

WADING IN: ENVIRONMENTAL GOVERNANCE AND QUEENSLAND'S CLEAN WATERS ACT 1971

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Queensland's environmental regulatory agencies during the Premiership of Joh Bjelke-Petersen remain neglected by scholars, despite much literature on the State's high profile conservation conflicts in this era, such as Fraser Island. This article investigates the administration of the *Clean Waters Act 1971* (Qld) by the Water Quality Council from 1970 to 1987. Using the Act as a case study, it seeks to examine different types of environmental governance factors and their impact on the effectiveness of legislation. It concludes that regulatory capture of individual Council members, resourcing constraints, ministerial interference, inspectorate discretion, a narrow conception of enforcement strategies, and limited public participation all conspired to reduce the effectiveness of both the Act and Council. While acknowledging the historical nature of the legislation, it is suggested that these problems remain causes for concern in maintaining robust environmental governance in the present.

I INTRODUCTION

Environmental histories of Queensland during the Joh Bjelke-Petersen era have generally been confined to conservation campaigns, such as the Daintree,¹ with little systematic examination of environmental

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¹ See, eg, Phillip Toyne, *The Reluctant Nation: Environment, Law and Politics in Australia* (1994); Stephen Dovers, *Australian Environmental History: Essays and Cases* (1994); William Lines, *Patriots: Defending Australia's Natural Heritage* (2006).

governance systems in force at that time.² These have led to a disjointed conception of environmental problems in the Sunshine State. Effective environmental governance is a multifaceted exercise, and laws in themselves provide only part of the solution. As Fisher notes: 'The law in itself is neither effective nor ineffective. So much depends upon the way the system is used by all those who have or may have access to it.'³ The effectiveness of environmental laws and the means by which they can be evaluated remain ongoing areas of discussion in the present era.⁴

This article examines the *Clean Waters Act 1971* (Qld) as a case study into the types of governance factors that impact on environmental legislation's effectiveness. After critically examining the socio-political context in which the Act came into being, the article will consider the purpose, structure and functions of the Act. It will then specifically consider a number of factors that led to the Act's ineffectiveness: the risk of regulatory capture of the Act's administrative body, the Water Quality Council ('the Council'), political interference at the ministerial level, the role of public servants, standards, the use of enforcement tools, as well as the public's role in reporting offences and promoting agencies' accountability. It will conclude that the multiple challenges encountered in the administration and enforcement of the Act at the time serve to provide guidance to present-day environmental regulators in effective environmental governance.

² See, eg, Ross Fitzgerald, *From 1915 to the Early 1980s: A History of Queensland* (1984); Drew Hutton and Libby Connors, *A History of the Australian Environment Movement* (1999).

³ Douglas Fisher, 'The Nature of the Environmental Legal System' in W. Duncan (ed.), *Planning and Environment Law in Queensland* (1993) 80, 80.

⁴ See, Chris McGrath, *Does Environmental Law Work?: How to Evaluate the Effectiveness of an Environmental Legal System* (8 October 2010) <<http://www.envlaw.com.au/delw.pdf>>.

II THE *CLEAN WATERS ACT 1971* (QLD)

A *Social-Political Context*

In 1970, when comprehensive water quality control legislation was introduced,⁵ environmental problems as significant political issues in Queensland were ‘novel’,⁶ with environmental protection ‘yet to be contemplated’ seriously.⁷ The policy of the Country (National) Party (1957–89), particularly under the premiership of Joh Bjelke-Petersen (1968–87), was to encourage development and progress, and was frequently at odds with effective environmental protection.⁸ According to Grant and Papadakis, ‘Until the late 1980s, knowledge of environmental problems in Queensland was scarce and there was little pressure on government to act on this issue.’⁹ It was in this climate that the Act was enacted.

⁵ Queensland’s *Clean Waters Act* was a long time coming. ‘River pollution regulations’ were considered as early as 1957. However, disputes over departmental responsibility and concern that the Brisbane City Council would struggle with compliance meant that the proposal was ‘deferred’. Another effort was made in 1966 by the Co-ordinator General of Public Works in response to requests for more effective water pollution control. The Department also conducted surveys of water pollution problems in Queensland from July 1966 onwards, and its Minister, Wallace Rae, felt that ‘urgent action was required’. Queensland, *Parliamentary Debates*, Legislative Assembly, 8 December 1971, 2689–2690 (Wallace Rae); Memorandum, Commissioner (Irrigation and Water Supply Commission) to Chief Investigation Engineer (Irrigation and Water Supply Commission), 20 August 1959, Brisbane, Environmental Control Committee of Investigation (Queensland State Archives item ID: 882612).

⁶ Tor Hundloe, ‘The Environment’ in A. Patience (ed.), *The Bjelke-Petersen Premiership, 1968–1983: Issues in Public Policy* (1985) 81, 81.

⁷ Patricia Smith, ‘Queensland’s Political Culture’ in A. Patience (ed.), *The Bjelke-Petersen Premiership, 1968–1983: Issues in Public Policy* (1985) 17, 27.

⁸ Fitzgerald, above n 2, 388; Simon Niemeyer, *Environmental Politics in Queensland and Western Australia, 1970–1990: A Theoretical Exploration of Administrative and Regulatory Reform* (BSc Hons. Thesis, Griffith University, 1998). See also, Aynsley Kellow and Simon Niemeyer, ‘The Development of Environmental Administration in Queensland and Western Australia: Why Are They Different?’ (1999) 34(2) *Australian Journal of Political Science* 205, 207–10.

⁹ Richard Grant and Elim Papadakis, ‘Transforming Environmental Governance in a “Laggard” State’ (2004) 21(2) *Environmental and Planning Law Journal* 144, 147.

B Functions of the Act

Introduced after a Senate inquiry into water pollution in Australia,¹⁰ the *Clean Waters Act 1971* (Qld) was a statute designed to oversee 'the Preservation, Restoration and Enhancement of the Quality of the Waters of the State'.¹¹ It was an example of command and control regulation, or direct regulation. The primary focus of the Act was on 'appropriate control of activities, rather than on outright prohibition'.¹² In such cases, the discretion of regulatory agencies and their field officers is important for determining the extent of regulatory implementation.¹³ This is discussed later.

The Act combated pollution in two ways. First, it attached conditions to licences for the discharge of wastes, with prescribed standards to limit pollution.¹⁴ Second, it imposed a duty of care upon the occupiers of premises to prevent water pollution and to avoid activities likely to cause it.¹⁵ Water pollution prevention was incorporated into town planning¹⁶ and inspections of premises were conducted by water quality inspectors to ensure compliance with section 31.¹⁷ Failing to hold a licence for the discharge of wastes or failure to show a duty of care to prevent water pollution amounted to offences under the Act.

¹⁰ Commonwealth Senate Select Committee on Water Pollution, *Water Pollution in Australia: Report* Parliamentary Paper No. 98 (1970).

¹¹ *Clean Waters Act 1971* (Qld), long title.

¹² James Prest, *The Forgotten Forests: The Environmental Regulation of Forestry on Private Land in New South Wales Between 1997 and 2002* (PhD Thesis, University of Wollongong, 2003) 43.

¹³ *Ibid* 43–44. Direct regulation has been criticised extensively in the literature in more recent times as inefficient and ineffective in comparison to 'less interventionist' forms of regulation. Prest, above n 12, 44–50.

¹⁴ *Clean Waters Act 1971* (Qld) ss 23–24.

¹⁵ *Clean Waters Act 1971* (Qld) s 31. This was consistent with a national trend towards imposing strict liability obligations on businesses to reduce pollution where possible. See, eg, Neil Gunningham, 'Beyond Compliance: Management of Environmental Risk' in B. Boer, R. Fowler and N. Gunningham (eds.), *Environmental Outlook: Law and Policy* (1994) 254, 256.

¹⁶ *Clean Waters Act 1971* (Qld) s 37(1), (2).

¹⁷ *Clean Waters Act 1971* (Qld) ss 42–44. Section 31 aimed to reduce water pollution by ensuring that occupiers of premises were instructed in compliance. It also established a process through which the Water Quality Council could enforce its recommendations for changes to an occupier's pollution prevention procedures and practices so as to ensure compliance with the Act, subject to an appeal to the District Court. *Clean Waters Act 1971* (Qld) ss 31, 41(1)(a)(iv).

The Act gave inspectors extensive powers to monitor compliance.¹⁸ Occupiers were required to cooperate and could be fined up to \$400 for obstructing an inspector. The Act also contained punitive measures. Penalties for breaching licences, or any other provision of the Act, including water quality standards as set by the Council, amounted to a \$10 000 fine in the first instance, \$1000 per day for continuing offences, and \$20 000 for all subsequent offences, with an additional \$2000 per day for a continuing offence — or a combination of fines and 12 months' imprisonment.¹⁹ In the absence of a specific penalty, a general provision imposed a fine not exceeding \$400 and \$40 each day if the offence continued. These were the highest penalties for non-compliance for an environmental control Act in Australia at the time.²⁰ Initially criticised in the drafting stages of the legislation as likely to be a time-consuming and costly organisation,²¹ the Council eventually became the administrative body for the Act, subject to the Minister for Local Government.²²

III THE COUNCIL

A *Formation and Membership*

Appointment of Council members occurred after Royal Assent to the statute on 22 December 1971,²³ though most of the Act's provisions would not come into force until 1 March 1973.²⁴ The decision to give immediate legal effect to the Council was made so it could prepare Regulations provided for under the Act,²⁵ necessary for issuing licences and drawing up waste discharge standards. The Council's membership consisted of representatives from various Government departments:

¹⁸ *Clean Waters Act 1971* (Qld) ss 42(1), (2), 43, 44.

¹⁹ *Clean Waters Act 1971* ss 48(a–b), 49.

²⁰ Anne-Marie Lanteri, 'Legislative Control of Environmental Quality' in K. Lindgren, H. Mason and B. Gordon (eds.), *The Corporation in Australian Society* (1974) 185, 194.

²¹ Cabinet Minute Submission No. 14133, 10 June 1971, Department of Local Government and Electricity, Introduction of special legislation to deal with water pollution (Queensland State Archives item ID: 958746).

²² *Clean Waters Act 1971* (Qld) s 9(1).

