between those implementing the law and those whose values are being challenged. While the effect of this conflict may be lessened through education about those values, ultimately enforcement is the best education because values change less as a result of education alone than as of the experience of power[49].

Conclusion

I wrote at the start of this article that environmental lawyers overlooked the goals that they are trying to achieve. This may be somewhat unfair. Much of what I have said relates to power. When values conflict those with power generally come out winners. It is usually the environment and those that value it that lack power and do not succeed in such conflicts. Because of this, environmental lawyers have been forced to concentrate most of their efforts on procedural laws which might achieve incrementally and by relative stealth that which they cannot achieve openly[50]. Yet the risk is that the fruits of such efforts are simply "evermore complex and intricate requirements for processing papers" rather than substantive change[51]. Environmental lawyers must not forget that it is parliament that makes the laws and that there are rare moments when environmental policy goals may be achieved directly through environmental laws. Rather than focussing on the next "nice" legal argument within the framework of procedural laws, efforts will need to be put into developing justiciable and objective standards for human interaction with the environment if environmental law is going to be more than a gloss on existing values.

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49 Jenkins (1980) *supra* note 22, 123 states that "if law is really to effect social reforms, it must persuade before it prescribes." It is arguable that procedural laws have paved the way for substantive laws by persuading people of their underlying goals, if not of the implications of the implementation of these goals. However it would be going too far to say that conflicts could be avoided.

50 Fisher (1980) *supra* note 18 at 90.

51 Fairfax (1978) *supra* note 19 at 747.