²³ Queensland, *Parliamentary Debates*, Legislative Assembly, 10 December 1971, 2826; *Clean Waters Act 1971* (Qld) ss 2(1), 10, 11.

²⁴ *Clean Waters Regulations 1973* (Qld) reg 2; Queensland, *Parliamentary Debates*, Legislative Assembly, 5 June 1973, 2229 (Brian Littleproud).

²⁵ *Clean Waters Act 1971* (Qld) s 53; 'Four-year plan for cleaner Qld. streams', *Courier Mail* (Brisbane), 3 February 1972, 5.

Irrigation and Water Supply Commission, Primary Industries, Harbours and Marine, Mines, Health, Co-ordinator General of Public Works, Industrial Development and Railways, and one representative each from the Queensland Chamber of Manufactures, Local Government Association of Queensland, Council of Agriculture, Queensland Institute of Technology, and Brisbane City Council.²⁶

Amendments to the Act in 1979 increased the size of the Council, with representatives from Queensland Fisheries Service, National Parks and Wildlife Service, Australian Sugar Producers Association and Griffith University.²⁷ Although conservationists were not directly represented, despite a submission from the Australian Littoral Society and Queensland Conservation Council pressing for this in 1979,²⁸ their indirect influence increased with the amendment. For example, Des Connell was appointed as Griffith University's representative in October 1979 and maintained his membership of the Australian Littoral Society while on the Council.²⁹ The Council itself was abolished in 1987 and replaced by a State Environment Advisory Council.³⁰ The Water Quality Council was charged with significant responsibilities.

B Purpose

The functions of the Council were to carry out or commission surveys, investigations and research into matters relating to the quality of waters, and report and make recommendations to the Minister on its findings. Additionally, the Council was to have a public service role, collecting and disseminating information about the quality of waters, maintaining

²⁶ *Clean Waters Act 1971* (Qld) s 12(1) (a–h).

²⁷ *Clean Waters Act Amendment Act 1979* (Qld) s 6, amending *Clean Waters Act 1971* (Qld) s 12.

²⁸ Anonymous, 'Amendments to Queensland's Clean Waters Act' (1979) 2(4) *Bulletin of the Australian Littoral Society* 5, 6. The Queensland Littoral Society was formed in 1965 by divers, amateur naturalists and marine scientists at the University of Queensland. Its aims were to research and lobby for marine conservation. It became the Australian Littoral Society in the 1970s and in the mid-1990s, the Australian Marine Conservation Society. See, Australian Marine Conservation Society, *In the Beginning*, (23 August 2010) <http://www.marineconservation.org.au/About-AMCS.asp?active_page_id=207>; Lines, above n 1, 62.

²⁹ Interview with Professor Des Connell (Telephone interview, 17 September 2007).

³⁰ *State Environment Act 1988* (Qld) ss 8, 53–87.

surveillance over discharge of waters, advising organisations on the prevention of water pollution, and recommending to the Minister changes to the Act, repeal of regulations, administration of the Act and other recommendations for the purposes stated above in the long title to the Act.³¹ Given the interests represented on the Council, particularly in its earlier phase of narrow representation, and its role in regulating water pollution, the risk of regulatory capture arose.

IV REGULATORY CAPTURE

A Definition

‘Regulatory capture’ describes ‘the development of a predisposition by regulators to make decisions and take actions consistent with the preferences of the regulated industry.’³² Regulatory capture has been further defined as ‘the prediction that, over time, regulators come to be more concerned to serve the interests of the industry with which they are in regular contact, than the more remote and abstract public interest’.³³ One model of regulatory capture is based on the idea of undue influence, specifically a ‘revolving door’ concept that posits regulators wooed by employment opportunities in the regulated industry and influenced to be sympathetic towards the regulated population. Another problem occurs when regulators are taken from the regulated industries, leading to bias.³⁴ Another model is systemic capture, which occurs where an entire regulatory system is captured by the industries being regulated, for example where inspectors and their political masters are captured.³⁵ Regulatory capture takes many forms and is found in regulators that have an overly close relationship with industry and where there is a heavy emphasis on negotiations with industry to draw up conditions

³¹ *Clean Waters Act 1971* (Qld) s 20(1)(a–e), (2)(a–d).

³² Barry Mitnick, *The Political Economy of Regulation: Creating, Designing and Removing Regulatory Forms* (1980) 207.

³³ Peter Grabosky and John Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (1986) 198.

³⁴ *Ibid.*

³⁵ Simon Marsden, Kathy Gibson and Carl Hollingsworth, ‘Tasmania’s Environmental Improvement Programs and the “Brown Issues” — Environmental Accountability or Regulatory Capture?’ (2000) 17(1) *Environmental and Planning Law Journal* 24, 26.

‘unduly favourable to industry and contrary to the public interest’.³⁶ It can become a contest between the need for a cooperative relationship between the regulatee and the regulator, and the risk of regulatory capture and corruption that an environment of cooperation can promote.³⁷ As will be seen below, this risk is increased by lack of transparency. Several studies of environmental administration in Queensland have made reference to the concept and it is useful to consider the literature briefly.

B Literature Overview

At the national level in the 1980s, Grabosky and Braithwaite’s pioneering efforts delved into Australian environmental regulators including the Council,³⁸ despite the responsible Minister (Russell Hinze) refusing to cooperate.³⁹ Their study went beyond environmental issues to encompass topics as varied as occupational health and safety and consumer affairs, but brief comments were made about the secretive nature of the Council and its conciliatory attitude to industry.⁴⁰

A lack of ministerial cooperation, the wide brief of their work and the limited range of sources consulted (annual reports of the Council), prevented any in-depth discussion of instances of regulatory behaviour that pointed to the risk of regulatory capture. Their conclusions therefore lack the additional evidence that this article is able to provide through access to records of Council meetings and interviews with participants in the Act’s regulatory process. Nonetheless, their view of the Council gave weight to additional critiques of the Act in the 1970s, from groups

³⁶ Neil Gunningham, ‘Voluntary and Negotiated Agreements in Agriculture: Towards a Partnership Approach to Resource Management’ (2003) 8(1) *Australasian Journal of Natural Resources Law and Policy* 1, 18.

³⁷ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992) 55.

³⁸ Grabosky and Braithwaite, above n 33, 27–54.

³⁹ *Ibid* 5. The authors also note on pages 4–5 that of the ‘116 regulatory and quasi-regulatory agencies’ approached by the authors, only two other organisations refused outright to cooperate with the researchers, namely the New South Wales Department of Industrial Relations and the Queensland Air Pollution Council — the latter ‘at the instruction of their Minister Russ Hinze’.

⁴⁰ Grabosky and Braithwaite, above n 33, 44, 195.

such as a law student public interest collective and scientists.⁴¹ Critics queried the capacity of some organisations represented on the Council to impartially regulate industries with which they were associated. Subsequent commentators drew on Grabosky and Braithwaite's findings to inform their Queensland focused research.

Investigations into regulatory capture amongst Queensland's environmental regulators continued in the 1990s, following many legislative reforms, including the enactment of the *Environmental Protection Act 1994* (Qld). Briody and Prenzler's post-Fitzgerald (1989–97) analysis researched Queensland's environmental protection laws and regulatory capture.⁴² That study examined the Queensland Department of Environment (a successor to the Council) and the Environmental Compliance Division of the Queensland Department of Mines and Energy under both National and Labor governments. It found a case for capture in the latter Department and evidence of significant under-enforcement in the former Department.⁴³ Another important work is Maddin's extended study of the 1993–4 Queensland Criminal Justice Commission Inquiry into the Improper Disposal of Liquid Waste in South-East Queensland. Maddin used regulatory capture to explain a culture of under-enforcement within Queensland's environmental protection and mining industry regulators, particularly as revealed by

⁴¹ Public Interest Research Group, *Legalised Pollution: the State of Queensland* (1973) 67–72; Walter Westman, 'The Queensland Clean Waters Act, 1971: A Critical Review' (1972) 2(2) *Operculum* 32; G.G. Miller, J.D. Davie and E.J. Heurle, 'An Assessment of Queensland's Progress Towards Cleaner Waters' (1976) 5(1) *Operculum* 3. A useful summary of the criticisms of the Act can be found in Jan Wegner, 'Sludge on Tap: Queensland's First Water Pollution Legislation, 1944-1985' (2009) 15(2) *Environment and History* 199, 210.

⁴² Michael Briody and Tim Prenzler, 'The Enforcement of Environmental Protection Laws in Queensland: A Case of Regulatory Capture?' (1998) 15(1) *Environmental and Planning Law Journal* 54; Michael Briody, *Enforcing Environmental Protection Laws in Post-Fitzgerald Queensland* (BA Hons. Thesis, Griffith University, 1997); Cf John Gilmour, 'Letter to the Editor' (1998) 15(3) *Environmental and Planning Law Journal* 163.

⁴³ Briody and Prenzler, above n 42, 54. For an expansion on Briody and Prenzler's findings in relation to the mining industry, see Drew Hutton, 'Mining and the Environment in Queensland: Where the Law Begins and Enforcement Fails — Regulatory Capture and Implementation Failure' (1999) 6(2) *Australasian Journal of Natural Resources Law and Policy* 149; Drew Hutton, 'Countering Environmental Crime: The Role of Environmental Regulators' (2000) 19(2) *Social Alternatives* 24.

Commission evidence.⁴⁴ Briody and Prenzler's findings are especially important for this article and are summarised below.

Briody and Prenzler could not perceive regulatory capture in the Department of Environment, because of its non-industry facilitation role; regulation of diverse industries rather than a single industry; the Department's status as a stand-alone regulator instead of being part of a larger Department; the inspectorate's lack of regular contact with the same client companies; little personnel interchange between industry and the Department; and the diversity of businesses being regulated by the Department.⁴⁵ Almost all of these behaviours apply to the Council. The exception was its status in relation to other regulators since the Council was tied to a larger Department of Local Government.

Briody and Prenzler claimed the Department of Environment's tradition of under enforcement was a legacy of its predecessors such as the Council. They contend that part of that tradition was a lack of training in prosecutorial techniques and a history of anti-environmentalism among the State's politicians, concluding that while there 'was no solid evidence of frequent and direct political interference, there is strong circumstantial evidence regarding political influence'.⁴⁶ Similar findings were made by this study when investigating the pre-Fitzgerald Council for indications of regulatory capture. Some warning signs of capture arose during the drafting of the Clean Waters Bill.

C Bill Preparation Bias

Input into the drafting of the Clean Waters Bill was received from industry submissions made in February 1971 from a committee composed of representatives from the Chamber of Mines, Chamber of Manufactures, Institution of Engineers, Institution of Fuel Engineers, and the Institution of Chemical Engineers. It asked that industry be allowed to participate in making decisions with financial implications for it, and that it had much to offer in the way of experience and knowledge to the proposed regulatory body. Labor Opposition members argued

⁴⁴ Hayley Maddin, *Regulating for Environmental Protection: A Case Study of the CJC Inquiry into the Improper Disposal of Liquid Waste in South-East Queensland* (MA Thesis, Queensland University of Technology, 1996). Other Australian jurisdictions, such as Tasmania, have also been examined for regulatory capture: see Marsden, Gibson and Hollingsworth, above n 35, 24–33.

⁴⁵ Briody, above n 42, 73.

⁴⁶ Briody and Prenzler, above n 42, 69; Briody, above n 42, 68–73.

during the Parliamentary debate to the Bill that this extended time-frame of seven years would be a disincentive to speedy compliance, and that three years was sufficient.⁴⁷ Labor attacked the Minister's sympathetic response to submissions by the Chamber of Mines and the Chamber of Manufactures for representation on the proposed Council, while he ignored the more ecologically knowledgeable Queensland Littoral Society.⁴⁸ Ultimately, a Council of 'interested Government Departments, primary industry, secondary industry, local government and tertiary education' was created.⁴⁹

Concessions granted to government departments identifying with industry interests aggravated the risk of regulatory capture. Pressure from the Department of Industrial Development for progressive compliance with the Act for existing industries is one example. The Department believed that in view of the presumed clean up costs, considerable time would be needed to reach the necessary standards of compliance and cited the *Clean Air Act 1963* (Qld) in support of its argument, since that Act had a 'grace period' of seven years. The Minister for Local Government, Wallace Rae, granted a four year period initially, but the Council was given the power to increase this by a further three years. With this compromise incorporated into the Bill, Rae recommended that it be introduced to Parliament.⁵⁰ Regulatory capture remained an issue when the Council was created.

D *Regulatory Capture and the Council*

The political and social context for the Act, described above, provided a likely environment for regulatory capture to thrive. Given the pro-development attitude of Government departments in charge of industries, and the fact that local government sanitation schemes were among the worst polluters, regulatory capture would seem likely.⁵¹ The confidentiality of Council meetings also increased the likelihood of

⁴⁷ Queensland, *Parliamentary Debates*, Legislative Assembly, 8 December 1971, 2694 (Harold Dean and Douglas Sherrington).

⁴⁸ Ibid 2701–2 (Douglas Sherrington).

⁴⁹ Cabinet Minute Submission No. 14133, 10 June 1971, Department of Local Government and Electricity, Introduction of special legislation to deal with water pollution (Queensland State Archives item ID: 958746).

⁵⁰ Cabinet Minute Decision No. 16461, 15 November 1971, Department of Local Government, Introduction of special legislation to deal with water pollution (Queensland State Archives item ID: 958746).

⁵¹ See, eg, Quart Pot Creek, Stanthorpe — Pollution (Queensland State Archives item ID: 882578).

regulatory capture. Indeed the narrow interests represented on the Council and the willingness of the Government to act on the recommendations of development-minded pressure groups (as discussed above), does raise questions of potential bias. This issue was pursued by the Labor Opposition, as the following example demonstrates.

The Labor Opposition questioned the Council's composition and the role of politics in the Act's enforcement within a short period of the statute entering into force, suggesting that regulatory capture played a part in preventing prosecutions by the Council. An example was pollution at the junction of the Brisbane and Bremer Rivers (near Ipswich) from the insecticide dieldrin, leading to the deaths of catfish. An inspector from the Brisbane Port Authority located fish with a high concentration of dieldrin and tests were conducted. The inspector reported that the dieldrin had been traced to Morris Woollen Mills (Ipswich) Pty Ltd. The inspector was instructed to 'hand his documentation and evidence to the Water Quality Council'. Nothing more occurred, leading Labor Opposition Spokesman for Water Conservation, Tom Burns, to claim that this was the standard practice of the Council 'because of its domination by people representing the polluters and not those representing the polluted' and that these individuals could 'stop inspectors taking certain action' — namely prosecutions.⁵² The Labor Opposition Member for Ipswich West, David Underwood, claimed that the Government was reluctant to take action against Morris Woollen Mills because its owner, Ivor Morris, was a 'leading National Party member'.⁵³ Hinze dismissed the accusation of political interference and regulatory capture in the Act's administration as a 'complete fabrication', but did not attempt to offer an alternative explanation.⁵⁴

Nonetheless, individual members of the Council with an industry affiliation did vote in a sympathetic manner where an industry they

⁵² Queensland, *Parliamentary Debates*, Legislative Assembly, 6 June 1979, 4926 (Tom Burns); Queensland, *Parliamentary Debates*, Legislative Assembly, 5 June 1979, 4872 (Tom Burns).

⁵³ Queensland, *Parliamentary Debates*, Legislative Assembly, 5 June 1979, 4879–80 (David Underwood).

⁵⁴ Queensland, *Parliamentary Debates*, Legislative Assembly, 6 June 1979, 4923 (Russell Hinze). One former Councillor confirms that private representations made by industry to the Minister impacted negatively on decisions to prosecute. Interview with Professor Des Connell (Telephone interview, 17 September 2007). For other examples of possible conflicts of interest involving Hinze, see Rae Wear, *Johannes Bjelke-Petersen: the Lord's Premier* (2002) 145–6.

identified with was under discussion. A specific example of this was the Council's recommendation to the Minister that Tully Co-operative Sugar Milling Association Ltd be prosecuted for breaches of section 23 of the Act. Eleven members voted in favour of prosecuting the company with two against. Those in the minority were Mr Leverington and Sir Joseph McAvoy, Council representatives for the sugar industry and primary industries respectively.⁵⁵ Such voting decisions were kept hidden from the public with confidential Council meetings, increasing the risk of regulatory capture through a lack of transparency. One study noted this and contended that: 'the Council keeps a low profile, and adverse publicity is used sparingly'.⁵⁶

From the admittedly incomplete evidence available from the Council's meetings,⁵⁷ it seems that although some individual Council members were captured by the interests they represented, the Council as a whole was not. However, regulatory capture is only one of the obstacles that can hinder effective environmental governance — insufficient resources are another.

V RESOURCING CONSTRAINTS

The Council laboured under an enormous monitoring exercise with limited resources. By the middle of 1981 the staff of the Council totalled 42, with seven inspectors.⁵⁸ Most were in Brisbane, and a regional office in Townsville did not open until 1977.⁵⁹ Although the Council recognised the public's role in reporting pollution, it and the Department of Local Government were not necessarily in a position to respond promptly to their complaints.

⁵⁵ Minutes of the 97th Meeting of the Water Quality Council of Queensland, 24 February 1982, Environmental Co-Ordination, Waste Disposal, Water Quality Council of Queensland, Minutes and Agendas of Meetings (Queensland State Archives item ID: 574173); Queensland, *Annual Report of the Water Quality Council of Queensland for the year ended 30 June*, Parliamentary Paper No. 51 (1982) 1.

⁵⁶ Grabosky and Braithwaite, above n 33, 44, 195.

⁵⁷ There are gaps in the Queensland State Archives' set of meetings records, which end in 1985. Bonyhady also had difficulty obtaining information from industry and government on environmental disputes, see Tim Bonyhady, *Places Worth Keeping: Conservationists, Politics and Law* (1993) ix.

⁵⁸ Queensland, *Annual Report of the Water Quality Council of Queensland for the year ended 30 June*, Parliamentary Paper No. 50 (1981) 1.

⁵⁹ 'Pollution group not adequate', *Courier Mail* (Brisbane), 1 October 1977, 8.

The Council lacked an after-hours answering service for complaints, prompting the Opposition's Tom Burns to claim that discharges were taking place on Friday evenings 'when one cannot get an inspector on the phone', so that when inspectors resumed their duties on Monday morning 'all the effluent that was poured into the river on Friday night has been dispersed by the action of the tide'.⁶⁰ During the second reading of the Clean Waters Amendment Bill 1979 to Parliament, Burns urged the Government to provide a 24-hour telephone answering service, suggesting that the calls could be transferred to the home numbers of inspectors to allow a faster response.⁶¹ Minister Russell Hinze responded that 24-hour monitoring of the Brisbane River was impossible and that arrangements were being made to ensure that inspectors were available at all times to receive complaints.⁶² However, no such arrangements were implemented until the Department of Environment and Heritage introduced an after-hours emergency response service in September 1990.⁶³ This was in contrast to the New South Wales State Pollution Control Commission, which introduced a 24-hour telephone complaints service in 1977.⁶⁴

Without adequate monitoring and enforcement, command and control regulation such as that used in the Act is weakened considerably.⁶⁵ The creation of an emergency response service in Queensland may have been driven by decentralising policies of the Department of Environment and Heritage, which had concluded by 1990 that despite a 'plethora of environmental legislation', the organisation suffered from the 'lack of a grass roots service, which can respond to the growing demands of the general public for an improved environment and their need to be

⁶⁰ Queensland, *Parliamentary Debates*, Legislative Assembly, 2 May 1979, 4522 (Tom Burns); 'River polluted after work hours', *Courier Mail* (Brisbane), 6 June 1979, 11.

⁶¹ Queensland, *Parliamentary Debates*, Legislative Assembly, 5 June 1979, 4873 (Tom Burns).

⁶² Queensland, *Parliamentary Debates*, Legislative Assembly, 6 June 1979, 4923 (Russell Hinze); 'Pollution "no trouble"', *Courier Mail* (Brisbane), 7 June 1979, 13.

⁶³ Queensland, *Annual Report of the Department of Environment and Heritage for the year ended 30 June*, Parliamentary Paper No. 86 (1991) 27.

⁶⁴ Dan Coward, *Out of Sight: Sydney's Environmental History, 1851-1981* (1988) 302.

⁶⁵ Neil Gunningham, Peter Grabosky and Darren Sinclair, *Smart Regulation: Designing Environmental Policy* (1998) 41.

involved in the improvement process'.⁶⁶ It seems clear that the Council struggled in a period of scarce resources for environmental protection. The shift in attitudes towards public engagement with the Act occurred at a time of political change in Queensland and consequently the role of political interference in the Act's administration cannot be ignored.

VI POLITICAL INTERFERENCE

Ministerial interference in the Act's administration is supported by Norberry's research into the enforcement of the statute. It suggests that political interference in the prosecution process occurred, with the withdrawal of at least one prosecution by the Minister and approval for one prosecution not being granted by the Minister in another case.⁶⁷ However, Norberry does not provide details of these incidents of political interference. Nor does she explore the wider consequences of ministerial bias in environmental administration in Queensland and the impact this had on the Act's implementation. These issues are addressed here in an attempt to offer an holistic perspective on the causes of the Act's ineffectiveness, thereby highlighting some of the factors that drive strong environmental governance more generally in the present.

A *The Minister*

The Minister to whom the Council was responsible for the Act's administration from 1974 to 1987 was Russell Hinze. The year 1981 spelled the end of the 'grace period' for compliance under the Act. Therefore it is important to consider Hinze's actions in relation to Council recommendations between 1981 and 1987 when prosecutions were most likely. Hinze had a reputation for ignoring questions from journalists about the possible conflict of interest he might have had in his roles as Minister for Local Government and property developer, curtly replying: 'That's not a conflict of interest, that's convergence of

⁶⁶ A.D. Gormley, 'Environmental Issues in Queensland' (Paper presented at the Local Government Engineers' Association of Queensland 41st Annual Conference, Logan, Queensland, 30 September — 5 October 1990) 1, 2. I thank Dr Simon Niemeyer for drawing this to my attention.

⁶⁷ Jennifer Norberry, 'Environmental Offences: Australian Responses' in D. Chappell and P. Wilson (eds.), *The Australian Criminal Justice System: The Mid 1990s* (1994) 156, 167.

interest.’⁶⁸ His strength of personality and disregard for administrative conventions were legendary. The following examples illustrate this.

B *Case-studies and Allegations of Ministerial Interference*

The attitude of the Minister is clearly indicated by his actions following the Council’s decision, acting on advice from the Solicitor General, to recommend that Babinda Co-operative Sugar Mill Society Ltd be prosecuted for a large fish kill at Babinda Creek in Far North Queensland in October 1984. The pollution incident was caused by a spill of ‘some 70 to 80m³ [cubic metres] of 6 % to 9 % Caustic Soda ... during the weekend cleaning of vessels’.⁶⁹ The Minister refused to prosecute, to the Council’s disgust. Griffith University’s Council representative Des Connell observed that ‘it was a widely held view that the Water Quality Council do not prosecute’. The then Director of Water Quality in the Department of Local Government, Humphrey Desmond, agreed and commented:

[T]he Minister [Russell Hinze] was prepared to be extremely tolerant of Companies which provide jobs for the people of Queensland ... the Minister’s policy was to call offenders into his office and give them a good talking to and extract a promise from them to ensure that further pollution incidents did not recur.⁷⁰

Another example of direct intervention from Hinze was in relation to Queensland Aluminium Ltd of Gladstone, which discharged slurry from a pipeline broken by corrosion. The spill was discovered by a jogger and reported to the Council.⁷¹ Advice from the Solicitor General D.V. Galligan indicated that a prosecution was possible.⁷² Due to the

⁶⁸ Peter Botsman, ‘Post-Fitzgerald Queensland’ (Paper presented at the Australian Society of Archivists Annual Conference: ‘Archives at Risk — Accountability, Vulnerability and Creditability’, Brisbane, 29–31 July 1999) 138. I thank Dr Doug Hunt for drawing this to my attention.

⁶⁹ Agenda and Minutes of the 124th Meeting of the Water Quality Council of Queensland, 14 November 1984, Environmental Co-ordination, Waste Disposal, Water Quality Council of Queensland, Minutes and Agendas of Meetings (Queensland State Archives item ID: 574185).

⁷⁰ Ibid.

⁷¹ Interview with Anonymous Interviewee #1 (Telephone interview, 25 September 2007).

⁷² Minutes of the 99th Meeting of the Water Quality Council of Queensland, 12 May 1982, Environmental Co-Ordination, Waste Disposal, Water Quality Council of Queensland, Minutes and Agendas of Meetings (Queensland State Archives item ID: 574174).

Council's administrative move to the Department of Water Resources and Aboriginal and Islander Affairs,⁷³ Hinze did not oversee the matter. Instead the Minister for Water Resources and Aboriginal and Islander Affairs, Kenneth Tomkins, authorised the first prosecution under the Act.⁷⁴ A hearing was set in the Gladstone Magistrates Court for 8 September 1982.⁷⁵ However, the hearing was adjourned until 22 November as a Senior Inspector of Water Quality considered essential to the prosecution was unable to attend due to illness.⁷⁶ Before the hearing could commence, the Council was moved back to its previous department and Minister, Russell Hinze, who would not allow the prosecution to continue.⁷⁷

C Ministerial Bias

Hinze was facing eight charges of official corruption at the time of his death from cancer in June 1991,⁷⁸ following allegations from the Fitzgerald Inquiry that he and his family's companies were given over \$4 million in loans, gifts and other payments from developers.⁷⁹ Given this allegation, the remarks of Council members above, and Hinze's own actions when faced with recommendations for a prosecution from the Council, it seems reasonable to suggest that Hinze's Ministerial

⁷³ Queensland, *Annual Report of the Water Quality Council of Queensland for the year ended 30 June*, Parliamentary Paper No. 50 (1981) 1.

⁷⁴ Minutes of the 100th Meeting of the Water Quality Council of Queensland, 16 June 1982, Environmental Co-Ordination, Waste Disposal, Water Quality Council of Queensland, Minutes and Agendas of Meetings (Queensland State Archives item ID: 574174).

⁷⁵ Notice of the 102nd Meeting of the Water Quality Council of Queensland, 25 August 1982, Environmental Co-Ordination, Waste Disposal, Water Quality Council of Queensland, Minutes and Agendas of Meetings (Queensland State Archives item ID: 574175).

⁷⁶ Notice of the 103rd Meeting of the Water Quality Council of Queensland, 29 September 1982, Environmental Co-Ordination, Waste Disposal, Water Pollution (other than oil) (Queensland State Archives item ID: 574175).

⁷⁷ Minutes of the 111th Meeting of the Water Quality Council of Queensland, 27 July 1983, Environmental Co-ordination, Waste Disposal, Water Quality Council of Queensland, Minutes and Agendas of Meetings (Queensland State Archives item ID: 574178).

⁷⁸ Pat Gillespie and Guy Ker, 'Big Russ Goes Quietly', *Sunday Mail* (Brisbane), 30 June 1991, 1.

⁷⁹ Evan Whitton, *The Hillbilly Dictator: Australia's Police State* (1993) 159, 181; Phil Dickie, *The Road to Fitzgerald and Beyond* (1989) 318. I thank Dr Doug Hunt for drawing these to my attention.

responsibilities under the *Clean Waters Act* may have been compromised by his association with pro-development interests. It is also worth noting the contempt held by Hinze towards conservationists — whom he called ‘fairies at the bottom of the garden’⁸⁰ — indicating which pressure groups would most probably influence his decisions.

Avoiding ministerial interference requires strict demarcation of responsibilities and powers between public servants and their political masters. The political environment must also be conducive to unbiased enforcement. Such factors were glaringly absent during this period. It is tempting to treat political interference by Hinze as the source of all failed prosecutions under the Act. However, as noted earlier by Prest,⁸¹ the decisions of regulators in the field also play a significant role in the implementation of environmental laws and must therefore be considered.

VII THE ROLE OF PUBLIC SERVANTS

Recent evidence suggests there were other reasons for the types of enforcement action taken under the Act, beyond the ministerial interference and resource constraints described above. Some incidents of pollution did not reach the Minister, as they were ‘swept under the carpet’ by members of the Department of Local Government, thus denying him the opportunity to exercise his ministerial discretion to order a prosecution — in spite of an abundance of evidence which existed to substantiate one in court.⁸² Others believe that ‘key members of the [Queensland] public service have had a significant influence on the direction of environmental policy [in that state]’.⁸³ Comino contends that in this era ‘the Queensland definition of “public” so far as the public service is concerned has been equated with developers — the public

⁸⁰ Edmund Burke, ‘Tide turns in fight for river’, *Sunday Mail* (Brisbane), 21 January 2007, 41. Conservationist Di Tarte later explained that ‘Hinze made this comment when a colleague and I accompanied the Minister on an inspection of the Donaldson Road (Oxley) sewage treatment plant.’ Email from Di Tarte to David Turton, 2 December 2009. See also, Ross Fitzgerald, Lyndon Megarity and David Symons, *Made in Queensland: A New History* (2009) 156.

⁸¹ Prest, above n 12, 43–4.

⁸² Interview with Anonymous Interviewee #2 (Telephone interview, 28 August 2008); *Clean Waters Act 1971* (Qld) s 47(2).

⁸³ Kellow and Niemeyer, above n 8, 218.

service is there for the most part to serve developers.’⁸⁴ It is a theme with a rich tradition in Queensland, as the next section demonstrates.

A *Perspectives from Commentators*

Comino’s views are consistent with the findings of Briody and Prenzler, who found that the Department of Environment had a tradition of under-enforcement.⁸⁵ Maddin agrees, adding that Department of Environment and Heritage field inspectors were ‘given little back-up from their superiors and were reluctant to press charges or even conduct serious investigations’.⁸⁶ Maddin cites evidence given to the Queensland Criminal Justice Commission Inquiry into the Improper Disposal of Liquid Waste in South-East Queensland by the Executive Director for the Environment Division, John Gilmour, who indicated that:

[M]onitoring premises for compliance with sections 31 and 34 of the *Clean Waters Act 1971–1979* (Qld) did not occur and ... these premises were found only upon receiving complaints or through being discovered when being inspected for, for example, compliance with licence conditions.⁸⁷

Maddin argues a culture of non-enforcement in the Department was exacerbated by the fact that criminal matters did not fall under the responsibility of ‘regional enforcement lawyers and specialised investigators’, but were ‘left to compliance inspectors in the field’.⁸⁸ This was not unusual. Hemmings has suggested that past prosecutions for breaches of licence conditions under environmental laws in New South Wales were dependent to an extent ‘upon the attitude ... of the investigating officer or public pressure’.⁸⁹ Another author concerned with

⁸⁴ Maria Comino, ‘Sustainable Development: The Role of Law’ (1991) 16(2) *Legal Service Bulletin* 57, 57.

⁸⁵ Briody and Prenzler, above n 42, 54–71.

⁸⁶ Maddin, above n 44, 140. See also, Hutton and Connors, above n 2, 202.

⁸⁷ Maddin, above n 44, 109. These sections related to the duty of care placed upon licence holders to prevent water pollution and ministerial powers to prevent, abate or mitigate water pollution. See also, Ciaran O’Faircheallaigh, ‘Evaluating Performance on the Environment’ in B. Stevens and J. Wanna (eds.) *The Goss Government: Promise and Performance of Labor in Queensland* (1993) 248, 261–2.

⁸⁸ Maddin, above n 44, 109–112, 140.

⁸⁹ Noel Hemmings, ‘Issues of Legal Process in Environmental Prosecutions’ (Paper presented at the National Environmental Law Association 11th Annual Conference, Perth, 20–22 September 1992) 311. Shifting attitudes amongst different generations of regulators has been noted as important for enforcement by other researchers. See, eg, Norberry, above n 67, 169.

land degradation on the Darling Downs has suggested that Queensland government departments adopted a passive attitude towards breaches of environmental laws in keeping with a bureaucratic conservatism that suited ministers fearing an electoral backlash.⁹⁰ This has also been noted as a possible explanation for a reluctance to prosecute amongst the State's current environmental agencies.⁹¹ Beyond these commentators, the role of public servants in enforcing the Act came to be scrutinised by independent voices, including the Queensland Ombudsman, suggesting that the policy of prosecution as a last resort under the Act created inexperienced evidence collectors.

B Evidence Collection

The inexperience of inspectors in collecting suitable evidence against polluters may be another explanation for the lack of prosecutions under the Act. Early attempts at prosecution failed according to one inspector because 'we were a bit naïve about getting evidence'.⁹² Haigh has suggested that the Council's (and subsequently various Departments') policy of prosecution as a last resort led to a lack of experience of enforcement in the bureaucracy and 'accordingly they couldn't even gather proper evidence ... it was a joke, it was a tragedy really'.⁹³

⁹⁰ Mark Carden, 'Land Degradation on the Darling Downs' in K. Walker (ed.), *Australian Environmental Policy: Ten Case Studies* (1992) 58, 73–6. I wish to thank Dr Chris McGrath for drawing this to my attention. For information on the politicisation of the Queensland Public Service during the Bjelke-Petersen era, see Wear, above n 54, 190–1.

⁹¹ See, eg, Chris McGrath, 'Case Note: Booth v Bosworth' (2001) 18(1) *Environmental and Planning Law Journal* 23, 24, 28; Chris McGrath, 'The Flying Fox Case' (2001) 18(6) *Environmental and Planning Law Journal* 540, 559, 560; Dominique Thiriet, 'The Relocation of Flying Fox Colonies in Queensland' (2005) 22(3) *Environmental and Planning Law Journal* 231, 237, 238–9. See also Dominique Thiriet, 'Flying Fox Conservation Laws, Policies and Practices in Australia — A Case Study in Conserving Unpopular Species' (2010) 13(2) *Australasian Journal of Natural Resources Law and Policy* 161. There are now better regulatory practices in place as a result of the Flying Fox Case.

⁹² Interview with Anonymous Interviewee #1 (Telephone interview, 25 September 2007).

⁹³ Interview with David Haigh (Telephone interview, 11 September 2007); David Haigh, 'Environmental Administration: Testing the Water' (1991) 16 (4) *Legal Service Bulletin* 172–3; Su Wild River, *The Environmental Implications of the Local-State Antinomy in Australia* (PhD Thesis, Australian National University, 2002) 116–7.

Certainly his comments are supported by evidence of collection problems following fish kills at the Barwon River.

In the last days of 1988, a cotton farmer had allowed the pesticide Endosulfan to wash into the Barwon River, which forms part of the border between Queensland and New South Wales, and a large fish kill occurred.⁹⁴ It was observed by a police officer, who reported this to the then Department of Environment and Conservation, who directed him to take samples of the water.⁹⁵ A nearby resident made a complaint over the ‘failure of the Department to prosecute the person responsible for the discharge of chemicals’ to the Queensland Parliamentary Commissioner for Administrative Investigations⁹⁶ — an office with identical functions to the present-day Queensland Ombudsman.⁹⁷

The Commissioner’s report into the Barwon River incident found that the ‘procedures adopted by the Department ... to enforce the *Clean Waters Act* were defective’.⁹⁸ It concluded that the water sample collected as evidence by the police officer was inadmissible as he was not authorised under the Act as an appointed inspector or analyst to collect samples in accordance with ‘accepted procedural guidelines’.⁹⁹ Officers from the

⁹⁴ ‘Pesticides killed fish, tests show’, *Courier Mail* (Brisbane), 7 January 1989, 5; Queensland, *Annual Report of the Department of Environment and Conservation Queensland for the year ended 30 June*, Parliamentary Paper No. 65 (1989) 9.

⁹⁵ Queensland, *Annual Report of the Parliamentary Commissioner for Administrative Investigations for the year ended 30 June*, Parliamentary Paper No. 109 (1991) 2. I thank Stephen Keim SC for drawing this to my attention. The Department of Environment and Conservation was subsequently renamed the Department of Environment, Conservation and Forestry in January 1989. See Queensland, *Annual Report of the Department of Environment and Conservation Queensland for the year ended 30 June*, Parliamentary Paper No. 65 (1989) 3.

⁹⁶ Queensland, *Annual Report of the Parliamentary Commissioner for Administrative Investigations for the year ended 30 June*, Parliamentary Paper No. 109 (1991) 28; *Parliamentary Commissioner Act 1974* (Qld) s 16.

⁹⁷ See *Ombudsman Act 2001* (Qld) ss 95, 97. The Commissioner could investigate the Department and its administrative actions on several grounds, including that such actions were taken contrary to law, were based wholly or partly on mistake of law or fact, or were wrong. See *Parliamentary Commissioner Act 1974* (Qld) ss 4, 12, 13 (1), 24 (a), (f), (g).

⁹⁸ Queensland, *Annual Report of the Parliamentary Commissioner for Administrative Investigations for the year ended 30 June*, Parliamentary Paper No. 109 (1991) 2.

⁹⁹ *Ibid* 28; *Clean Waters Act 1971* (Qld) ss 8, 42.

Department subsequently took samples of their own;¹⁰⁰ however, these, too, were inadmissible due to a failure to apply appropriate procedures of evidence collection. When further samples were taken in response to a 'subsequent fish kill' in the area, the 'requirements for the collection and preservation of evidence, together with the record of evidence' yet again did not meet the required standard of proof for a successful prosecution.¹⁰¹

The Department admitted that the Act's procedural requirements for evidence collection were difficult to administer and were in need of review.¹⁰² A program aimed to better train inspectors in evidence collecting procedures was also commenced in response to the Commissioner's investigation.¹⁰³ Nevertheless, it should be noted that the cotton farmer responsible for the fish kill in the Barwon River was eventually prosecuted by the New South Wales State Pollution Control Commission on the basis of water samples taken on the Queensland side of the river by officers of the Queensland Department of Environment and Conservation¹⁰⁴ and the police officer.¹⁰⁵

That such evidentiary issues arose so late in the life of the legislation is indicative of the serious problems that plagued the Act's administration throughout its period of enactment. Connected with the issue of evidence collection was the question of standards of water pollution under the Act.

¹⁰⁰ Queensland, *Annual Report of the Parliamentary Commissioner for Administrative Investigations for the year ended 30 June*, Parliamentary Paper No. 109 (1991) 28.

¹⁰¹ Ibid.

¹⁰² Queensland, *Annual Report of the Parliamentary Commissioner for Administrative Investigations for the year ended 30 June*, Parliamentary Paper No. 109 (1991) 29.

¹⁰³ Ibid 28–9.

¹⁰⁴ Ibid. It was renamed the Queensland Department of Environment and Heritage by the time the Ombudsman submitted their 1990–91 annual report.

¹⁰⁵ Queensland, *Annual Report of the Parliamentary Commissioner for Administrative Investigations for the year ended 30 June*, Parliamentary Paper No. 109 (1991) 28; *State Pollution Control Commission v Brownlie* [1990] NSWLEC 86 (Unreported, Cripps J, 1 August 1990), (6 August 2010) <<http://www.austlii.edu.au/au/cases/nsw/NSWLEC/1990/86.html>> ; *Brownlie v State Pollution Control Commission* (1992) 27 NSWLR 78. See also, Mark Leeming, 'Resolving Conflicts between State Criminal Laws' (1994) 12(1) *Australian Bar Review* 107, 111.

C Standards

The failure to set standards to assist in the definition of ‘pollution’ also helped to create a reluctance to prosecute. When law students from the University of Queensland inquired about scientific standards under the Act, the then Acting-Director of the Council, Leon Henry, responded that ‘there was no need for scientific standards of water quality’. Henry then conceded that without ‘set standards, prosecutions would be practically impossible’. Henry’s solution was to suggest that the Council would wait ‘until one prosecution took place then use this as a precedent for other prosecutions as to what constitutes “water pollution”’.¹⁰⁶ The students concluded that ‘the present and future position is still unclear as to what constitutes “water pollution” when the legislation is examined’.¹⁰⁷ Their concerns mirrored industry complaints at this time, with business seeing the largest obstacle to meeting the requirements of the Act as ‘the lack of guidelines for the discharge of effluent both now and in the immediate future’.¹⁰⁸ They urgently sought clarification to ensure their compliance with the Act.¹⁰⁹

When the Regulations to the Act were introduced they contained general¹¹⁰ and specific¹¹¹ standards for waste discharges — which in the case of the former, appeared to Fisher:

sufficiently specific to support a criminal charge, but the specific standards either give to the Council general responsibility for determining the standard or require the Council to determine the appropriate standard relative to the fitness of the water for the relevant use of the water. It is difficult to see either type of specific standard being taken to be sufficiently precise to justify enforcement by criminal or perhaps even civil proceedings.¹¹²

A lack of prosecutions under the Act was common to environmental legislation generally in Queensland at this time and prevented legislation from being tested in the courts. This led former President

¹⁰⁶ Public Interest Research Group, above n 41, 67.

¹⁰⁷ *Ibid.*

¹⁰⁸ J. Armitt, ‘Water Quality Control Authorities — Please Communicate with Industry!’ (Paper presented at the Water Research Foundation of Australia (Queensland State Committee) ‘Water Pollution’ Symposium, University of Queensland, Brisbane, 15 August 1972) 2.1–2.6.

¹⁰⁹ *Ibid.*

¹¹⁰ *Clean Waters Regulations 1973* (Qld) reg 25(a–e).

¹¹¹ *Clean Waters Regulations 1973* (Qld) reg 26(a–d)(e)(i–viii).

¹¹² Douglas Fisher, *Environmental Law in Australia: An Introduction* (1980) 173.

of the Queensland Environmental Law Association, Ian Hodgetts, to comment at the Queensland Criminal Justice Commission Inquiry into the Improper Disposal of Liquid Waste in South-East Queensland:

[P]resent legislation was never tested by litigation, its meaning was never clarified and nothing was learned regarding deficiencies. [Furthermore] this did not encourage compliance or understanding of the legislation.¹¹³

Successful environmental administration relies on the recognition that there are many tools for securing compliance. Regulators that are sufficiently trained to carry out their duties under environmental laws, combined with a compliance culture which takes a wide view of enforcement options and values the importance of robust standards in regulatory implementation are vital prerequisites for strong environmental governance. The administration of the Act was clearly found wanting in these respects. An examination of the enforcement strategies utilised and dismissed by the Council underscores this point.

VIII ENFORCEMENT TOOLS

A Enforcement Options

Ayres and Braithwaite see the use of warning letters as a regulatory strategy as part of an enforcement pyramid model, in which persuasion and warnings (at the base of the pyramid) represent the majority of regulatory efforts, followed in ascending order of severity by civil penalty, criminal penalty, licence suspension, and finally licence revocation at the apex of the pyramid.¹¹⁴ Given these possible actions, the Council's responses and the rigour with which compliance was pursued will now be considered.

¹¹³ 'New law on waste vague, inquiry told', *Courier Mail* (Brisbane), 13 April 1994, 21. Hopes for reform were high, with senior Department of Environment and Heritage officials claiming that the State government's newly enacted *Environmental Protection Act 1994* (Qld) would provide environmental protection policies with 'real sting' for the first time: see Bill Mason, 'Waste Disposal "out of control"', *Green Left Weekly Online*, 29 March 1995, no. 181, (6 August 2010) <<http://www.greenleft.org.au/1995/181/12314>>.

¹¹⁴ Ayres and Braithwaite, above n 37, 35–6.

B *The Council's Enforcement Preferences*

Queensland administrators conceded in 1992 interviews with Norberry that: 'We ... have not been a shoot first and ask questions later organisation ... we have tended historically to attempt to negotiate improvements before taking any legal action.'¹¹⁵ Their approach arose from:

a belief in the usefulness of negotiation and education, a belief that criminal investigation and prosecution are extremely time-consuming for the agency and of uncertain outcome and benefit, and some concern that environmental offences are not regarded seriously in magistrates' courts. The political environment in Queensland has also historically been unfavourable to the prosecution of polluters. Queensland officials said that prosecution would only be used when it was obvious that a person had set about flouting the law and was causing a significant environmental problem.¹¹⁶

For an organisation representative largely of government departments and business interests concerned with the economic development of the State, the Council had no hesitation in threatening prosecution in warning letters. These usually secured compliance and successfully brought about positive change in industry attitudes towards pollution. Examples include a pineapple waste dump operated by Wearing & Sons in the Pine Rivers Shire after a complaint from a member of the public to the Council,¹¹⁷ and complaints of pollution caused by vegetable washing at Palmer's Carrot Washery at Boonah.¹¹⁸

Although licence suspension and cancellation were threatened occasionally, for instance against the FJ Walker Ltd meatworks at

¹¹⁵ Jennifer Norberry, 'Australia' in A. Alvazzi del Frate and J. Norberry (eds.), *Environmental Crime, Sanctioning Strategies and Sustainable Development* (1993) 27, 94.

¹¹⁶ *Ibid.* See also, Robyn Bartel, 'Compliance and Complicity: An Assessment of the Success of Land Clearance Legislation in New South Wales' (2003) 20(2) *Environmental and Planning Law Journal* 116, 126–7.

¹¹⁷ Minutes of the 38th Meeting of the Water Quality Council of Queensland, 17 March 1976, Environmental Co-Ordination, Waste Disposal, Water Pollution (other than oil) (Queensland State Archives item ID: 574159).

¹¹⁸ Notice of the 72nd Meeting of the Water Quality Council of Queensland, 29 August 1979, Environmental Co-Ordination, Waste Disposal, Water Quality Council of Queensland, Minutes and Agendas of Meetings (Queensland State Archives item ID: 574163).

Maryborough,¹¹⁹ the legislation was not designed for this purpose. Self-regulation was promoted instead. The Council's powers to cancel or suspend a licence were limited to circumstances where the licensee was convicted of an offence under the Act, where the licensee failed to comply with the conditions of their licence, where the licence was granted on false or erroneous information, or if the Council received advice from the licensee that they no longer required a licence.¹²⁰ As Fisher points out: 'These are matters over which the licensee has control. It is, therefore, not open to the government agency responsible for the [Clean Waters] legislation to determine unilaterally that the licence should be cancelled or suspended.'¹²¹ Although these means of enforcement were open to the Council, negotiation was overwhelmingly favoured, as the case studies below demonstrate.

C Case Studies of Negotiation and Warning Letters

Despite aggressively pursuing industry compliance with the Act for some businesses, the Council could also be quite tolerant where fulfilment of licence conditions under the Act was found to be lacking over an extended period. Two examples traverse both the Council and post-Council eras of the Act's administration. The first concerned the World Heritage listing of the Great Barrier Reef in 1981 and the fears expressed by conservationists that the Federal Government was ignoring environmentally damaging tourism development proposals on islands that had World Heritage status in Queensland. One such resort at Hamilton Island had a detrimental impact, caused by sewage discharging from the resort into the surrounding reef during the late 1980s, with only solids being removed before disposal. Ongoing pollution occurred, despite the fact that the Council had made approval of the resort's 1985 licence under the Act contingent upon the construction of a treatment plant. The Council asked the resort in May 1988 to comply with the licence condition, but the treatment plant was still unfinished 10 months

¹¹⁹ Minutes of the 114th Meeting of the Water Quality Council of Queensland, 9 November 1983, Environmental Co-Ordination, Waste Disposal, Water Quality Council of Queensland, Minutes and Agendas of Meetings (Queensland State Archives item ID: 574179).

¹²⁰ *Clean Waters Act 1971* (Qld) s 28.

¹²¹ Douglas Fisher, 'The Meaning and Significance of Resource Security' in A. Gardner (ed.), *The Challenge of Resource Security: Law and Policy* (1993) 16, 38.

later.¹²² Other cases of water pollution in tourism locations away from seweraged areas concerned the Council throughout this period.¹²³

Another example arose in one of the few prosecutions attempted under the Act, *Scheumack v Queensland Nickel Pty Ltd*.¹²⁴ Queensland Nickel Pty Ltd's nickel ore refinery north of Townsville was at Yabulu, one kilometre from Saunders Beach on Halifax Bay. The prosecution arose in relation to two complaints laid in the Townsville Magistrates Court by the Department of Environment and Heritage (a successor to the Council) on 12 September 1990, alleging that on 27 November and 16 December 1989, Queensland Nickel Pty Ltd discharged ammonia waste into waters leading to two extensive fish kills, when it did not have a licence under the Act to do so.¹²⁵

The nickel refinery process required a great deal of water and the waste product of tailing mud contained nickel, cobalt and ammonia. Queensland Nickel built tailing dams to hold this waste but by 1990 their holding capacity was considerably reduced by silting. The company held a licence from 1975 onwards to discharge waste water into Halifax Bay under the Act.¹²⁶ The company was encouraged to limit discharge of waste through recycling, irrigation and evaporation, but this was inadequate during the wet season when dams overflowed

¹²² David Haigh, 'Marine World Heritage Sites' (1997) 2 (2) *Asia Pacific Journal of Environmental Law* 133, 144; Greg Roberts, 'Development bulldozes heritage listing on barrier reef islands', *Sydney Morning Herald* (Sydney), 6 March 1989, 3; Leith Young, 'Sewage will destroy reefs, says scientist', *The Age* (Melbourne), 10 March 1989, 15.

¹²³ Part of the problem was a lack of specialist skills in some communities to supervise treatment plants. The Council sought to improve the consistency of effluent quality by inserting a requirement for trained supervision of plant operations in licences. This approach was successful to an extent. Queensland, *Annual Report of the Water Quality Council of Queensland for the year ended 30 June*, Parliamentary Paper No. 53 (1984) 4; 'Water pollution "a growing problem"', *Courier Mail* (Brisbane), 3 October 1984, 9.

¹²⁴ *Scheumack v Queensland Nickel Pty Ltd*, Unreported decision, Magistrates Court, Townsville, 22 April 1991, B.D. Barrett, SM (Department of Environment and Resource Management Archival File 470092 Batch 2A, Townsville District). Case notes of this decision are more readily available: Haigh, above n 93, 172–3; Michael White, *Marine Pollution Laws of the Australasian Region* (1994) 202.

¹²⁵ *Clean Waters Act 1971* (Qld) s 23(1); *Scheumack v Queensland Nickel Pty Ltd*, 1.

¹²⁶ *Scheumack v Queensland Nickel Pty Ltd*, 8.

into nearby salt water creeks through a stormwater drain.¹²⁷ Discharges such as these were not licensed under the Act, but had been previously discussed between the defendant and the Council from 1977 onward and the parties appear to have been in a process of gradual negotiation.¹²⁸ Queensland Nickel argued that these conversations with Departmental representatives over a number of years constituted an agreement to make use of the stormwater drain and an informal 'licence to spill'.¹²⁹ The prosecution denied this.

Magistrate Barry Barrett dismissed the charges made against Queensland Nickel and confirmed the defendant's view that an agreement between the Department and Queensland Nickel existed, in the absence of any action taken by the Department to force Queensland Nickel to 'desist from its practice, and procedure, in relation to discharge of waste via its stormwater drain outlet at the Yabulu plant'.¹³⁰ One witness, former Water Quality Director Humphrey Desmond, informed the Court on the question of prosecution, that 'no warning letters were sent to the Defendant company ... [and that] it was a policy of the government of the day to tolerate such problems of companies similar to the Defendant'.¹³¹ This suggests that in some circumstances, even the lowest rung of Braithwaite and Ayres' enforcement pyramid was not utilised by the Council. The decision reveals the extent to which the Council was prepared to compromise with industry over the timeliness of meeting standards.

More generally, the policy of compromise and tolerance is reflected in the number of prosecutions attempted under the Act. Prior to 1990 two prosecutions were conducted, with one conviction and one dismissal. Prosecutions during the post-Fitzgerald era of the Act increased slightly,

¹²⁷ Ibid 8, 10.

¹²⁸ *Scheumack v Queensland Nickel Pty Ltd*, 9–10.

¹²⁹ Ibid 10–14.

¹³⁰ *Scheumack v Queensland Nickel Pty Ltd*, 18.

¹³¹ Ibid 9.

with one conviction and four dismissals between 1990 and 1995.¹³² A significant factor in the Council's tolerance of both delayed compliance and very limited use of prosecutions as a means of enforcement arose from the competing priorities of the state at this time.

D *The Consequences of Persuasion*

The Council's reluctance to insist upon rapid compliance with licence conditions is best understood in the context of the high priority given to economic development at this point in Queensland's history — with economic and social considerations having greater merit than environmental concerns on more than a few occasions, as explained in 1975:

In a few cases, it is difficult to see how an industry can continue, and at the same time comply with reasonable and desirable conditions for water quality. In two of these cases, an investigation is being made by the Co-ordinator General's Department into the social and economic consequences if the industries are forced to close down. Following these investigations, it may be necessary for the Water Quality Council to seek a policy decision from the

¹³² Briody and Prenzler, above n 42, 62; Briody, above n 42, 41. Briody's figures are based on Crown Law records and appear to be the most reliable available. Several authors have given erroneous prosecution numbers, fuelling community perceptions of ineffective pollution control. For the claim of only one conviction under the Act's '24 year history', see Roslyn MacDonald, 'Natural Resources Law and Policy in Queensland' (1996) 3(1) *Australasian Journal of Natural Resources Law and Policy* 125, 126. Others ignore attempted prosecutions, see Hutton and Connors, above n 2, 217. Bonyhady misread David Haigh when claiming that the 'first prosecution under Queensland's Clean Waters Act was in 1991, 20 years after this legislation came into force'. This is incorrect on two grounds. Firstly, the legislation came into force in March 1973 not 1971. Secondly, Haigh merely notes that the *Scheumack v Queensland Nickel Pty Ltd* decision signified the 'hope for an end to the extended honeymoon between government and water polluters in Queensland', not that it was the first prosecution under the Act, see Bonyhady, above n 57, 110, 170; Haigh, above n 93, 172. For anecdotal evidence of prosecutions, see Maddin, above n 44, 110. Regardless of the figures cited, all authors are correct in noting the limited prosecution record of the Act. Other commentators have sought to equate the 'failure' of the Act to prevent pollution with the absence of prosecutions. See, eg, Tor Hundloe, 'Heads They Win, Tails We Lose: Environment and the Law' in P. Wilson and J. Braithwaite (eds.), *Two Faces of Deviance: Crimes of the Powerless and the Powerful* (1978) 132, 134.

State Government.¹³³

Throughout its history the Council's policy was one of persuasion and negotiation, but the media received and reflected mixed messages about enforcement, sometimes in the same newspaper article. Following a decision by Cabinet not to prosecute a company for a fish kill at Breakfast Creek (Brisbane) in January 1977,¹³⁴ after the company undertook 'to spend big sums on installing better discharge systems, immediately', Minister Russell Hinze spoke with the press and warned industries that prosecutions would start. However, Hinze also stated the government's policy towards pollution, admitting a lax attitude: 'We have been lenient — perhaps too lenient — in enforcing this Act because we have a policy of co-operation with industry rather than confrontation.'¹³⁵ This policy was repeated in the final Annual Report of the Council ten years later, with the additional observation that:

while this approach has been successful in achieving the desired result [of compliance] in all but a few cases, it has often been at the expense of protracted compliance times and has required increased negotiation effort on the part of staff.¹³⁶

Queensland's policy of compromise and persuasion was not unique. Bonyhady made similar observations of the Council's New South Wales counterpart, the State Pollution Control Commission (SPCC), and it is possible that the cooperative approach adopted by both bodies resulted in some positive, though limited, effects for the environment:

[T]he SPCC relied primarily on 'conciliation' ... By seeking the cooperation of industry where possible and only punishing companies which either make no attempt to comply or commit significant or recurrent breaches, authorities such as the SPCC may achieve more for the environment than if they prosecute

¹³³ Queensland, *Annual Report of the Water Quality Council of Queensland for the year ended 30 June*, Parliamentary Paper No. 50 (1975) 2; J.M. Powell, *Plains of Promise, Rivers of Destiny: Water Management and the Development of Queensland 1824–1990* (1991) 291–2; Mark Carden, 'Unsustainable Development in Queensland' in K. Walker and K. Crowley (eds.), *Australian Environmental Policy 2: Studies in Decline and Devolution* (1999) 81, 100.

¹³⁴ 'Dead fish in second creek', *Courier Mail* (Brisbane), 12 January 1977, 10.

¹³⁵ 'Govt.'s "last" warning on pollution', *Sunday Mail* (Brisbane), 6 March 1977, 12.

¹³⁶ Queensland, *Annual Report of the Water Quality Council of Queensland for the year ended 30 June*, Parliamentary Paper No. 90 (1987) 13.

every violation. But conciliation by itself is a euphemism for taking no effective action.¹³⁷

As shown above in the Breakfast Creek example, the Council relied on the threatened possibility of future prosecutions to ensure compliance. Gunningham has pointed out that:

[T]his ‘negotiated compliance’ can only work if the inspectorate has credibility. The threat of prosecution must lie in the background and the regulated industry must believe that inspectors can and do resort to punishment if persuasion fails — hence the importance of bargaining and bluff to inspectors with limited resources and powers, engaging in this strategy.¹³⁸

However, the statistics cited earlier show the Council and its successor regulatory bodies rarely resorted to prosecution or even threatened prosecution — as indicated above by the lengthy compliance times granted to industry. Gunningham has argued that ‘such an extreme “advise and persuade strategy”, which almost entirely rejects prosecution as a regulatory tool, will produce a widespread breakdown of voluntary compliance’, as businesses lacked an incentive to observe the Act in the absence of firm official sanctions.¹³⁹ Conversely, an aggressive culture of prosecution amongst regulators can result in the breakdown of communications with the regulated population, reducing information flow and causing a loss of trust between the parties, damaging their capacity to work towards compliance.¹⁴⁰ It is interesting to note that the present-day Queensland Department of Environment and Resource

¹³⁷ Bonyhady, above n 57, 110. See also, Nicholas Brunton, ‘Environmental Regulation: The Challenge Ahead’ (1999) 24(3) *Alternative Law Journal*, 137, 141; Maria Comino and Paul Leadbeter, ‘Enforcement of Pollution Laws in Australia — Past Experience and Current Trends’ (Paper presented at the 5th International Conference on Environmental Compliance and Enforcement, Monterey, California, United States of America, 16–20 November 1998) 65, (6 August 2010) <<http://www.inece.org/5thvoll/comino.pdf>>.

¹³⁸ Neil Gunningham, ‘Negotiated Non-Compliance: A Case Study of Regulatory Failure’ (1987) 9(1) *Law and Policy* 69, 84.

¹³⁹ *Ibid.* See also, Queensland, Criminal Justice Commission, *Report on an Investigation Conducted by the Honourable R.H. Matthews QC into the Improper Disposal of Liquid Waste in South-East Queensland* (1994) vol 2, 119–20.

¹⁴⁰ Neil Gunningham and Darren Sinclair, ‘Regulation and the Role of Trust: Reflections from the Mining Industry’ (2009) 36(2) *Journal of Law and Society* 167–94.

Management also regard prosecution as a tool of last resort.¹⁴¹

The Council focused its regulatory efforts on persuasion and warning letters for a number of reasons, including the economic imperative of the state over other public policy concerns. This is linked with the difficulties the Council experienced in remaining free of political interference and regulatory capture. Effective environmental governance requires more than a steadfast commitment to one regulatory strategy over all others to safeguard economic interests. Consistency in enforcement is also important for environmental governance, both for the regulated population and the credibility of the regulator. The above examples show that the Council struggled in this respect. One key means of avoiding a myopic conception of environment governance is to permit public participation in a variety of forms. Failure to do so reduced the impact of the Council as an environmental watchdog and left community misunderstandings of the Council uncorrected.

IX THE PLACE OF THE PUBLIC

In its first years the Council was principally occupied with issuing licences and public relations.¹⁴² Both the Council and Minister attempted to inform the community of the new legislation and the Council's roles through the press,¹⁴³ conferences,¹⁴⁴ and educational materials on water pollution in schools.¹⁴⁵ The extent to which the public was engaged with the Council's enforcement of the Act varied, depending on the mechanism for their involvement. Reporting pollution to the Council

¹⁴¹ See Queensland Department of Environment and Resource Management, *Enforcement Management Guidelines: Enforcement Guidelines* (December 2004).

¹⁴² Minutes of Environmental Control Council Meeting, 10 July 1974, Brisbane, Environmental Control Council (Queensland State Archives item ID: 882610).

¹⁴³ Agenda for the 1st meeting of the Water Quality Council, 25 May 1972, Brisbane, Environmental Control, Water Quality Council (Clean Waters Act 1971) (Queensland State Archives item ID: 882614).

¹⁴⁴ See, eg, Leon Henry, 'The Water Quality Council of Queensland: A Policy for the Environment' (Paper presented at the Water Research Foundation of Australia (Queensland State Committee) 'Water Pollution' Symposium, University of Queensland, Brisbane, 15 August 1972) 1.1–1.12.

¹⁴⁵ Agenda for the 12th meeting of the Water Quality Council of Queensland, 22 August 1973, Environmental Control, Water Quality Council (Clean Waters Act 1971) (Queensland State Archives item ID: 882614).

was a common means of community participation and, where delayed, exacerbated the environmental governance problems discussed above. The lack of standing rights to contest the Council's decisions and attempts to limit information about the Act's administration were also a concern.

A Reporting Pollution

Fish kills at Norman Creek in 1981 and Kedron Brook, north of Brisbane, in 1985 were two of many instances where delays meant that pollution sources and the responsibility for them could not be traced successfully.¹⁴⁶ The Council observed that: 'a difficulty in solving some complaints is that the effect complained of disappears before it can be seen by an inspector, due to a delay in reporting, and a repeat incident must be awaited before an adequate investigation can be undertaken.'¹⁴⁷

The Council also grappled with educating the general public about water pollution issues and noted that many complaints from citizens were:

well justified, but a significant number arise from a lack of understanding of the effects of water pollution and the problems in attaining what would be in effect zero pollution. Where practicable, discussions are held with the person making the complaint and the position explained to him [sic].¹⁴⁸

The visibility of the Council in the public eye was also an issue for inspectors. Despite the sustained media coverage of the Council's activities, one inspector of water quality admitted that some owners of premises being inspected 'in the early days probably didn't know who we were'.¹⁴⁹ Public reporting of pollution and complaints made to the Council were only two aspects of potential community engagement,

¹⁴⁶ Notice of the 95th Meeting of the Water Quality Council of Queensland, 9 December 1981, Environmental Co-ordination, Waste Disposal, Water Quality Council of Queensland, Minutes and Agendas of Meetings (Queensland State Archives item ID: 574172); Notice of the 128th Meeting of the Water Quality Council of Queensland, 10 April 1985, Environmental Co-ordination, Waste Disposal, Water Quality Council of Queensland, Minutes and Agendas of Meetings (Queensland State Archives item ID: 574185).

¹⁴⁷ Queensland, *Annual Report of the Water Quality Council of Queensland for the year ended 30 June*, Parliamentary Paper No. 53 (1984) 4.

¹⁴⁸ Queensland, *Annual Report of the Water Quality Council of Queensland for the year ended 30 June*, Parliamentary Paper No. 50 (1975) 2.

¹⁴⁹ Interview with Les Bevis (Telephone interview, September 2007).

with access to licence information under the Act also posing difficulties for open and effective environmental governance.

B *Scrutiny of Licence Registers*

The capacity of the Council to be captured by industry arose not only in relation to its limited membership, but in the lack of public participation in its appeals process. It has been recognised that public participation in environmental litigation can be used to remedy or restrain breaches of environmental laws, expose regulatory capture, and 'compel the regulator to perform its public duty of upholding and enforcing environmental law'.¹⁵⁰ Other Australian States' legislation at the time allowed public participation to varying degrees.¹⁵¹ Public participation also lends itself to community oversight in environmental decision-making, and this seems to have been deliberately avoided in the formation of the Council. Indeed there was a fear that conservationists might embarrass the Council.

During the drafting of the Regulations to the Act, a clash emerged between members of the newly formed Council and the Minister for Local Government and Electricity, Henry McKechnie. The conflict arose from the Council's desire to permit public inspection of registers of licences, notices and notifications granted under the Regulations.¹⁵² Registers did not contain details of the conditions of a licence or notice, but the Minister felt obliged to retain confidentiality and, with a nod to the *Clean Air Act 1963* (Qld), stated:

[T]here is a risk that a person such as an ardent conservationist, might use information so obtained to harass a Local Authority or an industry or the Water Quality Council. It is understood that there is no provision in the Regulations under the Clean Air Act for the inspection by the public of registers etc, kept under those Regulations. I feel that the opening of registers, etc kept under the Clean Waters Act to inspection by the public could lead to

¹⁵⁰ Justice Brian Preston, 'The Role of Public Interest Environmental Litigation' (2006) 23(5) *Environmental and Planning Law Journal* 337, 342. See also, Donald Anton, 'Political Dissent, Environmental Protection and the Law' (Paper presented at the National Environmental Defender's Office Network One Day Conference: 'Defending the Defenders — Protest, the Environment and the Law', Sydney, 24 October 1998) 2, 3.

¹⁵¹ Bonyhady, above n 57, 21–39, 152–6.

¹⁵² Cabinet Minute Submission No. 15816 Part 1, 12 October 1972 (Queensland State Archives 6 August 2010) <http://www.archives.qld.gov.au/1972cabdocs/Submissions/15816_part01.pdf

difficulties and I feel that this provision in the draft Regulations might, with advantage, be deleted. The policing of the Act and the Regulations is a function of the Water Quality Council and provision is made for prosecution of a licence holder if he [or she] breaches conditions of his [or her] licence. I think that this acts as a protection to the public interest and that there should be no need for registers to be open to public inspection.¹⁵³

Cabinet approved McKechnie's judgment and the provision was removed from the Regulations.¹⁵⁴ It would not be the last time that a Minister rejected a recommendation from the Council. This episode highlights the extent to which public participation was discouraged under the legislation quite early. Nonetheless, this restriction on public involvement was relaxed in 1979 amendments to the Act that granted the public the right, for a reasonable fee, to examine the effluent quality standards of licences under the registers kept by the Council — after much pressure had been brought to bear on the Government by the Labor Opposition and conservation groups.¹⁵⁵ Another method of excluding the public was through the omission of standing (*locus standi*) provisions in the Act itself.¹⁵⁶

C Standing

The Minister could authorise any person to prosecute an offence against the Act's criminal provisions,¹⁵⁷ though some suggest this was potentially subject to political interference.¹⁵⁸ The availability of civil actions by individuals was otherwise absent from the Act.¹⁵⁹ An application of the Act to the leading case of the time, *Australian Conservation Foundation v Commonwealth*, would suggest that as the legislation did not provide for participation by outsiders, any attempt by conservation groups to use the regulatory process of the statute would

¹⁵³ Ibid.

¹⁵⁴ Cabinet Minute Decision No. 17757, 16 October 1972 (Queensland State Archives 6 August 2010) <<http://www.archives.qld.gov.au/1972cabdocs/Decisions/17757.pdf>>.

¹⁵⁵ *Clean Waters Act Amendment Act 1979* (Qld) s 26(2); Queensland, *Parliamentary Debates*, Legislative Assembly, 6 June 1979, 4923 (Russell Hinze).

¹⁵⁶ Timothy Longwill, 'Standing in Environmental Interest Suits' (1987) 3 *Queensland Institute of Technology Law Journal* 77, 93.

¹⁵⁷ *Clean Waters Act 1971* (Qld) s 47(2).

¹⁵⁸ Stephen Keim and Joanne Bragg, 'Standing on Castle Hill' (1994) 19(2) *Alternative Law Journal* 68, 69.

¹⁵⁹ Ibid.

not have strengthened their claim for standing to seek judicial review of the Council's and Minister's decisions.¹⁶⁰ Such omissions from both the Council and Act increased the risk of regulatory capture by severely limiting both appeals from the public and preventing external assessment by concerned citizens.

The limited role given to the public to participate in the Act's enforcement through complaints of pollution to the Council, combined with the lack of standing rights and limited information about the Council's impact in reducing water pollution, sits in stark contrast to developments since this period in the area of 'new environmental governance', which stresses participation and collaboration with the community.¹⁶¹ It would appear that lessons are being learnt on this front by environmental administrators.

X CONCLUSION

This article has examined a variety of factors surrounding the governance of the *Clean Waters Act 1971* (Qld) in the period 1970–87 and has indicated that the Act's enforcement failed on a number of levels, such as a lack of resources, political interference and lack of opportunities for public participation. This is consistent with Briody and Prenzler's contention of political interference with environmental regulatory agencies in post-Fitzgerald Queensland. It also confirms the suspicions of earlier researchers concerned with political interference in the enforcement of the legislation¹⁶² and is broadly consistent with the critique of the Act (and Australian environmental laws generally) by commentators during the period discussed and beyond. Further research will be required to comment thoroughly on elements of Briody and Prenzler's argument of a tradition of under-enforcement in Queensland's environmental regulators, especially a lack of training in prosecutorial techniques for inspectors.

The article has also shown that, despite seemingly ideal conditions for

¹⁶⁰ (1980) 146 CLR 493, 531–2 (Gibbs J). For a fuller discussion of judicial review and its relationship to Queensland's environmental laws of the time see Nicolee Dixon, 'Judicial Review of Environmental Decision Making in Queensland' (1994) 3(1) *Griffith Law Review* 94.

¹⁶¹ See Cameron Holley, 'Public participation, environmental law and new governance: Lessons for designing inclusive and representative participatory processes' (2010) 27(5) *Environmental and Planning Law Journal* 360.

¹⁶² Norberry, above n 67, 167; Keim and Bragg, above n 158, 69.

the development of regulatory capture in the Council, it is unlikely that this was responsible for the Council's poor enforcement of the Act. More plausible explanations may lie in the discretion exercised by individual field inspectors, interference by a Minister who favoured a conciliatory relationship with industry, as well as evidentiary, procedural and resourcing difficulties. In failing to address such issues, the Council alienated those most likely to assist in monitoring the state for compliance and accordingly failed to exhibit the vital prerequisites for effective environmental governance.

It should be noted that there have been significant changes to environmental regulation in Queensland since the period described in this article. Although its present day status is beyond the scope of this article and is not discussed here, it is clear that present day legislators and administrators alike need to remain vigilant in avoiding political interference, community exclusion from the enforcement process and inadequate resourcing, to ensure robust environmental governance in the modern era. Encouragingly, modern environmental administrators are showing signs of learning from past mistakes.